STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART, DISSENTING IN PART

Re: 2006 Quadrennial Review & 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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets Definitions of Radio Markets, Notice of Proposed Rule Making

We are required by law and by the Third Circuit Court of Appeals to launch this proceeding. It is entirely necessary that we do so. Congress requires a quadrennial review of all of our media ownership rules, and we must respond to the Third Circuit remand of our 2003 ownership decision. Appropriately, this broad inquiry responds to both requirements.

Unfortunately, the manner in which the Commission is launching this critical proceeding is totally inadequate. It is like submitting a high-school term paper for a Ph.D. thesis. This Commission failed in 2003, and if we don't change course, we will fail again.

The large media companies wanted, and today they get, a blank check to permit further media consolidation. The Notice is so open-ended that it will permit the majority of the Commission to allow giant media companies to get even bigger at the time, place and manner of their choosing. That is the reason I have refused to support launching this proceeding until now, and it is why I am dissenting from the bulk of this Notice. This Notice is thin gruel to those hoping for a meaty discussion of media ownership issues.

In particular, this item lacks commitment to three basic building blocks of a successful rulemaking on media ownership – an issue that affects the daily lives of every single American. First, the process does not commit to giving the public an opportunity to comment on specific proposals ***before*** any changes to the rules are finalized. Second, it does not commit to completing the localism proceeding and rulemaking ***before*** changing the ownership rules. Finally, it does not commit to making any final decision in a comprehensive manner. Given the history of this proceeding, these failings are astonishing.

Our ill-fated June, 2003, decision was rejected by Congress, the courts and the public. The United States Senate voted on a bipartisan basis to reject the bulk of Order and have us start from scratch. The court found that the Commission fell "short of its obligation to justify its decisions to retain, repeal, or modify its media ownership regulations with reasoned analysis."[1] Three million citizens, from right to left and virtually everyone in between, weighed in to oppose our decision. It is my sincere hope that we can avoid failing the test again, but doing better will require a commitment to openness and the democratic process that is largely absent from today's Notice.

It is all the more inexcusable in the wake of the unprecedented rejection of the Commission's 2003 decision that we launch such a shallow process today. The Third Circuit

[1] *Prometheus Radio Project v. FCC*, 373 F. 3d 373, 436 (3rd Cir. 2004), *cert. denied*, 73 U.S.L.W. (U.S. June 13, 2005).

gave us explicit suggestions on how to meet the challenge, which we ignore today at our own peril. In its opinion, the court specifically decided to remand, in part, to give the Commission "an opportunity to cure its questionable notice."[2] In clear and certain terms, the court said "it is advisable that any new "metric" for measuring diversity and competition in a market be made subject to public notice and comment ***before*** it is incorporated into a final rule."[3]

I believe success or failure of this proceeding will depend to a large extent on the Commission's willingness to listen to American people. Consequently, I am deeply troubled by the majority's refusal to provide assurance that the public will have an opportunity to comment on specific proposals before new rules are finalized. The Court, common sense and simple fairness all demand that we allow public comment on the specific rules that are likely to change the media landscape for generations to come.

If the Commission had released its proposals in 2003 for further public comment, as I advocated at that time, we could have avoided many of the problems that led to the Court's rejection of our rules. This time, we have no excuse. This time, we have been warned. We cannot slip rule changes through quietly, based on a vague notice, to avoid controversy. It is too late for that. Our process for deciding these rules should be open and transparent. The goal of this proceeding should be to do the job right – not "pull a fast one" on the American people.

Second, it would be unacceptable to finalize any decisions regarding media ownership until we ***complete*** our localism proceeding, which began in 2003 in direct response to the millions of Americans who expressed outrage at the Commission's relaxation of media ownership rules. Then-Chairman Michael Powell said the Commission "heard the voice of public concern about the media loud and clear. Localism is at the core of these concerns."[4] Unanimously, the Commission launched the localism proceeding because we had failed to use the structural media ownership rules to address the public's concerns.

Now, three years later, the localism proceeding has languished in the bowels of the Commission. We have failed to complete the field hearings we promised the American people. We have failed to complete important research studies on the extent to which there is sufficient coverage of local civic affairs, music and programming on radio and television. We have failed to produce final rules on any aspect of localism, including minimum public interest standards or license renewal processing guidelines. Simply put, we have failed to protect the interests of the American people.

Third, the rules are intended to work together, regulating the ownership of media assets in all urban, suburban and rural markets in the United States. On this point, I am profoundly disappointed that there is no commitment to handle any final rule changes in a comprehensive manner. It is especially discouraging that this Notice does not specifically seek comment on how all the media ownership rules work together, in tandem. . If the Commission decides to allow further consolidation in one field, such as newspaper/broadcast cross-ownership, we need to

[2] *Id.* at 411

[3] *Id.* at 412 (emphasis added).

[4] FCC Press Release, "FCC Chairman Powell Launches Localism in Broadcasting Initiative, August 20, 2003. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-238057A1.pdf

know at the same time how we might move on, for example, the duopoly rule. To split them, and operate in a vacuum, is to willfully ignore our responsibility to regulate the number of outlets a single owner can control in any given community. Moreover, the courts have asked us to ensure the consistency of our rules, and we cannot do so without a comprehensive final order. Any attempt to modify the rules individually may be good politics, but it would be poor public policy and a great disservice to the American people.

There are many other infirmities in this Notice. Given the circuit court's admonishment that there must be a "rational connection between the facts found and the choice made,"[5] there is an urgent need for the Commission to complete research papers and reports, which provide professional and objective information about current market conditions, trends and future expectations of the radio, television and newspaper sectors. The urgent need for this research is much more pronounced in light of the compelling public interest in promoting diversity and localism the media marketplace.

There are many key issues that deserve their own separate hearing, including the impact of media consolidation on minorities, children, the elderly, Americans with disabilities, and those who live in rural areas. We should also hold hearings on the potential effects of rule changes on indecency and family-friendly fare, religious broadcasting, independent programming, coverage of campaign and community events, music and the creative arts and the growth of the Internet, to name a few.

It was my hope that by issuing this Notice today the Commission would seriously endeavor to review the media ownership rules, in accordance with the statutory mandate to promote diversity, localism and competition. Instead, we seem to be repeating past mistakes. Regrettably, this Notice contains major flaws that could set the stage for another destructive rollback of consumer protection rules.

The task ahead requires transparency, leadership, bipartisanship, consensus building, thoughtful deliberation, and genuine participation by the American people. Fortunately, there is still time to get it right. I remain hopeful the Commission will change course and conduct a process that fulfills our legal responsibilities and reflects the best interests of the public. The American people deserve nothing less.

[5] *Prometheus*, 373 F. 3d at 390 (quoting *Burlington Truck Ones, Inc v. U.S.*, 371 U.S. 156, 168 (1962)).