SEPARATE STATEMENT OF COMMISSONER KATHLEEN Q. ABERNATHY

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 or 1996, Cross-ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Order and Further Notice of Proposed Rulemaking (adopted June 2, 2003).

Today the Commission faces another historic decision affecting free speech where it must decide whether to be guided by facts or by fears. For literally years, this Commission has struggled in a highly politicized environment through Democratic and Republican administrations to strike an appropriate balance in its media ownership rules. Many have argued that this proceeding is about the core of our democracy — and I agree. And nothing is more fundamental to democracy than following the rule of law as given to us by Congress and as interpreted by the courts. Our success will ultimately be judged not by a public relations assessment, but by the rigorous demands of judicial review. It is a heavy responsibility and I believe we have exercised it well.

I. Legal Framework of Today's Decision

I began my review of the FCC's media ownership rules with three inescapable realities: the Telecommunications Act of 1996, the judicial decisions interpreting it, and the U.S. Constitution.

> *First*, the Act requires the Commission to conduct a review every two years to determine which of our broadcast ownership rules can be justified in the modern world of media. For those who want us to delay this proceeding, I cannot do it. In fact, we are already five months behind schedule and therefore unfaithful to congressional intent.
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> *Second*, judicial decisions in this area have struck down every broadcast ownership rule the courts have reviewed since the 1996 Act. Each time the courts found the FCC had failed to justify the limits it continued to place on broadcast ownership. For those who want the Commission to maintain all the rules in their current form, you are asking me to defy the federal courts. This I will not do.
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> *Third*, the First Amendment to the Constitution protects the rights of free speech and free press and tells me that, in my capacity as an FCC Commissioner, I cannot tell the American people what they should believe, what they should read, or what they should watch or listen to for their own good. Any restraint placed on broadcasters' free speech rights must be a reasonable means to further our public interest goals. The federal court opinions specifically tell me that any restrictions we place on ownership must be based on concrete evidence — not on fear and

speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people.

Within these parameters, I want to emphasize that we have undertaken an enormous study of the reality of the modern broadcasting marketplace. We have accumulated a record of unprecedented breadth and depth, including hundreds of thousands of public comments, 12 independent studies, and testimony from a number of broadcast ownership hearings. Ken Ferree and the Media Bureau staff have invested countless hours in research and analysis.

II. Ownership Restrictions

Based on my review of the record, I am persuaded that several ownership limitations — in their current form or with some modifications — remain "necessary in the public interest"[1] to preserve competition, localism, and diversity. These rules thus meet the legal standard demanded by Congress and the courts. Rules that do not meet this standard may not be retained.

First, in the process of retaining our current limits on ownership of radio stations, we have tightened our definition of radio markets to ensure that it more accurately reflects the level of competition in these markets. Second, our television ownership rules continue to maintain the prohibition of mergers among any of the top four networks. Third, for other matters such as restrictions on local television ownership, the national television cap, and our cross-ownership rules, we have preserved structural limitations in revised forms.[2] We have modified these restrictions because, not only do the former rules fail to promote competition, localism, and diversity, but they may actually be *harming* these goals. For example, the record has demonstrated that combinations of two television stations actually produce more local news. The record also demonstrates that newspaper-owned television stations provide more news and public affairs programming and receive more industry awards for such programming than unaffiliated stations. If we kept our existing rules unchanged, we would artificially restrict such benefits to local communities with no countervailing advantages. I emphasize that our restrictions are grounded in actual evidence of harm, as required by the courts, not in merely hypothetical fears.[3]

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[1] Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996); *see also* 47 U.S.C. § 161; Joint Statement of Chairman Michael K. Powell and Commissioner Kathleen Q. Abernathy in *2002 Biennial Regulatory Review,* FCC 02-342, GC Docket No. 02-390, (rel. March 14, 2003) (explaining that biennial review standard in section 11 and section 202(h) is best interpreted as requiring an affirmative justification of covered rules based on the same substantive standard that applies upon adoption of the rules in the first instance).

[2] While I would have preferred to address cross-media mergers in small to middle markets on a case-by-case basis, I support the decisions we reached in this Order. Indeed, bright-line rules have the benefit of providing more certainty to the marketplace and increase the transparency of our process.

[3] Moreover, the modification of these prophylactic rules does not strip us of our continuing obligation to review transfers of media licenses to ensure they are consistent with the public interest.

III. Facts and Fears

Those who oppose our decision will continue to fear a mythical media monopoly that will descend upon our media landscape without any regulatory review of its power. But the reality is that under today's order there will continue to be hundreds of pathways into the American home in the average American city or town. The reality is that we are continuing to impose a national television ownership cap in recognition of the important role affiliates play in promoting localism, competition, and diversity. The reality is that today's order will prevent media companies from owning more than one of the top four stations in a market and will similarly forbid consolidation to fewer than six voices in the markets serving the vast majority of Americans. Democracy and civic discourse were not dead in America when there were only three to four stations in most markets in the 1960s and 1970s, and they will surely not be dead in this century when there are, at a minimum, four to six independent broadcasters in most markets, plus hundreds of cable channels and unlimited Internet voices.

Those opposing today's order have also emphasized that four companies air the programming that is chosen by approximately 75 percent of viewers during prime time. To me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other pipelines. Given these other viewing options, I can only presume that this means that Americans are watching these providers because they prefer their content, not because they lack alternatives. It would be anathema to the First Amendment to regulate media ownership in an effort to steer consumers toward other programming. By the same token, concerns about the degradation of broadcast content do not justify government manipulation of consumer choice. "Degradation" is just an elitist way of saying programming that one does not like. While I support adopting prophylactic regulations in the interest of ensuring that consumers have ample choice — as we have done today — I refuse to pour one ounce of cement to support a structure that dictates to the American people what they should watch, listen to, or think.

IV. New Initiatives

The defining characteristic of today's decision is balance. As I have said, we have undertaken affirmative steps to retain limits on ownership where they can be shown by actual evidence to promote competition, localism, and diversity. We have resisted merely hypothetical fears. In the process of reaching this balance, we have also taken some additional steps.

First, I was concerned that allowing an entity to own more than one television station in a market could decrease the amount of children's educational and informational programming available to families in those communities. I did not want to see the amount and diversity of such programming diminished if stations that are commonly owned in the same market simply re-run the same shows on each station. Accordingly, I

am pleased that we have clarified in this Order that commonly owned stations in a market must air distinct children's programming to comply with our rules.

Second, this Order also leads the Commission down a path of providing more opportunities for small businesses, many of which are minority- and woman-owned. The Order restricts transfers of most existing combinations that fall out of compliance with our new rules unless the purchaser is a small broadcaster. In doing so, we are creating new opportunities for participation in broadcasting without threatening diversity or competition in these markets.

Third, I also am pleased that, as part of this decision, we decided to issue a Further Notice of Proposed Rulemaking to explore opportunities to advance ownership by minorities and women in broadcasting. Furthermore, I commend the Chairman on his formation of a Federal Advisory Committee to assist the agency in creating new opportunities for minorities and women in the communications sector.

V. Conclusion

It goes without saying that *none* of us wants to see media ownership concentrated in the hands of a few. While reasonable minds can differ about which particular restrictions might best promote this goal — national ownership caps that vary by only five percentage points, a minimum of six versus eight owners of local television stations in a market, and so forth — we should recognize that these are in fact issues on which reasonable people may disagree. For me, given the rules we adopt today, the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers' homes, it is simply not possible to monopolize the flow of information in today's world. Indeed, the fall of Communism in the 1980's and of military dictatorships in the 1990's shows that diverse viewpoints cannot be suppressed even by authoritarian governments, much less by private media companies.

The net result of our Order is *balance*: We have preserved core values by maintaining safeguards to protect against undue concentration, we have altered rules as necessary to respond to the dramatic changes that have occurred in the marketplace since the adoption of our media ownership rules many years ago, and we have provided a rigorous justification with an exhaustive study of the record. Sometimes the facts have led us to strengthen former restrictions; sometimes they have led us to relax them in part. But in all cases our decisions were based on facts rather than fears. That is what Congress' statute requires, that is what the courts require, and that is what the First Amendment requires.