STATEMENT OF
COMMISSIONER KEVIN J. MARTIN

Re. 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking, MB Docket Nos. 02-277 and 03-130.

This proceeding required each of us to make decisions that were as difficult as they were important. The media touches almost every aspect of our lives. We are dependent on the media for our news, information, and entertainment. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democratic system. I agree with many of the concerns about consolidation and preservation of diversity that have been expressed by my colleagues.

I also believe that the FCC must respond to congressional and judicial calls to update our rules for the 21st century. We are under a legal mandate to review our broadcast ownership rules and determine whether they are still "necessary" in today's marketplace. If they are not, we must repeal or modify the rules. The courts have interpreted this provision, Section 202(h) of the Telecommunications Act of 1996, as placing a substantial burden on the Commission and creating a presumption in favor of deregulation. Since 1996, the courts repeatedly have found the Commission's reasoning insufficient to justify retaining media ownership regulations. In large part, the courts' criticism focused on the Commission's failure to recognize the impact of new voices present in the current marketplace.

Particularly after the courts' specific admonitions, I believe our statutory obligation requires that we review our rules in light of the current media landscape. The media marketplace is not stagnant. Factors such as rapidly improving technology and innovation have contributed to a media environment that is continually evolving—and considerably different from the one when most of the broadcast ownership rules were first adopted.

Indeed, we have progressed far from a world in which consumers received their news and entertainment from 3 or 4 television stations, a handful of radio stations, and a local newspaper. The number of broadcast networks has doubled, and we now have cable networks that regularly rival the broadcast networks in audience share. Indeed, over 85% of households receive their video programming via satellite or cable. Consumers today can choose from hundreds of televisions stations for their news and entertainment, often including a channel devoted entirely to local news. There also are more radio stations and more local weekly newspapers. In addition, the growth and popularization of the Internet has dramatically changed how people receive and distribute information. The Internet represents a significant outlet for diverse views, as well as an important source of news and information to consumers. As a result, people today have access to more information than at any time in our history.

It is important to appreciate, however, that while the media landscape has changed significantly, the three principles our original rules were intended to promote—competition, localism, and diversity—remain critical. Fundamentally, I believe our rules must continue to promote these core goals to nourish a vibrant media marketplace that functions in the public interest. The Order we adopt today attempts to respond to the courts' admonitions and our Congressional mandate by recognizing the availability of new media outlets, evaluating their impact on competition, localism, and diversity, and modifying our rules as appropriate.

I am particularly pleased that, for the first time in 28 years, the Order we adopt today finally concludes a review of the newspaper/broadcast cross-ownership rule. Adopted in an era with little cable penetration, no local cable news channels, few broadcast stations, and no Internet, the rule was based on a market structure that bears almost no resemblance to the current environment. Indeed, because of these marketplace changes, we have revised all our other media rules at least once since the ban's adoption. As a result, newspapers have been the *only* media entities prohibited from owning a broadcast station in the markets they serve, regardless of how large the market was or how many newspapers or broadcast stations were present. For example, in the large markets, two broadcast television stations have been permitted to combine and could own up to six radio stations, as well. Yet, newspapers remained prohibited from owning even a single radio station. Today we correct this imbalance, finally giving newspapers the same opportunities other media entities enjoy in medium and large markets. In so doing, we recognize that newspaper/broadcast combinations may result in a significant increase in the production of local news and current affairs, as well as an improvement in the quality of programming provided to their communities.

I also am pleased that, where the Commission determines that existing rules should be modified, we have crafted simple, clear rules. I remain skeptical of overly complicated mathematical formulas and the uncertainty they can beget in the marketplace. I therefore appreciate my colleagues' recognition that the diversity index cannot be used in particular transactions. I commend the staff for their hard work in developing this index, and I found much of their analysis helpful in informing us of general trends in the "market" for viewpoint diversity. Accordingly, the index was used to help design simple, clear cross-ownership limits. Ultimately, I found it important to acknowledge that a concept as complex as diversity cannot be quantified with mathematical precision.

Finally, I note that this proceeding – like other large, contentious proceedings at the Commission – involved a great deal of compromise to create a majority.[1] Indeed, it is widely

[1] Not surprisingly, it also involved a substantial post-adoption editing process Dozens of changes have been made to this item since this item was adopted on June 2; some are clarifying, most are clearly substantive, and a few are "bottom-line" changes. Many of these edits were intended to respond to weaknesses in reasoning and outcomes identified by the dissents For instance, we made five separate changes to significantly narrow the exception that permits grandfathered clusters to be transferred intact, including adding a new prohibition on the granting of an option to purchase or right of first refusal; we significantly reduced the time frame a party with an LMA or JSA has to comply with our new rules; we broadened the application of all our rules to any entity that has a "cognizable" interest in a media property; and we added discussions further justifying our top-4 restriction and the disparate

observed that the review of all these ownership rules were placed together in one proceeding intentionally to facilitate just these kinds of compromises. I am very comfortable with some of the decisions, such as those I reference above. Others, however, quite frankly give me pause. The decision regarding the national ownership cap was particularly difficult. The record contained evidence on both sides of this issue. I believe the affiliates made a compelling case as to why a national limit needs to be retained, and thus I did not support proposals to eliminate the cap altogether. I agree that a balance between the affiliates and the networks is important to maintaining localism. Yet, the networks also made persuasive arguments that a 35% cap may not be necessary—in particular, that we do not have sufficient evidence to conclude that the two networks currently reaching 40% of the country have caused actual and significant harm.

Without question, this biennial review has been among the most comprehensive and contentious undertakings the Commission has attempted in recent years. This Order endeavors to implement our statutory obligation while continuing to promote competition, localism, and diversity in the modern media marketplace.

treatment of UHF stations in our local and national ownership rules. We also found dramatic inconsistencies in the rules adopted June 2 regarding how we defined markets and therefore made changes to our rules such that, where possible, all markets are defined based on geography. We also broadened the application of our grandfathering provision to radio clusters. Finally, we changed whether Puerto Rico should be considered one radio market

STATEMENT OF COMMISSIONER MICHAEL J. COPPS, DISSENTING

Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

I dissent to this decision. I dissent on grounds of substance. I dissent on grounds of process. I dissent because today the Federal Communications Commission empowers America's new Media Elite with unacceptable levels of influence over the media on which our society and our democracy so heavily depend.

This morning we are at a crossroads – for the Federal Communications Commission, for television, radio, and newspapers, and for the American people. The decision we five make today will recast our entire media landscape for years to come. At issue is whether a few corporations will be ceded gatekeeper control over the civil dialogue of our country; content control over our music, entertainment and information; and veto power over the majority of what we and our families watch, hear and read.

Two very divergent paths beckon us forward.

Down one road is a reaffirmation of America's commitment to local control of our media, diversity in news and editorial viewpoint, and the importance of competition. This path beckons us to update our rules to account for technological and marketplace changes, but without abandoning core values going to the heart of what the media mean in our country. On this path we also reaffirm that FCC licensees have been given very special privileges and that they have very special responsibilities to serve the public interest.

Down the other road is more media control by ever fewer corporate giants. This path surrenders to a handful of corporations awesome powers over our news, information and entertainment. Here we treat the media like any other big business, trusting that in the unforgiving environment of the market, the public interest will somehow magically trump the urge to build power and profit for a privileged few. On this path we endanger time-honored safeguards and time-proven values that have strengthened the country as well as the media.

So the stakes are high – higher than they have been for any decision the five people sitting here today have ever made at this Commission. How do we decide which path to choose?

I start with three principles. First, look at the law and see what Congress instructs us to achieve. Second, look at practical, real world experience rather than cling to some prefabricated mind-set or ideology. And third, when faced with the automatic consequences that will follow such a far-reaching decision, act cautiously rather than rashly, and trust in the wisdom of the American people.

What does the law tell us? The Communications Act tells us, very clearly, to use our rules to promote the public interest, and to that end, for decades we have promoted the goals of localism, diversity and competition. The statute tells us that the airwaves belong to the American people, and that corporations are given a temporary right to use this public asset only in return for their pledge to use it in the public interest. No broadcast station, no company, no single individual owns an airwave in America; the airwaves belong to all the people. The law tells us that the last time Congress legislated on this topic, it thought that restrictions on how big a single media corporation could get and how much power one company could amass were important and necessary. And the Supreme Court has upheld media protections, stating that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[1] Finally, on the larger issue of media power, Judge Learned Hand instructed us that "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country."[2] His words remain true today.

What practical, real world experience do we have to guide us? Radio deregulation gives us powerful and relevant lessons. When Congress and the Commission removed some of the radio concentration protections, we experienced massive, and largely unforeseen, consolidation. Very quickly after taking actions for radio like those we will take today for television and newspapers, there was a 34 percent reduction in the number of radio station owners. Diversity of programming suffered. Homogenized music and standardized programming crowded out local and regional talent. Creative local artists found it evermore difficult to obtain play time on the air. Editorial opinion polarized. Competition in many towns became non-existent as a few companies -- in some cases a single company -- bought up virtually every station in the market. This experience should ***terrify*** us as we consider visiting upon television and newspapers what we have inflicted upon radio. "Clear Channelization" of the rest of the American media will harm our country.

What about seeking out the counsel and trusting in the wisdom of the American people? Begin by realizing that every American has a stake in this decision. ***Every American***, not just the companies that have temporary license to use the public's spectrum. Commissioner Adelstein and I have attended public hearings in many cities across the country. We have met with conservatives and liberals, broadcasters and creative artists, concerned parents and civil rights activists, church leaders and educators. Our Commission has seen a flood of opinions from every state in the nation. Close to three quarters of a million people have registered their

[1] *Red Lion Broadcasting Co v. FCC*, 395 U S. 367, 390 (1969)
[2] Learned Hand, Memorial Service for Justice Brandeis, December 21, 1942

views now – more than for any proceeding in Commission history. And in a nation that can be deeply divided on important issues, these citizens are almost unanimous on the question of whether this Commission should allow further media concentration. They are imploring us to protect local broadcasting, diversity of programming and opinion, and the ability to compete with the huge companies. We should heed their conservatism – their urgent call to refrain from abandoning time-honored protections when so much is at stake and so much is unknown about the consequences of what we are doing here today.

The majority instead chooses radical deregulation – perhaps not quite so radical as originally intended a year ago before so much pressure was brought to bear upon them – but radical nevertheless. This decision allows a corporation to control three television stations in a single city. Why does any corporate interest need to own three stations in ***any*** city, other than to enjoy the 40-50 percent profit margins most consolidated stations are racking up? What public interest, what diversity, does that serve? This decision also allows the giant media companies to buy up the remaining local newspaper and exert massive influence over some communities by wielding three TV stations, eight radio stations, the already monopolistic newspaper, and potentially the cable system. What public interest, what new competition, is enabled by encouraging the newspaper monopoly and the broadcasting oligopoly to combine? This decision further allows the already massive television networks to buy up even more local TV stations, so that they control up to an unbelievable 80 or 90 percent of the national television audience. Where are the blessings of localism, diversity and competition here? ***I see centralization, not localism; I see uniformity, not diversity; I see monopoly and oligopoly, not competition.***

Take away the protections against concentration that still remain and one company could dominate a region's access to information by controlling its radio stations, television stations, newspapers and cable system. Where once it was commonplace to have two, three, or more daily newspapers in a city, today most communities are one-paper monopoly towns. Local broadcast television and radio are both concentrated oligopolies in communities across this country. And the story is not much better on a national level. The conglomerates that own the networks control 70 percent of the prime-time audience. Their audience share of television households is approaching – and could soon surpass according to analysts – the share the three networks had during the 1960s and 1970s. And today, those conglomerates are more vertically integrated, controlling the production of most of their programs as well.

What about the vaunted 500-channel universe of cable TV saving us? Well, 90 percent of the top cable channels are owned by the same giants that own the TV networks and the cable systems. More channels are great. But when they're all owned by the same people, cable doesn't protect localism, editorial diversity, or competition. And those who believe the Internet alone will save us from this fate should realize that the dominating Internet news sources are controlled by the same media giants who control radio, TV, newspapers, and cable. So, how does it promote localism, diversity and competition to allow, as we will allow by our action

today, more media concentration in the more than 175 markets with over 90 percent of the American population?

If we were just starting down the road to media concentration, maybe we could have a different kind of discussion today. But we have already traveled dangerously far down that road, and the need now is to slow the headlong rush to media monopoly until someone can prove it is taking the media, and the country, anywhere worth going. This is a huge and foolhardy gamble with the future – every American's future.

Let us remember that this is only the latest, most radical step in a twenty-year history of undermining the public interest. Step by step, rule by rule, bit by bit, we have allowed the dismantling of public interest protections and given a green light to the forces of consolidation, until now a handful of giant conglomerates are in the saddle.

The Commission has allowed fundamental protections of the public interest to wither and die – requirements like ascertaining the needs of the local audience, the Fairness Doctrine, teeing up controversial issues, providing demonstrated diversity in programming, ensuring decent quality programming for our children, to name a few of the safeguards we had once but have abandoned.

At the same time, the Commission has pared back its license renewal process from one in which it examined whether the broadcaster was actually serving the public interest to one where companies need only send us a postcard every eight years and nothing more. Unless there is a major complaint pending against a station, the license is almost automatically renewed.

The Commission cut back on its structural regulations that limited both horizontal (or distributional) concentration ***and*** vertical (or production) concentration, so that the same network distributing programs increasingly owned them. The worst monopolies in American history were built on this model. Then the Commission went further, eliminating outright the vertical safeguards that protected against a few conglomerates controlling all of the creative entertainment that we see.

Over the years, the Commission has dismantled all of these provisions and more, relying instead on marketplace forces as a proxy for serving the public interest. Along the way, make no mistake about it, localism, diversity and competition suffered grievous wounds. Worse, the heart and soul went out of much of our media. And we are left with only the current rules governing control of ownership structure as a means to safeguard our public interest obligations. They can't do the job by themselves, even if we were to keep them as they are. By emasculating them today, we only make the problem worse. And by neglecting to do justice to proposals that could supplement our ownership rules, such as requiring more independently produced programs and enforcing real public interest performance standards on our stations, we come perilously close to taking the "public" out of the public airwaves.

Don't tell me that those of us who feel strongly about this are being too emotional or are laying too much on one set of decisions. Some would have us believe that this is merely an ordinary examination of our rules that we conduct every two years. Let's not kid ourselves. This is the granddaddy of all reviews. It sets the direction for how the next review will get done and for how the media will look for many years to come. As for the emotion, I have seen the concern, the deep feeling and outright alarm on the faces of people who have come out to talk to Commissioner Adelstein and me all across this broad land. Are they emotional? You bet. And I think they are going to stay that way until we get this right.

I. The Commission's Decision-Making Process and Record Development Was Deeply Flawed.

Good, sustainable rules are the result of an open administrative process and a serious attempt to gather all the relevant facts. Bad rules and legal vulnerability result from an opaque regulatory process and inadequate data. Unfortunately, today's rules fall into the latter camp.

The Commission launched this biennial review proceeding in September 2002. I went into this last year believing that if the Commission really worked at it, got around the country looking at various markets, talking to people, collecting data and really reaching out, we had a shot at building an adequate record for today's vote.

Unfortunately, we have not succeeded. I am concerned that this proceeding has been run as a classic inside-the-Beltway process with too little outreach from the Commission and too little opportunity for public participation in this far-reaching review of critical media concentration protections. This is the way the Commission usually does business, we are told. Well, I submit this is too important to be treated on a business-as-usual basis.

Let's look at the facts. In October, we released the results of a dozen FCC-sponsored studies. We gave commenters a mere 60 days to analyze the six separate media consolidation rules and to sift through the twelve studies. A number of these studies are incomplete and contested, criticized because of allegedly faulty methodologies and unwarranted conclusions. Yet today's item returns to them again and again, according them what I believe is more deference than merited, to the exclusion of other expert studies. I criticize the studies no more than the Commission's operating premise that in this far-reaching rulemaking that will affect tens of billions of dollars in industry business, we could understand its implications and its consequences through a small number of meagerly financed inquiries that ignored many of the most critical questions.

I was also saddened last Fall that we failed to open our own studies to public scrutiny by not releasing the methodology or underlying data, notwithstanding that some of the studies were based on proprietary data that parties criticized as being created for and manipulated by the media industry. Finally, a month later, while the clock for comments continued to run, we

provided limited release of the underlying data, but only to those who could come to our headquarters in Washington, D.C. Requests for further extensions of time to assess these studies and provide additional record data were denied.

We then sought to promote the broader national dialogue and debate that these issues so clearly merit. Proceeding on an assumption that all expertise does not reside within the Beltway, I sought to have the Commission hold a series of forums and roundtables around the country that would include significant input from both traditional and non-traditional stakeholders. After an initial flat denial we were given only one official hearing, and it was less than 100 miles outside the Beltway in Richmond, Virginia.

That was a start, but at the time we held that hearing, a survey indicated that three-quarters of all Americans were not aware that this critical issue was being decided at the FCC. We had not told them, nor had Big Media told them. I sought additional hearings and forums. Again, no success. I sought resources to hold my own hearings and to attend forums. Again, requests for both staff assistance and funding were denied.

Using my limited office resources, I have traveled across the country to attend as many hearings and forums as I could. I commend Commissioner Adelstein for his very active participation in this hearing process. Between us, we have held hearings and attended forums in New York, Seattle, Austin, Durham, Phoenix, Chicago, Burlington, San Francisco, Los Angeles, Philadelphia, Marin County, Detroit and Atlanta. All told, there have been over a dozen gatherings to discuss media ownership.

With resources and institutional dedication, a full-fledged process involving more Commissioners could have given us the information and insight needed to craft rules that both took account of technological and market changes and fulfilled our responsibility to protect localism, diversity and competition. But we had too few resources and too little dedication. So, we are left, unsurprisingly, without the record or new ideas we need to do our job well.

More recently, the Commission has even refused to publicly disclose the rules we are voting on today. What possible harm comes from transparency? How can telling Congress and the public what we plan to do possibly be bad? I see no legitimate purpose for casting our votes in a shroud of secrecy except to insulate the FCC from public scrutiny.

Therefore, Commissioner Adelstein and I sought to have the specific proposals put out for public notice and comment. We believed that the country would be much better served by putting the proposals out for comment for a limited period, say 60 or 90 days, so we could get it right, understand the consequences of the new rules (both the intended consequences and those invariably more troubling unintended ones) and let these ideas bathe in the sunshine of national debate. Such discussion would have the important additional benefit of enhancing the sustainability of any Commission decision in court by providing concrete input, analysis, and

testing on specific proposals. Sound policymaking, perhaps even the law, requires no less. But the request was denied.

When a draft proposal, ***not including the proposed text of the new rules themselves***, was circulated to Commissioners a mere three weeks before today's vote, we formally requested that the Commission postpone today's meeting to provide additional time to study more thoroughly the impact of the proposals and their interplay, and to see if common ground could be found. Under long-standing Commission practices, such requests from Commissioners have generally been honored. That request was also denied.

And so, we arrive at today. Citizens across this country will hear for the first time the proposals that we are adopting. Some of the details of the rule changes have leaked to the press. Even with this incomplete information, the public reaction against the proposed changes has been unlike anything the FCC has ever experienced. This proceeding has generated three-quarters of a million comments now – more than any other proceeding that I am aware of in the history of the FCC. Of those comments, all but a few hundred are from individual citizens. And of those, nearly every one opposes increased media consolidation – over 99.9 percent!

We've heard bipartisan concern from more than 150 Members of Congress, including the Congressional Black Caucus, Congressional Hispanic Caucus, and the Congressional Asian Pacific American Caucus, asking us to slow down and put these proposals out for public comment before we vote. Some of those Members of Congress are here today.

Dozens of organizations have weighed in with their concerns about media concentration. Among others, we have heard from Children Now, the Writers Guild of America, the Parents Television Council, the Communications Workers of America, AFTRA, the National Association of Hispanic Journalists, the National Association of Black Journalists, the Conference of Catholic Bishops, the Center for the Creative Community, Common Cause, the American Civil Liberties Union, the National Rifle Association, the American Civil Liberties Union, the National Organization for Women, the Family Research Council, the National Association of Black Owned Broadcasters, Rainbow Push, the Media Access Project, Consumers Union, the Consumer Federation of America, Move On, the Center for Digital Democracy, United Church of Christ, the Minority Media and Telecommunications Council, the Leadership Conference on Civil Rights, and many, many more across a broad political and geographic spectrum. City councils across this country in such places as Chicago, Seattle, Philadelphia, San Francisco, Atlanta, and Buffalo, as well as a whole state -- Vermont -- have gone on record against media concentration. Note, please, that several of these are cities where Big Media would have us believe that all is well with the consolidation they have introduced.

As Brent Bozell of the Parents Television Council so aptly put it, "When all of us are united on an issue, then one of two things has happened. Either the Earth has spun off its axis and we have all lost our minds or there is universal support for a concept." Well, it's the concept

– a transcending, nationwide concept. This issue is not Republican or Democratic. It is not liberal or conservative. Not North or South. Not young or old. It is an all-American issue.

The FCC is not, of course, a public opinion survey agency. Nor should we make our decisions by weighing the letters, cards and e-mails "for" and the letters, cards and e-mails "against" and awarding the victory to the side that tips the scale. But even this independent agency is part of our democratic system of government. And when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice. Here the right call is to take these proposals, put them out for comment and then -- only then -- call the vote. Plausible arguments have been put forward that the letter of the Administrative Procedure Act requires this. Other legal experts demur. I do know this: the spirit underlying notice and comment is that important proposed changes need to be seen and vetted before they are voted. Today we vote before we vet.

Now the only opportunity all these concerned citizens have to comment on the specific rules is to file reconsideration petitions after the decision is already made. Given that such petitions are unlikely to be resolved for months, the impact of this decision by then will likely be irreversible. In such a situation, we ought to establish a longer timetable and procedure for implementation of these changes to the rules, just as the Commission did when it dismantled the financial interest and syndication rules a decade ago. Such a procedure would allow the Commission to consider petitions for reconsideration on these specific rules to protect against irreversible, unintended and unforeseen negative consequences. This would also allow the Commission to examine its proposed rules and determine if additional measures are needed to protect the public interest before consolidation occurs, and it would allow Congress opportunity for any input that it may deem appropriate.

II. The Record Does Not Support the Majority's Decision To Undermine Media Concentration Protections.

In reviewing our first biennial review, the D.C. Circuit faulted the Commission for its failure to provide an adequate explanation for its rules.[3] Importantly, the court did not indicate that a relaxation of the concentration limits is warranted or required.[4] On the contrary, the Commission could choose, if so inclined, to ***tighten*** its ownership rules. What the court demands is that the Commission provide more analysis and empirical data to justify the rules it adopts. And I do not believe the courts want only granular, data-driven justifications; I think they would welcome justifications more deeply grounded in history, macroeconomics, political theory and the philosophy of democratic government. In any event, we are obligated to present reasoned rationales with more compelling explanations than we have thus far presented. But we are ***not*** instructed to radically restructure the rules.

[3] *Sinclair Broadcasting Group, Inc v FCC*, 284 F 3d 148, 168-69 (D.C. Cir 2002), *Fox Television Stations, Inc. v FCC*, 280 F 3d 1027, 1041-45 (2002), *rehearing granted*, 293 F 3d 537 (D.C Cir. 2002).
[4] *Sinclair*, 284 F.3d at 162.

My overarching reaction to the record before us is this: first, the evidence we have gathered does not justify such loosening of the rules as the majority approves today and, secondly, we have not asked a sufficiently diverse range of questions to do justice to so important a public issue. The evidence we have amassed points to the need for maintaining existing media concentration protections.

The court was particularly troubled by inconsistencies in our previous decisions. Yet, in this Order, the majority once again fails to provide coherence and internal consistency to the rules and rationales we adopt. I am concerned that these inconsistencies will undermine the decision on appeal and will open the decision to the charge that it was made to reach the result sought by companies that want to consolidate. I provide below a few examples of these inconsistencies.

A. The Majority Ignores the Lessons of Radio Concentration.

In 1996 Congress and the FCC eliminated the national cap for radio concentration. Over the years the Commission has loosened its local radio concentration rules so that one corporation can now own up to eight stations in a market. These deregulatory changes provide the FCC with a record to study the impact of fewer media concentration protections on localism, diversity and competition.

The largest company owned less than 75 stations before deregulation. Today one company, Clear Channel, owns more than 1,200 stations. In many cities, this company owns eight stations. In some markets, it owns even more. And in some towns, it owns virtually all the stations available. The number of radio station owners has decreased by an incredible 34 percent since 1996. The number of minority owners has dropped by a shocking, and nationally embarrassing, 14 percent. A Future of Music Coalition study shows that music has become more homogenous and that many stations are now programmed by computers hundreds of miles away rather than by local DJs, leaving no local content. In our hearings around the country, Commissioner Adelstein and I have talked to many capable young musicians and creative artists who are simply unable to secure air time in the new consolidated radio environment. Real news radio is dying outside the largest cities, and viewpoint diversity has given way to a constant drumbeat of one-sided talk shows.

Even supporters of today's decision have been heard to say that the state of radio is troubling -- yet the Commission charges ahead to deregulate TV and newspapers without comprehensively studying the results of radio concentration. The failure to do so ignores critical information that is both relevant to these rules and that suggests the rules we vote on today are a mistake.

Even worse, although the majority claims it is taking steps to limit radio concentration, in fact the majority today launches a new round of consolidation in radio. First, the majority eliminates in the vast majority of the country the radio/TV cross-ownership rule which limited

the number of commercial radio and television stations one company could own in a market. Without these cross-ownership limits, companies can expand their reach even further. In addition, in the name of helping small businesses, minorities, and women, the majority creates a huge new loophole for consolidation above even the limits set today. The majority grandfathers any clusters that are above the caps. It further allows a company to transfer those licenses to a small business. After only three years, the majority allows the small business to sell those stations to anyone else without restriction -- even if it is to Clear Channel or some other giant media conglomerate. This decision will encourage a regulatory shell game that threatens to make a mockery of the radio limits.

B. The Decision To Raise the National Ownership Cap to 45 Percent is Arbitrary.

Current protections limit TV networks to controlling 35 percent of the national TV audience. Today we increase this limit to 45 percent, encouraging what Merrill Lynch calls a "Gold Rush" of acquisitions of local stations by the big four networks. The Communications Act insists that the Commission protect localism, diversity and competition. In reviewing the last biennial review, the D.C. Circuit held that diversity and localism are valid public interest goals and that the Commission could determine that the national ownership cap is necessary in the public interest if it serves either interest. The court held, however, that the Commission had failed to provide sufficient evidence that either objective was served.[5] The majority today correctly determines that a national cap is needed to serve the statutory goal of having independently owned affiliates continue to serve local community needs and to act as a counter-balance to the national networks. The majority, however, arbitrarily determines that the cap should be raised from 35 percent to 45 percent without adequately justifying this new number, seeking comment on this specific number, or presenting their rationale for arriving at it. The courts may exact a heavy toll on the majority for these omissions.

The National Association of Broadcasters, the Network Affiliated Stations Alliance, and other parties favoring retention of the 35 percent cap submitted exhaustive and largely uncontested evidence including economic studies, station surveys, in-depth analyses, and numerous market-specific examples to justify retention of the 35 percent cap. The record evidence demonstrates, among other things, that independently owned affiliates are better able to preempt network programming networks based on community standards and needs; that the 35 percent cap ensures a critical mass of affiliates necessary to perform this role effectively; and that a substantial majority of affiliates are experiencing increasing pressure from the networks not to preempt network programming. Yet, the majority largely ignores this evidence and arbitrarily chooses a number that tips the balance further in favor of the national networks and away from the local stations. The majority fails to explain how a 45 percent cap – in reality a 90 percent national cap with the illogical UHF discount as discussed below – meets Congressional goals.

[5] *Fox*, 280 F 3d at 1042-43

The majority justifies an increase in the cap to 45 percent based on the assertion that affiliates preempted networks with a national reach of over 35 percent as often as those with less than 35 percent. It does so without accounting for the weight of evidence in the record that supports retaining the 35 percent cap. The majority further reasons that the 45 percent cap could accommodate all existing combinations. But this goal could have been met with a 40 percent cap as well. Yet the majority concludes that it needs to allow conglomerates to grow further without any explanation for this particular number. I repeat: the prospects for successful judicial scrutiny are not well served by this approach.

Some have argued that the only way to preserve free over-the-air television is to let the big conglomerates get even bigger. Unless we allow even more concentration, the argument posits, over-the-air television is doomed. I find the arguments regarding the networks' financial distress to be far-fetched, more likely totally ludicrous. The facts tell such a different story. The networks, with their ability to deliver a large number of viewers across the country, have become even more valuable. They not only reach consumers over the air through their own highly profitable stations and through affiliates, but they are also guaranteed carriage to cable subscribers. Indeed, they own much of cable. The record demonstrates that the top four networks maintain the greatest reach of any medium of mass communications. I find no convincing evidence in the record of network poverty or financial distress. Although it is difficult to break out a precise measure of one part of these large conglomerates' operations, it is clear that their broadcast operations are profitable. Moreover, the network operations enhance the profitability of other parts of the conglomerate. The Commission itself recently concluded that, "Broadcast television is certainly a survivor, even a vigorous survivor."[6] The networks command an enormous advertising premium. They recently received a record $9.4 billion in up-front prime-time advertising for the next season. They have ownership in most of their profitable programs, and these are subsequently put into syndication or "repurposed" – the fancy new term for a re-run. These companies know how to move costs around, shift assets and make things look good or bad as they need to do for various audiences. Sometimes regulators hear a very different story than Wall Street analysts hear. I believe the argument that the only way for the less well-off among our citizens to continue receiving free, over-the-air television is through allowing already powerful networks to grow more powerful would have been better left unsaid.

I would add a point on the much-touted economies of scale and the alleged efficiencies of bigness, because it may be that the networks do have a longer-term reason to worry. This country has witnessed the unraveling of huge mega mergers and acquisitions across economic sectors during the past couple of years, while other such ventures are struggling to make it. We should have learned by now that size is no guarantor of success, even though the urge to grow larger continues to motivate so many industries. Suppose we whittle down the media world to an even more precious few, and some of these begin to implode like other huge deals have

[6] Jonathan Levy, Marcelino Ford-Livene and Anne Levine, *Broadcast Television Survivor in a Sea of Competition*, Federal Communications Commission, Office of Plans and Policy Working Paper 37, 309 (Sept. 2002).

imploded. Talk about stations going dark! Talk about striking at the heart of the country! Sometimes I think the networks need to be protected from themselves.

C. Maintaining the 50 Percent UHF Discount In the Face of Technological and Marketplace Changes Is Arbitrary.

Understanding the so-called "UHF Discount" is critical to understanding how the new 45 percent cap will actually work. Under the UHF Discount policy, UHF stations are considered to reach only 50 percent of the households that a VHF station reaches in a market for purposes of determining whether a company has exceeded the national ownership cap. When established in the mid-1980's, this discount was designed to take into account the technical limitations of over-the-air UHF stations. The Commission found that over-the-air UHF stations reached fewer viewers than VHF stations because their signals were different and weaker. But UHF and VHF stations reach an identical number of viewers when delivered over cable TV facilities. The differences between UHF and VHF only manifest themselves when they are broadcast over the air. Why didn't the Commission consider this in the 1980's? Because at that time cable penetration was only around 35 percent, so the vast majority of Americans received their television signals over the air. Today over 85 percent of consumers receive their signals from cable and DBS. Cable signal carriage rules ensure that consumers receive the UHF signal, and DBS operators are required to carry all UHF stations in any market where they carry any local channel. According to the record, these changes in the market are reflected in the valuations of UHF licenses which are approximately 10-15 percent less than VHF licenses with similar affiliations. Indeed, the Commission itself in previous proceedings has recognized that the growth of Multichannel Video Programming Distributor (MVPD) subscribership has reduced the UHF signal handicap.[7]

With 85 percent of Americans experiencing no difference between UHF and VHF stations, the discount no longer makes sense. Eliminating the entire discount may be warranted, but at a minimum it requires replacement with a number that reflects the reality of today's technology and marketplace.

Notwithstanding the majority's repeated admonishments that the Commission must take into account changes in the marketplace and in technology and must provide empirical data for the rules it adopts, the majority inexplicably, and I believe wrongly, retains the UHF discount in its present form without performing the comprehensive review that is required.

Adding to the inconsistency in this decision, when the majority conducts its analysis of the cross-ownership and local television rules, it counts the number of television stations in the market. All stations – whether UHF or VHF -- are counted equally in this analysis and assumed to be available throughout the market. How can it be that, in one part of the decision, UHF

[7] *See, e g*, Review of the Prime Time Access Rules, 60 Fed. Reg. 44773 n.101 (1995).

stations are determined to reach the entire market, and in another part of the same decision, those stations are determined to reach only half the households?

Eliminating or changing rule after rule to allow further consolidation on the basis of changed technology and market conditions, yet refusing to change the one rule that the networks approve will lead many to believe that this decision is results-oriented, that it is designed to ensure that no station group exceeds the national cap, and that conglomerates may continue to grow no matter what technological or marketplace changes may occur.

III. The Majority's Rules and Reasoning are Arbitrary and Inconsistent.

As described above, I believe that the majority has made serious errors in its high-level decisions to restructure media concentration protections. It is also important to recognize that when one digs into the details of today's action, it becomes clear that it is riddled with arbitrary decisions and inconsistencies. I describe a few of them here.

A. The Majority Protects Against Mergers of the Top Four Television Stations in a Market but Inconsistently Allows a Monopoly Newspaper To Purchase Even the Top Television Station.

In the local television ownership rule, the majority recognizes that a single entity can achieve excessive market power through consolidation. The majority therefore precludes one company from owning two of the top four television stations in a market. The majority further treats news sources as interchangeable in its "Diversity Index" that counts different media news outlets available to consumers. Yet, although the majority constrains two of the larger local news voices in the market from combining in the local television rule, the majority arbitrarily provides no similar constraints in its cross-ownership rules. The Order allows a newspaper – clearly a significant news voice in the market – to purchase one of the top four television stations, thereby potentially harming consumer welfare and eliminating a voice just as surely as allowing two of the top four stations to merge. The majority does not explain this inconsistency. Nor does it explain how allowing a newspaper with say 80, 90, or even more of the circulation in a community to merge with the top station in that market would help a smaller newspaper or television station survive. Indeed, such a merger could allow the creation of a dominant news outlet in the market against which no other entity could compete. Yet, the majority does not explain how eliminating one strong local news voice through consolidation will benefit diversity, localism or competition in that market.

An additional problem concerns the majority's method of counting news voices in the market. The Diversity Index counts television, newspapers, radio, and the Internet as local news outlets. It weighs television most heavily, and gives Internet sites the least weight, based on where consumers ***actually*** obtain their news. The majority, however, then counts all outlets within a medium equally in assessing the level of consolidation allowed. This inconsistency between using actual news sources in one part of the Diversity Index and potential news sources

in another leads the majority to count a television shopping channel as heavily as a station with local news programming when assessing news outlets within a community. In sum, the majority bases its Diversity Index on where consumers supposedly obtain news, but then arbitrarily allows cross-ownership based on all television stations, not just those providing news.

B. The Majority Inconsistently Accepts "Highly Concentrated" Markets and Arbitrarily Treats All Television Stations as Equals.

In its local television ownership rule, the majority allows one entity to own three stations when there are at least 18 stations in the market. The majority reasons that requiring 18 stations will preserve at least six independent voices and therefore, ensure the market is at most moderately concentrated. The *Merger Guidelines* of the U.S. Department of Justice and the Federal Trade Commission categorize any market with fewer than the equivalent of 10 equal-sized independent entities as "concentrated," and any market with fewer than 6 such entities as "highly concentrated."[8]

But the new rules go even farther, permitting even more concentration by allowing duopolies in markets with as few as five stations. Thus, broadcast television in many markets across the country may be highly concentrated. Moreover, given that all stations do not provide local news, the market for broadcast television newscasts will be even more highly concentrated. The majority does not take account of this fact.

Why does the majority believe that allowing concentrated local markets is acceptable? Why does it believe that allowing even highly concentrated markets is acceptable in markets with 5 to 6 stations? Why does it treat all TV stations as equals, from the Home Shopping Network to the local NBC station, whether or not they have local news?

A similar problem of concentration occurs in the context of the local radio rule. At present, we not only limit the overall number of stations one entity can own, but we also flag mergers that will result in one or two entities dominating a market, thereby initiating a public interest review by the Commission. The majority would have the Commission rely only on a station limit, without any examination of the audience or advertising share. Without such limits, one company could acquire all of the top stations in the market, with the result being that one entity dominates, or even monopolizes, that market.

C. The Majority Arbitrarily Fails To Account for Local Market Conditions in its Bright-Line Rules Undermining Localism, Diversity and Competition.

The record demonstrates that every local newspaper market is "highly concentrated" according to the Department of Justice's Hirfindahl-Hirschman Index. Indeed, most communities have become one newspaper towns. The vast majority of local television and radio

[8] Horizontal Merger Guidelines, 57 Fed Reg. 41552 (1992)

markets are tight oligopolies, with even higher levels of concentration for local news. I do not find that the majority accounts for this extreme level of concentration in its decision, ignoring quantifiable data in the process.

A rulemaking that met our statutory obligation to safeguard localism, diversity and competition would have examined the voices available in specific local markets and whether proposed transactions would undermine these principles in specific communities. The majority's reliance on national bright line rules does not allow us adequately to take into account different situations in local markets. The majority inconsistently allows parties to seek waivers of our rules where local conditions mean a transaction that violates the bright line rules would in fact not offend localism, diversity and competition; but it does not similarly accept petitions to deny transactions that undermine these core principles even if they meet our bright line rules. This one way ratchet is arbitrary and irrational.

D. The Majority Arbitrarily Concludes that All Consolidation Will Enhance News and Informational Programming.

The majority arbitrarily concludes as a general nationwide matter that efficiencies created through consolidation will enhance news and informational programming. They therefore, *a priori*, determine that all mergers that cause concentration levels up to our bright line rules will serve the public interest, without any individualized examination of the facts of a particular merger. There is no record to support such a sweeping conclusion. The majority, without such support, bases its rules on the hope that companies will use some of the money they save through consolidation to invest in more news and informational programming. But the record shows that instances where companies have provided more news and informational programming following consolidation are overwhelmed by instances where news voices and news programming in a market were eliminated.

E. The Majority Arbitrarily Treats Television Stations, Newspapers, Radio Stations and Internet Sites Equally For Purposes of Analyzing Diversity and Competition in the Local Market.

The majority treats broadcasters as just one voice among many, no different from a website. The majority's analysis depends upon treating different types of media as equally important "voices" in the local market. Clearly, different types of media are not identical in providing localism, competition and diversity. This analysis ignores that broadcasters play a distinct role in our media. They are granted the right to use a public resource and, in exchange, they commit to serve their local communities. Notwithstanding the majority's assertions about new technologies and the availability of alternative sources of information, the fact remains that there is still an inadequate number of frequencies to accommodate all those who wish to broadcast to local communities.

We should recognize and reaffirm the proud heritage of local broadcasters, many of whom are strongly committed to serving the public interest. Unfortunately, consolidation has meant that broadcasters are less and less captains of their own fate and more and more captives to Wall Street and Madison Avenue expectations. One large station owner reportedly stated that, "We're not in the business of providing news and information. We're not in the business of providing well-researched music. We're simply in the business of selling our customers products." Another large station group's "local" news is actually "distance cast" from one central location hundreds of miles away. During the hearings and forums that Commissioner Adelstein and I attended, we heard time and again from small, local broadcasters that consolidation has had a direct and detrimental impact on their ability to compete against the large conglomerates that cut costs by consolidating operations outside of the community. Although there are few such poignant examples, it is not only such places as Minot, North Dakota that are feeling the effects.

F. The Majority Arbitrarily Subordinates Diversity and Localism Concerns To Competitive Concerns.

The majority subordinates the statutory goals of localism and diversity to competition throughout its analysis. The principles of localism and diversity are deeply rooted in our history. Since the earliest days of our nation, access to a diversity of viewpoints on issues of public importance has been considered essential to democracy. Maximizing the number of independent owners increases the likelihood of a wider range of viewpoints. And Congress mandated that we protect localism because local media tailor their programming to the needs of their communities.

Yet, the majority time and again relies only on measures of economic efficiency to justify rule changes, but does so at the expense of viewpoint and ownership diversity. It is clear that it would be less expensive to have one owner control all of the news outlets and to have the local broadcaster merely act as a passive feed for a national network. But the American broadcast system is based on more than just market forces. Any rule changes must be evaluated in diversity and localism terms, and not just economic terms.

I am pleased that the majority at least acknowledges the important goal of having adequate minority and female ownership in the broadcast industry. But I am disappointed that it then fails to take well-considered action to try to achieve this goal. Minority ownership is vitally germane to this proceeding. I fail to see how we can perpetuate diversity of viewpoint, for example, without addressing minority ownership. Ownership matters to diversity. The issue of its impact on women and minorities should not be relegated to a Further Notice at some indeterminate time. It is not enough to allow dominant clusters that exceed our limits to be transferred to small businesses and then, after a few years, be transferred to a large media conglomerate. How does it benefit minorities and women to maintain such high levels of concentration in a market? How will minority- and female-owned businesses break into a market if the stations are already locked up? Wouldn't these businesses be better served if there were more opportunities for ownership and we addressed such problems as access to capital?

Other facets of diversity fare even less well. The majority concludes that market forces will ensure adequate program diversity, and it dismisses outlet diversity and source diversity as independent goals. There is inadequate record support for these sweeping decisions. Lacking record support, the majority merely offers us unproven beliefs for comfort.

In the end, this decision also disserves competition. In a media world already well down the road toward high levels of consolidation, questions of preserving small, independent voices and of encouraging conditions conducive to new market entry should be a top Commission priority. Instead, I hear around the country, and I read in newspapers almost every day, the anguish of independent stations facing the prospect of imminent absorption by one of the media Goliaths. Some of these independents serve very diverse audiences and what they fear most is that the first casualty of a buy-out would be their very diversity.

IV. The Order Fails To Consider Several Relevant Concerns and To Include Several Important Proposals.

The previous section describes a number of problems with the contents of the Order. But equally troubling are the Order's omissions. The Commission has not conducted adequate analysis to make an informed decision on the impact of the additional consolidation we allow today. The studies the Commission conducted are a start. But, even putting aside the myriad criticisms of the conclusions and methodology employed in these studies, the Commission only examined a few questions. Amazingly, we did not even attempt to consider the prospective impact of the consolidation that would occur following these rule changes. Nor have we ascertained how these rule changes interact and work in concert, instead apparently assuming that each rule is an island, and that the interactivity of rule changes will not have important effects on the media landscape. These studies also do not consider what the impact of these rule changes will be on local communities across this country.

This section details several relevant specific concerns that are not adequately addressed in the Order, and several important proposals that, if included in the Order, would have greatly improved it.

A. The Order Should Address the Impact of Undermining Concentration Protections on Independent Programmers.

Commenters addressed the need to require more independent programming on our airwaves so that a few conglomerates do not act anti-competitively to control all of the creative entertainment that we see. These proposals should have received the serious attention they deserve in ***this*** decision. Over the past decade, we have witnessed a substantial increase in the amount of programming owned by the networks. Where once independent production accounted for much of what we saw, we now have huge vertically-integrated conglomerates that own the vast majority of the programming they deliver.

As we loosen the concentration limits, we should have addressed whether there is a need for independent programming requirements to ensure that we do not end up with national vertically-integrated conglomerates that control the distribution channels ***and*** all of the content we see and hear. The powers of vertical concentration in today's broadcast industry are part and parcel of the power that accompanies ownership. Network ownership of the full range of prime time programming constrains competition, consigns independent production to oblivion or, at best, minor and marginal roles, and it cripples the production of diverse programming. It also entails serious job losses for thousands of workers, including creative artists, technicians and many, many others. I am disappointed that the majority dismisses out of hand the issues raised by independent content producers. The majority expresses doubt that it had notice to act and then finds that changes to our rules are not warranted in any event.

B. The Order Should Establish a Legitimate License Renewal Process To Partially Protect Against the Risks of Further Consolidation.

Some commenters suggested the need for an effective license renewal process under which the Commission would once again actually consider the manner in which a station has served the public interest when it comes time to renew its license. The Commission formerly did exactly that. But the system has degenerated into one of basically post-card license renewal. Unless there is a major complaint pending against a station, its license is almost automatically renewed. A real, honest-to-goodness license renewal process, predicated on advancing the public interest, might do more for broadcasting than all these other rules put together. Such a process, properly designed, would avoid micro-management on a day-to-day basis in favor of a comprehensive look at how a station has discharged its public responsibilities over the term of its license. Such an approach is most certainly within the scope of this proceeding, if for no other reason than the objective of our ownership rules is to benefit the public interest. It would certainly be a welcome supplement to achieving the goals Congress established for the ownership caps.

C. The Order Should Require Licensees and Those Seeking License Transfers To Periodically Report To the Public How They Serve the Public Interest.

From the earliest days of broadcasting, the Commission has sought to promote localism and obligated licensees to serve the needs and interests of the local communities. Why not require licensees to disclose more publicly how they are serving the public interest and the needs of their local communities? Such information, perhaps made available on the Internet, would give the public an overview of how its airwaves are being used and might provide incentives to produce more and better local news and community programming. At a minimum, it would allow us to analyze whether our rules are actually achieving their desired goals so that future Commissions can make better decisions.

In addition, special disclosure rules ought to apply to buyers and sellers seeking to transfer a license. They ought to specify the tangible, concrete ways in which the transaction would serve the public interest. The merged entity would then have to disclose after the transaction how it fulfilled its public interest benefits. Such a step would allow the Commission to identify those transactions that serve the public interest, convenience, and necessity, as required by the statute. The majority claims that consolidation could lead Big Media to produce more and better local news and community programming. Let's take some action to make sure this expectation is met and to hold conglomerates accountable after mergers. Moreover, this procedure would allow us to identify those transactions in all markets -- including smaller markets -- that serve the public interest.

D. The Order Fails To Analyze the Impact of Undermining Concentration Protections On Children, On Families, and on Indecent Programming.

In our hearings, we heard from parents fed up with the rising tide of indecency and violence on the airwaves and repulsed by programming's race to the bottom. We also heard from broadcasters who had managed network-owned and operated stations and were unable to preempt programming that they believed was not suitable for their community. These broadcasters told us that programming decisions were often made by distant network executives rather than by local station managers. In contrast, we heard from independent local broadcasters who had stood up to programming they and their communities found inappropriate.

Some have suggested that there may be a link between increasing consolidation and increasing indecency on our airwaves. Yet, the Commission failed to address this issue in its analysis. Has consolidation led to an increase in the amount of indecent programming? When programming decisions are made on Wall Street or Madison Avenue, rather than closer to the community, do indecency and excessive violence grow more pervasive? I do not know the answer to this question. I do know this: we have no business voting until we take a serious look at the matter and amass at least a credible body of evidence. We owe it to our children, and their parents, to explore this question before voting on whether to allow more consolidation.

I say again: ownership matters. If it is not germane for this proceeding to ascertain whether there is a possible relationship between indecent content and the fact that a shrinking Media Elite controls that content, then I do not know what is germane.

In addition to its failure to consider the impact of consolidation on indecency, the majority does not look at the relationship between concentration and ***positive*** children's programming. We now have some data on this subject in the record. The news unfortunately is not good. A recent study analyzed the market in Los Angeles and found that the number of broadcast TV programs for children dropped sharply after independent local stations were swallowed up in media mergers. This study found a 47 percent drop in children's programming with duopolies accounting for the largest decreases. Another recent survey found that 80 percent

of parents think the FCC is doing a poor to fair job of protecting families and children. Unfortunately, we do not take actions today to gain their confidence. Although the Commission does take a positive step today to ensure that duopolies and triopolies will not merely rebroadcast the same children's programming, we do nothing to examine how Big Media will serve our youngest viewers and listeners before allowing further consolidation to take place.

Some believe that the First Amendment does not allow us to consider these subjects in relation to our concentration rules. But there are laws in force today on both of these subjects and courts have upheld special responsibilities for broadcasters related to these goals. If there is a question of whether the Commission can constitutionally try to use concentration restrictions to reduce indecency and increase children's programming, let us have that debate on the record rather than ignore these clear Congressional goals.

E. The Order Fails To Analyze the Impact of Undermining Concentration Protections on Women and Minority Groups.

Twenty-five years ago, in the FCC's Statement of Policy on Minority Ownership of Broadcast Facilities, the Commission said, "It is apparent that there is a dearth of minority ownership in the broadcast industry." A quarter of a century later, there still is. Although today's Order recognizes the importance of minority and female participation, we fail to conduct rigorous analysis of the impact of today's rules on minorities and women.

We know that there are substantially fewer radio station owners today than there were before the rules were changed in 1996. People of color now make up less than four percent of radio and television owners. The National Association of Black Owned Broadcasters tells us that the number of minority owners of broadcast facilities has dropped by 14 percent since 1997. People of color are under-represented not only in boardrooms, but in newsrooms as well. Maybe that's why a study from Fairness and Accuracy in Reporting found that 92 percent of sources interviewed on the nightly network news were white and 85 percent were male. A handful of huge companies stand astride the media world and it is not helping diversity of viewpoint, diversity of ownership, or just plain old American diversity.

It is not surprising therefore that among those opposing the relaxation of ownership rules are the Congressional Black Caucus, the Congressional Hispanic Caucus, the Congressional Asian Pacific American Caucus, the Leadership Conference on Civil Rights, the National Organization for Women, the National Association of Black-Owned Broadcasters, the National Association of Hispanic Journalists, the National Association of Black Journalists, and many others who are afraid that additional media concentration wlll reduce opportunities for minorities and women.

We have not even attempted to understand what further consolidation means in terms of providing Hispanic Americans and African Americans and Asian-Pacific Americans and Native Americans and women and other groups the kinds of programs and access and viewpoint

diversity and career opportunities and even advertising information about products and services that they need. America's strength is, after all, its diversity. America will succeed in the Twenty-first century not in spite of our diversity, but ***because*** of our diversity. Diversity is not a problem to be overcome. It is our greatest strength. ***And our media need to reflect this diversity and to nourish it.*** It takes no rocket scientist to understand that changing the rules of media consolidation is likely to have far-reaching effects on different groups.

The decision today states that we will address minority and female ownership proposals in the future and will establish a new Advisory Committee on Diversity. An advisory committee is a good step, but we should not be deflected from tackling the ownership diversity questions that are central to the media concentration item before us now. I am reminded of that old bureaucratic sleight-of-hand of foisting controversial issues onto a new government commission or task force to get them out of the way. In any event, solutions to this problem will be harder to come by if media conglomerates proceed now to lock up control of the scarce licenses to use the public's airwaves. That is why these problems need solutions now, not somewhere far down future's road.

Where the Commission has acted in this decision, it is not to the benefit of minority communities. The majority even determines that those who speak Spanish or any language other than English do not deserve the limited protections the Commission adopts today. The cross-ownership rules apply only to English-language newspapers unless it can be demonstrated that another language is dominant in that market. Thus, these safeguards are not even triggered by a merger between a broadcaster and, for example, a Spanish-language newspaper in most communities in this country. This decision allows even higher levels of media concentration for the millions of Americans who depend on non-English media for their news and entertainment.

F. The Order Fails to Analyze the Impact of Consolidation on Small, Local Broadcasters.

Increasing consolidation threatens the very survival of small, local broadcasters. Media analysts expect that the only option for local broadcasters will now be to sell. They conclude that those that want to remain will face an extremely tough road. During our hearings, we heard from small broadcasters that had already been squeezed out of the market. These rule changes can only accelerate this trend. These changes could spell the end for such uniquely local stations as WCIU TV in Chicago and many other small, independent broadcasters. Yet, we have failed even to consider the impact on these local broadcasters.

G. The Order Fails To Analyze the Impact of Undermining Concentration Protections On Small Businesses and Advertisers.

Changes to media concentration rules also threaten small businesses. As fewer and fewer companies control our media outlets, small local broadcasters will find it harder and harder to

compete. Other small businesses will find it harder to produce and sell programming as national vertically integrated conglomerates control local distribution.

Concern has been expressed in the hearings that Commissioner Adelstein and I conducted that consolidated media markets are more expensive for advertisers. We have also heard concerns relative to consolidated media companies forcing advertisers to run ads in all their media assets and stations, not just the ones the advertisers really want. This means that even if per-eyeball ad rates look stable in a market, real-life advertising expenses may be rising significantly. And small businesses may not be able to afford advertising on multiple outlets, even if the rates in one particular market are not rising. This is another of those circumstances that need study before we proceed to vote.

Moreover, we have heard that consolidation may lead to homogenization and media geared to certain and limited demographics. Already, we have seen a reduction in children's programming due to consolidation. This means that advertisers who want to reach minority groups or niche communities may be stuck without a way to access them.

Small businesses have been, and will continue to be, the engine of growth in our country. Yet we fail here to analyze how media consolidation will affect small businesses. The Office of Advocacy of the Small Business Administration strongly urged the Commission to conduct such an analysis prior to rushing ahead with a decision.

V. Conclusion.

I began this proceeding hopeful that we would take a balanced, measured approach, engage in fact-finding and open discussion, and reach out to stakeholders across this land. Instead, in the face of (1) a record that simply does not support the changes being proposed, (2) a record that fails to do justice to the larger implications of these issues, (3) overwhelming public opposition, (4) widespread and bipartisan concern about both the substance and the process that have been followed here and (5) the potential for great and irreversible consolidation before we fully understand the consequences of our actions, I am convinced this is the wrong decision. It is wrong for the media industry, wrong for the public interest, and wrong for America.

All this means that I am deeply saddened by the Commission's actions today. Some have characterized the fight against this seemingly pre-ordained decision as quixotic and destined to defeat. But I think, instead, that we'll look back at this 3-2 vote as a pyrrhic victory.

This Commission's drive to loosen the rules and its reluctance to share its proposals with the people before we voted awoke a sleeping giant. American citizens are standing up in never-before-seen numbers to reclaim their airwaves and to call on those who are entrusted to use them to serve the public interest. In these times when many issues divide us, groups from right to left, Republicans and Democrats, concerned parents and creative artists, religious leaders, civil rights activists, and labor organizations have united to fight together on this issue. Senators and

Congressmen from both parties and from all parts of the Country have called on the Commission to reconsider. The media concentration debate will never be the same. This Commission faces a far more informed and involved citizenry. The obscurity of this issue that many have relied upon in the past, where only a few dozen inside-the-Beltway lobbyists understood this issue, is gone forever.

I believe, after traveling the length and breadth of this country, that our citizens want, deserve, and are demanding a renewed discussion of how their airwaves are being used and how to ensure they are serving the public interest. I urge my colleagues to heed the call. I want to thank the hundreds of thousands of people who have attended hearings, filed comments, written letters to the editor, and contacted the Commission. You have made a difference. And if you stay the course now, we have a chance to settle this issue of who will control our media and for what purposes, and to resolve it in favor of public airwaves of, by and for the people of this great country.

STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
DISSENTING

Re Report and Order In the Matter of 2002 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules; Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Market.

With the adoption of this Order, a dark storm cloud looms over the future of the American media. The majority has sealed into federal regulations the most sweeping and destructive rollback of consumer protection rules in the history of American broadcasting.

The public stands little to gain and nearly everything to lose by slashing the protections that have served them for decades. Allowing fewer media companies to control what Americans see, hear and read will not serve our democracy well. Today's relaxation of our media ownership rules is likely to damage the media landscape for generations to come, as all of our experience tells us that the relentless waves of consolidation are virtually impossible to rollback once they advance. Today's action will likely diminish the diversity of voices heard over the public airwaves, which can only dilute the quality of our society's intellectual, cultural and political life. It will also likely diminish local control of our media, the core concept at the foundation of the American system of broadcasting, as media giants buy more local stations and homogenize the programs and stories they broadcast.

In the end, the new rules simply make it easier for existing media companies to gobble up more outlets and fortify their market power. Today's Order capitulates to many of the longstanding demands of the media giants we oversee. It shatters many of the vestiges of the consumer protections that weren't eliminated in the 1980s. It pulls the teeth out of the remaining protections, leaving the Commission little more than a toothless tiger.

As big media companies get bigger, they may chase the bottom dollar ahead of serving the local needs of the community. They're likely to broadcast even more homogenized programming that increasingly appeals to the lowest common denominator. If, in the words of former Chairman Mark Fowler, television is nothing more than a toaster with pictures, we are paving the way for only Wonder Bread to pop out.

I dissent, finding the decisions embodied in today's Order are bad policy, indefensible under the law, and inimical to the public interest and the health of our democracy.

I. Suffering the Consequences

Now that this document, with its peculiar diversity index and other proposals, will finally become public, I expect media experts, academics, public interest groups, and most of all, the American people and their representatives will find it riddled with contradictions, false assumptions, and outcome-driven thinking.

It may take a while for the public to feel the full effects of today's decision. Consolidation in the media markets could take place over a number of years, just as it did in radio. But most people already expect it to prove a disaster. They intuitively distrust more media control in the hands of a few corporate giants. People will notice every time a new merger goes through that eliminates a voice in a community. Anger will flash when greater consolidation leads to more sensationalism, commercialism, crassness, violence, homogenization, and noticeably less serious coverage of news and local events.

It didn't have to turn out this way. Congress and the courts forced a massive review. They did not force massive deregulation. We had a choice. The courts required us to justify our rules, not to gut them or replace them with pale substitutes. Certainly, the media markets have changed and our rules must keep pace with those changes. But the majority chose to go much further than Congress or the courts required. They chose to pursue gratuitous deregulation. This is the most dramatic weakening of our media ownership rules this country has ever seen.

I had hoped for a better outcome I could support. The Commission undertook the most comprehensive review of its broadcast ownership rules ever. It was supposed to produce a judicially-sustainable, intellectually-coherent framework. But those good intentions and good faith efforts are not reflected in the final product. The comprehensive framework never materialized. An effort begun with serious intellectual aspirations descended into an incoherent, outcome-driven document, the likes of which the Commission has too often seen and sought to avoid.

A new regime for a new era fell short. Instead, we're left with a muddled patchwork of skeletal protections based on market-driven philosophies and deregulatory outcomes. The Order is rife with more than a hundred references to market efficiencies for broadcasters, yet it is upon consumers that the effects of our decision will be most palpable. It is these listeners and viewers, not the media companies, whom we are charged with protecting.

II. Today's Decision in Context

The majority touts the changed legal and technological environment since these rules were adopted. Yet, for all the changes we have undeniably experienced, some important

foundational principles remain constant. For all the striving to update our rules with modern empirical support, some core concepts underpinning our broadcast media remain as elusive and as imperative as ever.

A. Our Statutory Public Interest Responsibility

The majority implies that Congress and the courts forced this outcome. I disagree. We had much wider latitude than this suggests. The biennial review provides a simple directive – to determine whether the rules "are necessary in the public interest as the result of competition," repealing or modifying them only if we determine they are "no longer in the public interest."[1]

The *Fox* and *Sinclair* courts sent the rules back to us for justification, not for evisceration.[2] It wasn't the prior Commission's attempt to maintain the rules in their current form that failed to satisfy the courts, it was the failure to examine the current environment and justify retention of the rules based on that environment.[3] Congress's direction in the statute is to review the rules, not to revise them. The Commission is only required to, as the D.C. Circuit characterizes, "continue the process of deregulation" if it finds after review that the current rules no longer serve the public interest. The *Fox* court even stated, with respect to the 35-percent national ownership cap, "we cannot say it is unlikely the Commission will be able to justify a future decision to *retain* the Rule."[4] And the court made clear that the Commission could use "either analytical or empirical" reasoning to justify its decisions.[5]

The linchpin of Congress's statutory directive is two words – public interest. The Commission for decades has sought to serve the public interest by promoting diversity, localism and competition through diversification of mass media ownership.[6] The courts have consistently approved these priorities, agreeing that assuring the public access to a multiplicity of information sources is a governmental purpose of the highest order which promotes values central to the First Amendment.[7] Diversity is of exceptional importance, for achieving "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of

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1 Telecommunications Act of 1996, Pub.L. No. 104-104, § 202(h) (1996 Act). *See also* 1996 Act § 257(b) (asserting the need to "promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity")

2 *See Fox Television Stations v FCC*, 280 F.3d 1027 (D.C. Cir. 2002). *See also Sinclair Broadcast Group v FCC*, 284 F.3d 148, 152 (D.C. Cir. 2002) (noting that the *Fox* case remanded the national cap "for justification" by the FCC)

3 *See Fox*, 280 F.3d at 1044 (criticizing the prior Commission for merely listing facts in a single paragraph, "without defining the relevant markets, let alone assessing the state of competition therein" and without linking the listed facts to the decision to retain the rule, "precisely what § 202(h) requires.")

4 *Id*, 280 F 3d at 1049 (emphasis added).

5 *Id*, 280 F 3d at 1048.

6 *See FCC v National Citizens Committee for Broadcasting*, 436 U.S. 775, 780, 808 (1978) (*NCCB*). *See also United States v Storer Broadcasting*, 351 U.S 192 (1956).

7 *Turner Broadcasting System v FCC*, 512 U.S. 622, 663 (1994)