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Washington, D.C. 20554

In the matter of:

**LOCAL BROADCAST OWNERSHIP.
AN EN BANC HEARING
February 12, 1999**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF DR. DEAN ALGER

Dr. Dean Alger
author, political scientist, public affairs & media consultant
5000 Bloomington Ave. So.
Minneapolis, MN 55417
(612) 824-3973

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TABLE OF CONTENTS

**I. Fundamental Perspective on the Role and Purpose(s)
of Free Over-the-Air Broadcasting.....Pg. 3**

**Public Opinion on Media: Another Matter for Basic
Perspective of the Broadcast System.....6**

An Absence of Public Interest Provisions in the Telecom Act.....9

**II. Comments on En Banc Questions and Related Local
Ownership Rules.....10**

Introductory Case, Key Issue & Part Answer to En Banc Question 2....10

Responses to Issues/Questions for En Banc hearing.....13

Final Matter for Perspective: Who Is Represented in Policy Process?...33

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**LOCAL BROADCAST OWNERSHIP:
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COMMENTS OF DR. DEAN ALGER

Please NOTE: reference citations are grouped together at the end.

(I beg forgiveness if the following seems a bit meandering in structure and in how the nine questions posed for the En Banc panel are tackled. But time and resources were short (I don't have the resources of CBS, Inc. or NAB), and the substance for considering various of the key questions is interrelated; also, there is too much compartmentalizing in FCC documents and some functionally related elements are not being properly considered.)

**I. FUNDAMENTAL PERSPECTIVE ON THE ROLE AND PURPOSE(S) OF FREE
OVER-THE-AIR BROADCASTING IN AMERICAN SOCIETY**

The First Amendment and the Media's Role I am encouraged that the Commission asks hearing participants to assess "the role and public purpose of the free over-the-air broadcasting system in our society," and the "significance of a locally licensed service and how localism will fare in the future," etc. Especially with the pressures on FCC from organizations with big financial stakes and with its need to specify rules and the bases of them in narrow legal fashion, I have been concerned that the Commission has at times failed to keep fundamental principles at the fore and "lost sight of the forest for the trees."

In Chapter 2 and in the final two chapters in my recent book, **MEGAMEDIA**¹, on the issue of the patterns of concentration of media ownership and the implications for competition and democracy, I sought to provide a solid foundation in judicial opinion and democratic and media theory and research for considering such fundamental principles for our broadcasting system. With limited space and time for testimony, I refer the Commission and others to that more extensive treatment.

Here, let me briefly note fundamental principles. With all due respect, I must take issue with Commissioner Furchtgott-Roth's reading of the First Amendment in his Statement in the matter of the 1998 Biennial Regulatory Review. He notes the "Congress shall make no law" phrase and declares that since it is "entirely in the negative... this provision is by its terms a limitation on -- not an expansion of -- governmental power." This reading of the surface of the First Amendment misses the ultimate point of that keystone of the Bill of Rights and of the democratic process.

The press provision is the only one that gives a category of private, economic organizations special privileges in the Constitution. But those special privileges are a *means* to an end. What is the end itself? The answer is: So the press can make a primary contribution to the democratic process. That is the ultimate *reason* for the centrality of the press provision; and correspondingly, it reposes *responsibilities* on the news media. That has been centrally recognized in the history of American law and principle; even the 1996 Telecommunications Act, which is otherwise derelict in recognizing genuinely public purposes (see below), refers to "the *public trust*" placed in electronic media, carrying forward the language from the original Communications Act of 1934. The Code of Ethics of the Society of Professional Journalists also strongly registers this:

"The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time" - which is "a public trust."²

Thus, the free press provision in the First Amendment was *not* placed there to be purely a negative element - or to, in effect, facilitate Megamedia corporations in building ever greater business empires. Rather, it included an underlying *affirmative responsibility* for the press to maximally serve the public's need for information and varying opinions which enable the democratic process to be fully realized. The noted New York Times reporter R.W. "Johnny" Apple said it well in a talk at Harvard:

It is my conviction that the Founding Fathers... had a reason for giving journalists special privileges in the Constitution. The reason was that we were supposed to find out what was going on, here and abroad, and report it, so that the public could understand and make an informed judgment. It was *not* put in the Constitution so that publishers could make billions of dollars or so that journalists could make lots of money.³

The affirmative responsibility for the news media is especially compelling in the case of broadcast stations that use the "public airwaves," particularly in the case of the prime mass medium of television, and given the "main source" reality of local TV as a news source; while about 40 million Americans attend to network TV news shows, about 80 million watch local TV news. It is the source of news with nearly universal access for Americans. TV is also a uniquely powerful medium of mass communication, as I have analyzed, drawing on social science theory and empirical research, in chapters 3 and 4 in my previous book The Media and Politics, 2nd ed. (Harcourt Brace College Publishing, 1996). It is also crucial to consistently keep in mind that the *main mass media effectively constitute the primary realm of the public arena in the American*

democracy. The control and performance of those media outlets are then, of profound concern for the future of this republic.

It is encouraging that the Commission has prominently cited the landmark language in Justice Black's Supreme Court decision in the Associated Press case: "The First Amendment rests on the assumption that the *widest possible dissemination* of information from *diverse and antagonistic sources* is *essential to the welfare of the public*." In using the word "antagonistic" he meant that information and opinion must come from *fundamentally different and opposing sources*, not just different individuals presenting the news, if we are to fully realize the "marketplace of ideas" that all major democratic theorists see as a foundation of the democratic process. Specific implications of this principle for the structure of local broadcasting ownership are discussed below in "Comments on Local TV Ownership Rules and Related Questions."

Prof. Owen Fiss, in his important book The Irony of Free Speech,⁴ has authoritatively discussed the Constitutional and conceptual bases of how the ultimate purpose of the First Amendment involves an *affirmative* role for public authority in fostering democratic communications from genuinely diverse sources, widely disseminated to the public. I leave the balance of that point to the distinguished Prof. Fiss.

Before addressing specific local TV broadcast ownership issues, I'd like to add a couple of additional elements of background and perspective. Please bear with me, I believe these additional perspectives need to be considered.

Public Opinion on Media: Another Matter for Basic Perspective on the Broadcast System (and Media in General) The Dean of the Columbia

University Law School, Benno Schmidt (who later became Yale's President), pointed out a few years ago that the First Amendment protections for free press and speech are not automatically operative. Rather, they "depend on the spirit of tolerance in our society and the extent to which society as a whole understands the role of the press." Then he went on to note: "Most important is the current social and political climate which is unfriendly to the press, viewing it as an uncaring, unresponsive big business."⁵

Indeed, the public's opinion of the media - news operations especially, but media in general, as well - has declined dramatically and has increasingly focused on the impact of control by media chains and conglomerates. Polling by the Pew Research Center found: "The public's assessment of press performance has grown increasingly negative in recent years. A majority (56%) now say news stories... are often inaccurate, up more than 20 percentage points since 1985."⁶

It is important to note that the mid-1980s are precisely what I have identified in the book MEGAMEDIA as the beginning of the Megamedia era. The conjunction in time is *not* coincidental. A July 1998 opinion poll for Newsweek found that 76% of the American people thought media corporations, in "the competition for ratings and profits," had "gone too far in the direction of entertainment and away from traditional reporting" in their news operations; and the same percentage specifically cited pressure for such fare from "media owners and news executives" as being worse than in earlier years.⁷ A major study that I co-directed out of Harvard's Shorenstein Center, using in-depth interviews and focus groups with citizens in four areas of the nation, found: "This theme, that the mass media pander to the audience, recurred... throughout the campaign. People

linked the media's taste for scandal and sensationalism to commercial motives that got in the way of useful information." This response was volunteered by our citizen subjects; we didn't ask about that, rather, our study was focused on the media in election campaigns.⁸

Richard Clurman, respected former senior editor at Time magazine and then news executive at Time, Inc., concluded a few years ago that for the public, "it was becoming harder and harder to think of the news media as different from any other business in free enterprise America."⁹ The public opinion data confirm that. Again, as Law School Dean Schmidt noted, the First Amendment cornerstone of our democratic process requires public support for it to work. But if the public support dissipates upon seeing more media concentration, Megamedia corporate obsession with profits, and little commitment to their First Amendment responsibilities, then at some point we are in a very dangerous situation for the American democracy. Unduly alarmist? Consider the findings of a 1996 Harris Poll conducted for the Center for Media and Public Affairs: 70% of the public "would allow courts to impose fines for 'inaccurate or biased reporting'," among other "drastic measures."¹⁰ As I have documented in detail in MEGAMEDIA, chain, media group, and conglomerate ownership of mass media has increasingly degraded the news process and product (see below for evidence on that) and is leading us in precisely that dangerous direction. I cannot understand how even more loosening of ownership limits, leading to even more concentration of media control, national corporate profit obsession, and loss of commitment to local community will lead to anything but a further major step in this dangerous deterioration in our democratic society and its bedrock principles and practice. Former editor of the Chicago Tribune, James

Squires, frankly noted the core problem: "Corporate America has been in the driver's seat as the press enters the new world of information. And it is this 'corporate takeover' of journalism... that has weakened the press as an institution of democracy and destroyed its brand-name credibility."¹¹

The famous financier George Soros - who experienced a closed state-socialist society growing up in Hungary - has put the basic point in broader perspective: "Although I have made a fortune in the financial markets, I now fear that the untrammled intensification of laissez-faire capitalism and the spread of market values into all areas of life is endangering our open and democratic society."¹² The dramatically increasing concentration of media ownership and the attendant lessening and degradation of the news and lessening of diverse "voices," as well as other media offerings, is the ultimate exemplification of that concern. The media are Constitutionally recognized to be in a critically unique category of economic activity. They cannot be treated the same as any other business area; there must extra caution used in structuring control of media businesses.

An Absence of Public Interest Provisions in the Telecom Act

Unfortunately, the Telecom Act itself illustrates the "untrammled intensification of laissez-faire capitalism" and spread of raw market values into the heart of public policy. For example, while businesses and the consumers are repeatedly referred to, revealingly, *the word "citizen" makes not a single appearance in the Act.* In fact, while numerous provisions clearly benefit big media and telephone corporations, there is precious little that directly speaks to the general public good (see Chapter 4 in MEGAMEDIA for further details); substituted for the latter is the near-religious belief that what Soros aptly calls "market fundamentalism"¹³ will

somehow result in public good as a fringe benefit - despite the record that I have documented in MEGAMEDIA. Regarding the process producing the Telecom Act, Senator McCain himself noted: "It was clear to me all along that it was the... special interests that were driving this train."¹⁴ (Sadly, his own market fundamentalism has blurred his vision regarding other realities here; and I lament his misconceived threats against FCC.) This Telecom Act action also illustrates another matter for basic perspective: the public's involvement - or effective lack thereof - in this policy process. A note on that is added at the end of these comments.

II. COMMENTS ON EN BANC QUESTIONS & RELATED LOCAL OWNERSHIP RULES

Introductory Case, Key Issue & Part Answer to En Banc Question #2

In the dockets under consideration here, the core of the questions relates to whether a further loosening of ownership restrictions, with the consequent further increase in ownership concentration nationally and locally, will have a beneficial or a deleterious impact on economic competition and on genuine diversity of sources of news and sorts of opinion. Not only the predictable comments of the NAB, but various suggestions in Commission documents suggest increased ownership concentration, from allowing "duopolies," etc., will result in increased efficiencies and that owners of multiple broadcast properties are somehow more likely to be able and inclined to provide more public service through their TV stations.

For introduction, it is important to register a stunning piece of empirical evidence regarding broadcasters' discharge of their responsibilities. While watching the Telecom bill during its consideration

in Congress, I didn't seem to hear much of it in the news media, especially on TV news shows - precisely where it should have been most prominently covered. So, for MEGAMEDIA, I searched the Vanderbilt TV News Archive for all stories in the three major network news shows on the Telecom bill. That and other research yielded shocking results.

From the May 1995 primary congressional introduction of the Telecom Act through its passage in early February 1996 - nine months - the total coverage all three major networks gave to the Act amounted to only nineteen and a half minutes of material primarily on the Act. The 11-14 million viewers of GE-controlled NBC News received a total of three minutes, fifty seconds on the Telecom Act over those nine months. And those totals actually exaggerate the coverage, as a sizable amount of that minimal coverage was about the side issue of the V-chip and/or the Internet "decency" concerns. Almost nothing was heard from the network news shows on the proposed easing of ownership restrictions and their implications. This was abject failure of First Amendment responsibilities - with bias for their parent corporations' financial special interests. And remember, those three network corporations also own at least 35 local TV stations, mostly in large markets; such an orientation was likely to be carried out through those local stations.

But the tale gets worse. My own viewing in Minnesota and North Dakota, along with research by political scientists Snider and Page, led to the conclusion that local TV news shows were at least as derelict in reporting on this important policy issue, which involved their financial interest. But even more appallingly, while this absence of reporting was going on, the National Association of Broadcasters and many local stations - especially group owners, as far as I can tell - sponsored and aired

millions of dollars worth of what they called "Public Service Announcements" which misleadingly characterized proposals to auction the digital spectrum as a "TV tax," etc. These PSAs were actually just self-serving propaganda. And, while those propaganda pieces were airing and while they were *not* covering provisions in the Telecom Act, the *stations allowed no alternative perspectives to be aired*. This was an ultimate betrayal of the First Amendment and of the stations' public trust. And now they, especially the group and conglomerate owners, want to be given control over even greater swaths of these main mass media - which are also main realms of the public arena. Still further Yale political scientist Martin Gilens looked at news coverage of the Telecom bill and found that *newspapers from corporations with substantial TV station ownership* were decidedly *less likely* than those without such TV ownership to mention that the Telecom Act would mean each media corporation could own more TV stations and would likely lead to more concentrated media ownership. Thus, we see again that group and conglomerate ownership, notably including cross-media ownership, led to a loss of adequate coverage of that momentous bill and did so in a way that benefited the group owner.¹⁵

Political scientist E.E. Schattschneider pointed out that a key to understanding the nature of the governing process was to look at the *"scope of conflict"* on an issue.¹⁶ That is, if the involvement of people and groups is limited to well-connected insiders with special interests, then the range of policy options is likely to be narrow - and to serve the special interests; whereas, if the scope of conflict is broad, with the public well informed and involved, then the range of options and the whole dynamic of policy-making is quite different. Relatedly, other researchers have

noted that *defining the issues* is often half the battle in the policy process. In the case of the Telecom bill, the group and conglomerate media corporations controlling that main media source of public information, TV news, and even various newspaper companies with TV stations, kept the scope of conflict narrow by refusing to adequately cover the bill and its implications. And the TV owners used the power of their medium to define the issue on dispensation of the digital spectrum by using the biased PSAs and refusing to give alternative perspectives air time. This should serve as a strong cautionary note on the notion that increased chain and conglomerate ownership would be likely to lead to better public affairs material for the public and on the need to more strongly and clearly hold such media groups accountable in general.

Responses to Issues/Questions for Panelists at the En Banc Hearing

On Question 1 (Further Thoughts) Earlier I suggested some fundamental principles and logic related to question 1 on the role and purpose of the free over-the-air broadcasting system, the significance of locally licensed service and how localism will fare in the future, etc. Some more specific comments follow.

First and foremost, considering the purposes of the broadcast system, along with how to evaluate any genuine "substitutes" provided by cable TV and other TV outlets, democratic theory and judicial opinion make clear that the most important element of the prime mass media communications system in the American democracy, TV, is provision of ample news and public affairs coverage and an ample exchange of ideas and opinions of a truly diverse nature. And for local TV - and radio - local and state news and opinion are the central and most important concern.

On Question 3 - & Notes Related to Questions 4, 5, 6, 7 & 8

Question 3 asks about the status of competition and diversity in local mass media, how the emergence of cable and new video outlets affect competition with local broadcast TV and radio, etc. There are a number of points of evidence and logic that need to be considered here.

a. In assessing whether cable TV, DBS and other means of delivery constitute a genuinely broadened competitive environment, as noted, the first question to ask is whether they supply full coverage of news and public affairs and opinion on them, especially on state and local public affairs. This should include broadcast of key public affairs events like major candidates' debates and presidential and gubernatorial state of the union/state messages. Media contributions to the marketplace of ideas for democracy is the Commission's most profoundly important responsibility.

Now, consider the case in the major metro area of the Twin Cities. First, I simply looked at last week's Star Trib "TV Week" listings for Monday evening. On each of the four long-time VHF stations (local ABC, CBS, and NBC stations), there was the 6:00 news and midwest-schedule late news at 10:00; and former independent channel 9, now a UPN-affiliate, has an hour-long news show at 9:00, as well as a half hour at ten. But I looked across the hours for ch. 23 (affiliated with Time Warner's WB network): no news show; I looked at ch. 29 (Fox): no news show; I looked at ch. 41 (Paxson): no news show - and the latter is *owned* by big group owner Paxson, but such ownership has not resulted in regular news. This illustrates how, in reality, UHF, which gets its best exposure via cable, acts like the typical cable channel, shouldering no responsibility for contributing to the democratic process - even when it is owned by a group

owner. What I *do* see in the 10:00 late news slot on the WB affiliate is an hour of the *Jerry Springer sleaze-a-thon* (an exploitation of people of lower demographics). In this case, no news is *bad* news - for the media's responsibilities to the American democracy. And on cable, as a rule, there simply is no independent, digging local and state news show at all. The good news is that various areas have one or two government and public affairs cable channels that, some or much of the time, air state and local legislative sessions, forums, etc. - although they tend to be out in the hinterlands of cable on channel 47 or the like, and few people even know of their existence. Those are nice additions, but they are not substitutes for or competitors of genuine local news operations. Cable TV is NOT a substitute for broadcast TV and should not be counted as a set of full competitive "voices."

It is important to note that FCC, in its Notices of Rule Making when addressing the competition in local markets and the notion of "total independent voices" and the like, frequently muddles together channels that provide various entertainment options with channels/outlets that provide genuine, full scale local news and public affairs. This is frequently enough muddled together that I sometimes wonder if the Commission fully understands the functions of full news operations and coverage of public affairs events. This is also why the great majority of radio stations cannot be considered a full additional source or voice, as most stations carry little meaningful news and public affairs material. In fact, the typical radio station "news break" is not only inadequate; in previous assessments and college courses I have characterized such news breaks as worse than nothing at times (especially when they just repeat in headline fashion the propaganda line from a presidential or gubernatorial

administration or other official that was intended for a lead - but that is very inaccurate). A very few radio shows in major markets, including public radio, do provide a significant additional source of news and views, but they are few. And a thorough study by political scientists Davis and Owen documents how the much discussed talk radio may give various people a feeling of having a place to vent their spleen, but is mostly governed by intensely commercial and entertainment criteria and fails badly at being consistent contributors to meaningful democratic information and dialogue.

Regarding the broadcasting of major candidates' debates and other crucial elements of the governing process and the democratic need for the public to be exposed to such events, UHF stations and 90% of cable and satellite channels are, in reality, working overtime to *entice people away* from such key forums of democracy by airing sensationalist entertainment fare. As Henry Geller has noted, "cable TV is a First Amendment horror story."¹⁷ Now, in Minnesota this last election, *all* the VHF stations aired candidate debates; and on one notable occasion, three of the four, along with public TV, simulcasted/"roadblocked" a gubernatorial debate. This bit of high responsibility is increasingly rare even on traditional main VHF stations (I'm proud that the Minnesota Compact election reform I worked in helped organize that noble effort). But no such responsibility was or is evident on UHF stations or on over 90% of cable stations. Correspondingly, how can the Commission consider cable stations in the "total independent voices" calculus, especially for the core concern of *local* electronic media outputs?!

More basically, given the record of group and conglomerate megamedia corporations in news and public affairs information and

opinion, ownership of multiple media outlets means, at a minimum, that Justice Black's fundamental and oppositional diversity has a strong tendency to be attenuated; inevitably, in many cases it will be severely lessened. This is especially the case when there are a few enormous "Megamedia" conglomerates that control numerous media properties in most or all the main mass media - as is documented in MEGAMEDIA. Thus, when General Electric's CEO John Welch pokes his finger in the chest of an NBC News President and says "You work for GE!," and also says NBC and its TV news operation is "no different from toasters, light bulbs or jet engines," then as Larry Grossman says, such an industrial-media conglomerate (with its 12 local TV stations in large markets) "will do whatever is necessary to achieve high profitability, with little regard for journalistic standards, integrity, or taste."¹⁸ With a rare few exceptions (apparently like A.H. Belo), this is increasingly the orientation of media groups and conglomerates, from Gannett, with its 90+ newspapers, 21 TV stations and so on, to the Tribune Co., with its 20 TV stations, newspapers, etc. (Group owners' state of mind is also starkly evident in demands on profit margins, and in how, with certain past actions and the current environment, local TV station owners increasingly treat their "broadcast properties" like "commodity trading." It is also evident in the loss of a sense of stewardship for the stations' responsibilities to this democratic society. All of this is detailed in "b" below.)

The examples just noted from GE-NBC, Gannett and so on suggest another point that needs to be dealt with, even though the Commission has preemptorily dismissed it: national concentration issues and impacts cannot be separated from local media concentration and performance issues. This is the case both in terms of specific concentration and

diversity of voices and offerings in and for local areas, and in terms of overall dominance of communication in the prime public arena of the main mass media. In specific concentration terms, consider the case of Chicago. CBS, Inc., after gobbling up the Infinity Broadcasting and American Radio System chains, controls no fewer than 8 AM and FM stations and it owns one of the prime VHF TV stations in Chicago - and has proudly held its waiver of the radio-TV cross-media ownership rule for something like 2 years now. But add to that the fact that the Tribune Co. owns another of the prime VHF TV stations, along with WGN radio, largest in the Chicago area, and the dominant newspaper in the region; and Chancellor-Capstar owns 6 radio stations. Thus, just three Megamedia corporations control all of the following: 2 prime VHF TV stations, 15 radio stations (with the majority of ad revenue), and the dominant newspaper in that third-ranked media market and metro area of over 6 million people. Any sensible analysis has to conclude that this is very bad news for economic competition and genuine diversity of sources in our democracy.

The extensive cross-media ownership, along with other properties of media conglomerates, presents further problems for fair, level-playing-field economic competition and diverse offerings and "voices." A couple of examples will help clarify the point. The Disney-ABC media conglomerate gained control over three radio stations in the Los Angeles media market. Two of those stations had previously been competing talk show format stations. But under the Disney-ABC corporate umbrella those two stations now "complement" each other. Thus, local radio competition and a diversity of both voices and functions was lost or lessened under group ownership of multiple stations in the same market. Another example

comes from my home area of Minneapolis-St. Paul. In the Twin Cities by September 1997, the Chancellor-Capstar two section media group owned seven radio stations with about 30% of total listenership - and fully 37% of 18-34 year olds; and Disney-ABC controlled five stations. These aggregations resulted in multiple station format shifts throughout 1997, confusing and dis-serving many in the area. Especially notable was the loss of what had been a genuinely alternative voice in the media mix: "Rev 105" radio; it was replaced by a standard rock station, which the conglomerate felt would make them more money. Further, a station that I and many of my friends and colleagues relied on as a leading music station and entertainment option, "smooth jazz 104," suddenly disappeared; here one day, gone the next without a word to the community - another victim of conglomerate use of broadcast properties like a Monopoly game. By the way, one other thing happened at about the time Rev 105 was lost: national chain owner of supposedly alternative weekly newspapers, Stern Publishing, bought out both of the fine alternative weekly newspapers in the Twin Cities, the Twin Cities Reader and City Pages, and then promptly closed down the Reader. Still another alternative voice was lost.

There are two further troubling dimensions to the impact of big chain and conglomerate control of media, especially with extensive cross-media ownership. The Commission notes that promotion and protection of real competition is a key goal of the FCC. I appreciate the effort Commission staff made in section III of the Further Notice of Proposed Rule Making to systematically detail a framework for competition analysis. But I have concerns that some factors are not adequately taken into account therein, in significant part due to excessive narrowness in

considering market forces, including a narrow focus on local market areas.

With the "Megamedia" conglomerates of today come massive holdings in network TV, local TV stations, cable channels, Internet sites, movie and TV production, newspapers, magazines, book publishers, recording companies, etc., as well as theme parks and huge franchise merchandise chains in the case of Disney-ABC; or much of the same, along with huge cable distribution systems, pro sports teams, etc. in the case of Time Warner-Turner. First, these multiple cross-media properties afford an extraordinary capacity for cross-promotion and cross-subsidization. (Media moguls like to call this "synergy," but there is little evidence of the new creative production that was the chief rationale for synergy; mostly it has been used to overwhelm economic competition.) For example, an ABC radio executive said: "What synergy has done for us, particularly here in Los Angeles, with the fact that there's KABC-TV, Disneyland, Los Angeles magazine, the Disney movies, and three radio stations, is, it's a great opportunity to cross-promote each vehicle and help each other."¹⁷ It tilts the playing field for smallish L.A. area companies to compete with the enormous financial and personnel resources of Disney-ABC and such extensive cross-promotion and -subsidiization. Further, in the cable TV realm, with largest MSOs TCI and Time Warner also owning or having sizable stakes in many cable channels and production companies, a number of insidious "exclusive programming deals" have been engaged in, as noted in the National Journal.¹⁸ And other preferential treatment actions have come to light such as Time Warner keeping "Space Jam" "in the family." In general, with Disney-ABC, Time Warner-Turner, News Corp.-Fox, and Viacom controlling such a large swath of movie and TV production houses, there is a constant potential for independent or

smaller TV stations, radio stations or cable operators to be severely disadvantaged in obtaining programming. And as Los Angeles attorney Rita Haeusler has noted: "The vertical integration of all these media companies is leaving creators' without negotiating power"²¹ - which certainly has implications for the diversity of creative sources in our culture. Indeed, the level of cross-subsidization appears to be extensive enough that the antitrust concept of "predatory cross-subsidization" is operative for these media and industrial-media conglomerates, at least at various times, and in great potential. And given their orientations and intense empire-building, as documented in MEGAMEDIA, it would seem naive to think they will not make ample and probably increasing use of those capacities - in the absence of close antitrust monitoring and other regulation.

Now, let's step back and think about the basic concept of competition in the marketplace. As law professor Michael Meyerson has noted, drawing on the introduction to the Act, the major changes in the Act were "based on the premise that technological changes will permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers being made available to the American consumer."²² What has actually happened is a tremendously increased concentration of ownership, with far fewer genuinely independent options and fewer companies "going head-to-head." But further and crucially, consider the essence of how the capitalist marketplace is supposed to work, which is the prime rationale for the idea that such a market is most effective and efficient. The idea is that in a given particular market, a number of companies compete on the basis of price and quality of the product or service comprising that particular market; that is how the "market mechanism" sends a specific signal to the

competing companies - and those that might want to get in. But media chain and especially industrial-media conglomerates can shift resources from other media operations or even from a totally different industrial area (think of GE or Viacom) and thus can affect the particular market in artificial ways, ways that do not relate to price and quality of the specific product or service; the conglomerates can even lower prices to drive out of business a smaller competitor (although that, if clear & obvious, is an egregious form of restraint of trade and could bring one of those rare antitrust cases).

Further, with chain and conglomerate owners like CBS and Chancellor-Capstar controlling as much as eight radio stations in a market, many of them the largest ones, they have each captured 25-35% of the radio ad revenue in the market. Such big groups, using their array of stations (with formats selected for maximum appeal for advertising revenue, not viewpoint diversity), can offer advertisers package deals that overwhelm the competition. In a case like CBS, where they control most of the largest stations in New York, Chicago and elsewhere, they could even threaten a shut out of advertisers in prime radio territory; certainly with such sheer market power, they have some artificial control over prices. As CBS's Mel Karmazian told Barron's magazine: "It used to be that [stations] competed, that media buyers would play [them] off against each other. Now we have the [CBS stations'] ad sales managers talk to each other every morning. That adds up to higher prices and better [profit] margins." ²³ That also adds up to evidence that Megamedia distort level playing-field competition. In summary, media groups and especially conglomerates severely tip the "level playing-field" of market economics.

(The good news is that this radio advertising conglomerate crunch was getting so egregious that the Department of Justice began looking into it.)

It seems to me that invigorated antitrust efforts are badly needed. It is important to note that the Celler-Kefauver Act of 1950, augmenting the key Section 7 of the Clayton Antitrust Act, indicated the need to make efforts to "arrest a trend toward concentration in its incipience."²⁴ The mass media are clearly the most critically important area to deal with in concentration concerns, and equally clearly, the situation is now well beyond incipient! Thus, as the more full exposition in MEGAMEDIA documents, there is a great need to have more serious efforts at antitrust enforcement and better coordination between the Justice Department's Antitrust Division, FTC, and FCC in the critical area of mass media. Because general antitrust laws are handled by Justice and FTC, but mass media raise unique concerns and have unique elements, and because the instrument of antitrust enforcement, especially as hesitatingly practiced at present, is a blunt one, FCC's expertise and efforts beyond antitrust are needed. Thus, the answer to En Banc Question #5, "Are the antitrust laws by themselves sufficient to protect broadcast diversity and competition themselves?," is: no.

More generally, with the enormous number of media holdings across most or all prime media, the few Dominant Dozen megamedia corporations have the capacity to dominate, or at least significantly influence, the public arena of American democracy and its public agenda. This is exactly what was done to a stunning degree regarding the crucial issue of the Telecom Act, as noted. In general, as one reporter observed at the time of a certain mega-merger: "Time Warner's move to remain no.1 in the face of Disney's expansion also means it will be hard for American households to

avoid one of the industry's giants when they seek news or entertainment."²⁵

In the 1930s, President Roosevelt denounced the "economic royalists" of concentrated economic power and expressed concern that they were using their vast power to undermine American democracy. But today, it is not just industrial and banking giants; conglomerate giants now control the central nervous system and public arena of our American democracy: the media. This is far more dangerous. In the first third of the century, the public arena of media was quite diverse and 80% of the principal media of the time, newspapers and magazines, were *independently* owned (although the radio networks were already showing the concentration problem by the 1930s). Correspondingly, there was a vigorous national debate about the concentration of business ownership and its consequences. But today, chains and conglomerates overwhelmingly dominate media and the public arena. As their actions in the case of the Telecom bill demonstrate, there is much less likelihood that America will have such a wide, vigorous national debate about such matters today. In my judgment, this is the single greatest danger to the American democracy for today and the new millenium.

The realm of entertainment offerings also demonstrates what the media moguls are increasingly doing with their media properties. Opinion polling shows increasing public disgust with the excesses of violence and increasingly raw sex on TV, cable TV being an especially great offender. The public's feelings are justified: Content analyses of TV shows have increasingly shown, in the words of a 1996 study, that "psychologically harmful violence is pervasive on broadcast and cable TV programs;" indeed, "the average child will witness 8,000 made-for-TV murders before finishing elementary school."²⁶ This is the fare, along with

the cheapening of the news, that the Megamedia era has increasingly brought us.

As NAB claims and FCC speculates, common ownership of TV stations might enable some lesser stations to have more resources to buy "better" quality or a bit more variety of entertainment programming in some cases. But as I read through Broadcasting & Cable magazine's recent special report on the "Top 25 Television Groups" and their program "shopping lists and syndication strategies,"²⁷ I find it hard to generate much enthusiasm for the augmentation of media contributions to our civilization when these media group execs talk almost exclusively about filling various day parts with standard talk shows like "Sally Jesse Raphael," game shows like "Wheel of Fortune" or "Let's Make a Deal," recycled older or newer network sit-coms and sit-drams like "Touched By an Angel" or "Eight is Enough." How does such fare meaningfully enhance competition and substantive diversity?!

Dr. Alger's favorite entertainment and cultural area, music, is one where the addition of cable TV *has* significantly enhanced programmatic offerings, with MTV, VH-1 and occasional material on other channels. The same goes for sports. But those, especially the latter, *will* easily be taken care of in standard marketplace fashion. For the core of First Amendment responsibilities, news and public affairs information and opinion, I see little evidence common ownership will provide fundamentally opposing sources and orientations; in fact, the evidence is considerable that orientations and practices of media groups tend to lead to a worsening of the public affairs offerings. The following adds to that evidence.

b. In considering further easing ownership restrictions to allow duopolies, more radio-TV cross-ownership, etc., FCC, as well as NAB and

the big broadcasting groups repeatedly refer to increased efficiencies resulting from economies of scale which supposedly can result in more and better news and "could permit the production of new, diverse, and locally produced programming."

There are, however, three factors that cast doubt on those notions. First is a fact/pattern that is startlingly absent from any of the FCC documents ("Further Notice...", "Second Further Notice..." etc.). It is odd to hear so much about strengthening the weakened economic status of broadcast stations by allowing media groups to increase broadcast station ownership, especially TV stations, when the record shows profit margins for most TV stations, especially VHF ones, at a level that would make executives of the average industrial company in America drool uncontrollably. Thus, for TV stations in any of the medium or larger markets, the profit margins are anywhere from 20% up to 55%; and it is group, chain and conglomerate ownership that, from distant corporate headquarters, puts the greatest pressure to produce the highest profit margins. A Gannett executive recently testified that their profit margins were around 35%; Capital Cities squeezed no less than 55% from their stations, and newer owner Disney has done its best to keep up those basic levels. A specific example from my home area illustrates the point. In later 1995 or early 1996, Westinghouse-CBS (now just "CBS") bought Twin Cities CBS affiliate, WCCO. Through the 1960s, 1970s and much of the 1980s, WCCO had one of the two or three best local TV news operations in the nation. From internal testimony, I know that while WCCO earned a 27% profit margin in 1996, under control by CBS, Inc., the national executives are now demanding 40% profit margins. Now where is the extra profit margin going to come from? The primary local station

programming is news and public affairs; clearly they would be squeezed further (as WCCO's leading correspondent has noted) and that money sent back to headquarters to improve the national corporate bottom line and impress Wall Street so the stock will fly high. (The Wall Street obsession in these increasingly publicly traded media corporations, is the other indirect deleterious element in the intensified degradation of the news and public affairs offerings in broadcast stations, as I have documented in MEGAMEDIA in chapters 5 and 6.) But the primary public trust responsibility suffers. Gannett, for further example, has a long record of squeezing its media properties for high profits - and reducing the capacities of its news operations to do their First Amendment jobs. This casts doubt on the notion that still more group/chain ownership will result in better programming, especially in public affairs.

Indeed, in the book I have drawn on a number^{of} studies from scholars, watchdog groups and even journalists themselves, and the trend in the nature of news offerings is increasingly dismal. On network news shows and so-called "news magazine" shows, and on local TV news shows, sensationalism, scandal, crime and mayhem, celebrity-chasing, and the like are the steadily increasing fare, under group and conglomerate ownership especially. For example, the Rocky Mountain Media Watch analyzed one hundred local TV stations around America on the same evening. They found an average story length of only 47 seconds, and, combining crime, disasters, and like stories into an aptly entitled "mayhem index," they found that for 33 of the stations, news shows were over half mayhem, and the average for medium and large-market news shows (most of which are group owned) was 46%.²⁸ (See chapter 6 for the full data.) And on network news shows, General Electric-controlled NBC

News was the worst of the three in the declining coverage of foreign affairs - at a time when it is more crucial than ever for Americans to better understand the rest of the world. In summary, the Megamedia moguls are building huge empires and making themselves very rich, while they are impoverishing the dialogue of democracy.

If there is a specific case where a TV station, presumably in a small market, is truly failing and where a group owner can save it and add a real news operation that did not exist before, then I might agree that a rare waiver could be justified. But given all that is noted here and in the book, I would strongly support the Media Access Project's insistence that a clear condition of granting the waiver is a requirement that the broadcaster "make specific, enforceable promises as to the public interest program benefits that will redound from" the waiver - and periodic reports must document that such substantial net gain in genuine public service programming has, in fact, been provided. Such programming could *not* include the obscenely bogus claims a number of broadcasters made in the aftermath of passage of the Childrens' Television Act...!

A second factor that casts further doubt on the notion that additional group ownership would benefit local broadcasting's service to the community is as follows. Looking at the history of American media, we see a number of notable media owners who had a strong sense of *stewardship* for "their" network, TV station, newspaper or magazine, from Bill Paley of CBS to David Sarnof of NBC to the Sultzbengers and Grahams of the New York Times and the Washington Post. Group ownership in TV, as in newspapers and other media, however, typically means the loss of a strong sense of stewardship for the station's substantive performance, especially on news and public affairs, and an increasing loss of a primary

orientation to and understanding of the local community, in the case of local media. For Paley and CBS its news division was "the jewel in the crown" and was central to the self-image of the company. When Lawrence Tisch grabbed control of CBS, news was just another division to cut to maximize his profits. The same was the case when General Electric gained control of NBC. As Leonard Goldensohn said, upon ending his time as head of the ABC network with its sale to Capital Cities: "I fear that one of the most insidious byproducts of the current merger mania may be the loss of a sense of stewardship.... Our business is more than a business. It is a public trust."²⁹

Public policy should be doing all possible to encourage such stewardship; but, reflecting also on En Banc panel Question 4 on the FCC's role and goals in regulating broadcast ownership, currently, policy encourages the treatment of prime media as mere commodities. Indeed, as Martin Pompadur of Television Station Partners acknowledged: "It's commodity trading to us. We don't know the community. We're short term players"³⁰. And that raises a point about past FCC rules - or rather the abandonment of them. In a revealing action that was a direct precursor to the Telecom Act, in the 1980s, the Commission cancelled the requirement that an owner who buys a broadcast station must hold it for at least three years before reselling. As Patricia Auderheide has detailed:

Three years after the dropping of the... trafficking rule... half the broadcast stations in the country had been sold, many of them repeatedly, and for escalating, even dazzling prices. In the purchasing fury, groups and chains were favored over smaller purchasers.

Thus, regarding En Banc panel Question #6 on the impact of consolidation on small business, the answer is that it has indeed had a negative such impact. And Aufderheide went on to point out:

A new generation of station managers came to the fore, whose eyes were focused not merely on the bottom line but on the next sale. Group and chain broadcast holdings fueled a syndication market that both mass produced and tailored for individual markets headline news services, providing the simulacrum of local news and public affairs programming...³¹

But a *headline service simulating* genuine, community-based, digging local news is not what the First Amendment is about or what the FCC should be working to facilitate. Thus, regarding En Banc Question # 7 on whether FCC's local ownership rules promote or undermine First Amendment values, the answer is: they undermine those values.

And that abandonment of the trafficking rule was in profound contradiction with the rationale underlying the routine granting of license renewal and the refusal to consider seriously any comparative license challenges. That is, the *expectation* of and essentially automatic renewal was instituted to encourage sustained ownership that would really invest in the station and be involved in the community, including ascertaining what needs the community had. Instead, the abandonment of the three year holding rule, and the even greater encouragement of group buyouts included in the Telecom Act, has led to group owners simply treating these public trusts as commodity trading items, with little regard for public service to the respective communities. In light of the skyrocketing prices of broadcast stations, a direct result of the general Megamedia trend and the Telecom Act's opening of the buyout floodgates, the likely result of allowing duopolies is that there will be more group ownership with less community and public service commitment. For example, two stations in Portland and Bangor, Maine, sold for \$112 million

in 1997 - and they were bought by Gannett from the local Maine Radio and Television Co.

Further regarding En Banc panel Question 6: Those resultant skyrocketing prices and Megamedia machinations also mean, as several analysts and magazine pieces have recently pointed out, that minorities have a much tougher time getting into the game. Indeed, especially with the resultant Megamedia buying frenzy after passage of the Telecom Act, minority ownership of broadcast stations has declined, becoming even more "few and far between," as Broadcasting & Cable put it in October.³² And regarding small business in general, listen to the chairman of sizable but not quite Megamedia-magnitude Renaissance Communications - in the aftermath of the Telecom Act: "I'm a buyer who can't buy. Every time I try to buy, a bigger gorilla gets in the way." Then in July 1997, Renaissance itself was bought out by Megamedia corporation, The Tribune Co.³³ Further, as Broadcasting & Cable points out: "With large competitors controlling as many as eight stations in a market, minority owners say they are losing a greater share of ad revenue and popular syndicated programming as well."³⁴

Further and related to the issue of group buying of an additional station if the duopoly rule is eased, note that there is an increasing tendency for network affiliates to bump their network's programs because they feel they can make more money from showing syndicated shows during which they can sell most or all of the ad spots. Clearly, on average this tendency will be greater with group owners than with individual owners since the groups can offer better bids for more enticing syndicated shows. At first glance that might seem like a step in the direction of more diverse programming. But further thought shows that

the substitute programming will generally be, as detailed above, standard, often recycled entertainment fare; and the most frequent shows preempted have significant public affairs or cultural material. This then, is actually a loss of important material in our media mix

The third factor that casts doubt on the claimed additional public service and meaningfully better programming from easing the duopoly, cross-media and other rules, is the huge debt levels incurred from buyouts by group owners. As Ken Auletta has reported: "Run by bottom-line managers, and often burdened by the debt incurred to meet the steep purchase price, stations were constantly trying to better last year's numbers.³⁶ And, the debt problem has gotten worse as broadcast stations have dramatically risen in cost/market value.³⁶

One other note on the impact of group ownership: There is increasing evidence that radio group ownership is having an impact on local community broadcasting that is the opposite of what the Commission has long said is in the public interest, namely local programming that serves the particular community. Group owners are increasingly substituting national and syndicated programming for genuinely local material, CBS's radio empire and Karmazian's part-owned Westwood One national radio syndication/distribution operation being a prime example.³⁷

All that further suggests an answer to En Banc question #7, "do the FCC's local television ownership rules promote or undermine First Amendment values? With the abandonment of public affairs programming log-keeping, ascertainment rules, and the like, along with the great increase in ownership concentration and the impacts of those

developments discussed above, the answer is: the current law and rules undermine First Amendment values.

An additional note on the notion of cable TV constituting competition for broadcast stations: FCC documents refer repeatedly to the sizable total cable coverage of about two-thirds of the public. But besides the unreasonable programmatic comparisons for core First Amendment concerns, this simple count is inaccurate. 67% of the public does get *basic* cable, but a smaller percentage gets extended basic, and a much smaller percentage gets premium channels. Broadcasting & Cable's spring '98 listing documents a wide range of "pay-to-basic" ratios in the top 25 cable MSOs, with many in the 40-70% range of basic cable subscription.

In summary, maybe is it time to step back and ask ourselves, for a civilized society, what can and should these powerful and pervasive means of mass communication be used for, and how can we facilitate more meaningful and constructive use of them? Is our society about more than just business empire-building and crass money-making?

A Final Matter for Perspective: Who is Represented in the Policy Process?

An esteemed colleague, Prof. Darrell West of Brown University along with co-author Prof. Burdett Loomis of the University of Kansas, recently published an important book entitled The Sound of Money: How Political Interests Get What They Want.³⁸ Their excellent scholarship demonstrates how increasingly skewed is the policy process, in Congress and elsewhere, by the huge resources of corporations, trade associations and other special interest groups, and how the gap between them and the general public in the ability to exert influence in governmental processes has widened

further with use of various contemporary means of communication, computing and other technology.

In the Commission's Further Notice of Proposed Rulemaking on regulations governing television broadcasting, etc. and in its Second Further Notice on that docket, we see evidence of precisely this pattern - and a very unfortunate and undemocratic pattern of conclusions. That is, looking through the List of Commenting Parties one sees they are nearly all business or trade organizations that have a big financial stake in these rules; but other elements in our society, including the general citizenry, are only in rare evidence. Correspondingly, it is severely inaccurate and very misleading for the Commission to repeatedly say "most commenters thought..." or "commenters were generally saying...." Those summations seem to suggest this was the majority of opinion in general; but nothing could be further from the truth. The list of commenters - especially in light of what professors West and Loomis report - actually demonstrates how severely skewed is the pattern of voices heard by the Commission. In simple terms, this is overwhelmingly an insider, special interests' game - and they and their financial interests overwhelm the policy process, while the public's interests are lost. I am appreciative of the opportunity to have my voice heard. I'm also thankful that such organizations as the Consumers' Union, the Media Access Project and a couple of others have striven to add a more general public interest voice, one not carrying special financial stakes; but they are the rare exception.

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Alger - FCC on Danc Testimony

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