STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

In the Matter of 1998 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

In Section 202(h) of the Telecommunications Act of 1996, Congress directed the Commission to evaluate its ownership rules every two years. In this first review, we developed a comprehensive record and undertook a careful review of these vitally important rules, as required by Congress.

This Biennial Review Report balances the public interest in diversity of ownership with the demands of a changing marketplace and the broadcast industries' need to realize economic efficiencies and remain competitive. We reviewed our rules to determine whether competition, not simply an increase in programming options available to viewers, render our current rules unnecessary. I write separately to emphasize that the proposed modifications to the dual network and newspaper/broadcast cross-ownership rules, and the technical changes to our radio market definition policies are appropriately careful, deliberate, and forward looking.

I. Competition, Diversity, and Changes in the Media Marketplace

In the course of our review, we recognized three critical facts. *First*, the majority of Americans still get most of their news and public affairs information from broadcast stations. Our structural ownership restrictions, therefore, seek to promote critical First Amendment principles because in a participatory democracy, it is vitally important that we encourage the widest possible dissemination of this information from diverse and antagonistic sources.[1]

Second, the media marketplace has become increasingly dynamic, with an expanding number of information outlets and media platforms. However, although new technologies like the Internet and satellite delivery may be fundamentally changing the communications landscape, they do not yet command the time and attention of most consumers. The average American still spends *seven hours per day* watching television, but only *eight hours a month* on-line. In addition, even as programming

[1] *See Associated Press v. United States* 326 U.S. 1, 10 (1945)(noting that 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").

choices expand, owners of media outlets continue to dwindle. For example, after Congress relaxed the radio ownership limits in 1996, the number of independent owners in commercial radio markets decreased from 5,133 in March 1996, to 4,004 in March 2000.[2] In 85 of the 270 Arbitron radio markets, two entities already control more than 80 percent of radio advertising revenue; in 143 markets, two entities control more than 70 percent of such revenue.[3]

Third, over the last 18 months, the FCC has provided significant regulatory relief to the broadcast industry and the industry is in the process of responding to this new regulatory environment. Although the marketplace is still in flux, we do know that the regulatory changes have allowed broadcasters in large markets to respond to competitive dynamics, without sacrificing our long-cherished diversity and competition principles. The changes we propose today provide similar advantages.

Commenters who oppose retention of our ownership rules emphasize the substantial growth in media outlets and programming choices relative to twenty years ago, but essentially ignore the countertrend toward ownership consolidation in the broadcast and cable industries. This asymmetry is problematic for two reasons. First, more choice does not necessarily yield more competition in viewpoint. Indeed, economic theory teaches that a monopolist may offer viewers more programming variety than a more competitively structured market.[4] However, such an industry structure yields only one point of view. Therefore, our assessment of the nature and extent of competition in broadcast markets necessarily must go beyond mere observations of the expanded programming and format choices available to consumers.

Second, this approach ignores the common sense, real-world predicate that undergirds our concern about viewpoint diversity: that who is in control matters. Simply multiplying the number of "pipes" into the home (i.e., moving from a 3-network world to a 500-channel world) does little to promote independent viewpoints if all the pipes are controlled by a very few. Instead, it may provide consumers with the proverbial

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[2] BIA Master Access Database, adjusted to include completed (not pending) mergers and attributing ownership of LMAs to owners entering into the LMA rather than to the station licensee.

[3] *Id.*

[4] The modern economics literature on program choice carefully examines the special circumstances where *fewer* broadcasters *may* broaden the variety of programming. For example, a monopoly television station that is totally advertiser-supported will tend to avoid duplicated programs and may provide a wider range of program types compared to a market with multiple, competing stations. For a survey, see Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge, Mass.: Harvard University Press, 1992), Chapters 3 and 4.

"Hobson's choice" in terms of independent viewpoints.[5]

I am not convinced by the record in this proceeding that a single individual or corporation who serves as the only conduit for news and public affairs information in a community would have sufficient incentive to act against its self-interest in maximizing profits and maintaining a favorable corporate image and provide the same level of independent viewpoints as would competitively and independently-run outlets. Our ownership rules significantly increase the likelihood that consumers will receive independent viewpoints on issues of public importance.

II. Proposed Changes to Broadcast Ownership Rules

I support the careful, but forward looking rule changes we propose in this Report.[6] First, the dual network rule continues to promote viewpoint diversity and should not be eliminated as it applies to the four major networks. I am persuaded that there may be powerful arguments for modifying the rule to allow common ownership of an emerging and established network. For that reason, I support a Notice that examines the diversity costs and efficiency benefits of such a rule change.

Similarly, the newspaper/broadcast cross-ownership rule well serves our public interest goals. However, there may be certain circumstances in which, given the specifics of the market and of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain even if a newspaper and broadcast station were commonly owned. For example, a combination between a single radio station in a large market and a small, suburban newspaper might raise fewer concerns than other potential combinations.

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[5] The notion that program diversity and viewpoint diversity are essentially the same would turn 50 years of policymaking on its head. For example, more than twenty years ago, the Supreme Court upheld the Commission's prohibition of cross-ownership on the basis that one could not expect viewpoint diversity from commonly-owned entities to mirror that from antagonistically run entities. *FCC v. National Citizens Committee for Broadcasting* 436 U.S. 775, 797 (1978).

[6] I also support our decision to retain the national television ownership rule and the cable/television cross-ownership rule. Contrary to the suggestion of the dissenting Commissioners, there is nothing procedurally inappropriate in making revisions, substantive or non-substantive, to the biennial review report after adoption in order to further elucidate the rationale for the decision to retain the national ownership rule. Such revisions are permissible when all non-dissenting Commissioners concur in the revisions. **Here, all the Commissioners who supported the relevant sections agreed to the post-adoption edits.** Post-adoption edits are not uncommon. Furthermore, the Commission made the determination required by Section 202(h) of the Telecom Act by the statutory deadline, and the post-adoption edits did not alter that determination.

I also fully support the decision to commence a proceeding to examine the way we define a radio "market" and the way we count the number of stations in a market for the purpose of our local ownership rules. In Section 202(b)(1) of the Telecommunications Act of 1996, Congress directed the Commission to expand the limit on how many stations a party could own in a market. Congress specified a sliding scale of numerical limits depending on the size of the market that, for example, would allow a party to own *up to* 8 commercial radio stations in a market with 45 stations, *up to* 7 stations in a market with 30-44 stations, and so on.[7] None of these standards contemplate (or approach) a duopoly or monopoly in local markets, and I am unwilling to ascribe such an intent to Congress.

Some parties have argued that the Commission has no remaining authority to consider these issues. However, when Congress raised the ceilings on local radio ownership, it did not eliminate the requirement that the Commission find that license transfers and assignments serve the public interest, convenience and necessity, pursuant to Section 310(d) of the Communications Act. Absent such action, our statutory responsibility is to continue to ascertain that such transactions comply with the public interest prior to granting license transfers or assignments.

In addition, Congress did not directly address the market definition aspects of the Commission's rules in the 1996 Act. Although the Commission has used one method of defining markets and counting the number of stations in a market since 1992, the potential of this methodology to produce unanticipated and anti-competitive results in particular cases did not become apparent until the methodology was used in conjunction with the increased ownership limits adopted pursuant to the 1996 Act.

We should not shy away from beginning a proceeding to resolve these important and controversial questions, on the record, after opportunity for public comment. The public interest would not be served by anything less.

[7] Pub. L. No. 104-104, 110 Stat. 56 (1996). *See* Order, In the Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996, 11 FCC Rcd 12368, 12370 (1996).

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: 1998 Biennial Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

I write separately regarding the Commission's review of the newspaper/broadcast cross-ownership rule[1] to explain why I support commencing a rulemaking proceeding to modify but not eliminate that rule. I also write separately regarding the Commission's decision to commence a rulemaking to revise the methodology for calculating both the total number of radio stations in a market and the number of stations owned by a party, to underscore that any modifications must be applied prospectively only.

Newspaper/Broadcast Cross-ownership Rule

The question presented to the Commission in this biennial review is whether any rule is "necessary in the public interest as the result of competition" and, if not, whether the Commission "shall repeal or modify" that rule.[2] The rule was crafted in 1975 to achieve the noble goal of ensuring that local markets enjoy not just competition for advertising dollars but also diversity of viewpoints – a diversity that can come only from a healthy number of independently-owned outlets. In its decision adopting the rule, the Commission sought to promote "the widest possible dissemination of information from diverse and antagonistic sources,"[3] which the Supreme Court had found "is essential to the welfare of the public."[4] The Commission's rules, therefore, were designed to ensure that the public had access to a critical threshold of local viewpoint diversity. The Commission recognized that, at that time, broadcast services – especially television -- and newspapers were the dominant sources of local news and information.[5]

There have been sweeping changes in the media marketplace since the rule was adopted in 1975. Back then, there were only three commercial broadcast networks; today, there are six or seven. In 1975, many UHF stations were just initiating broadcast service and they were limited in number; today, the number of UHF television stations has nearly tripled. In the early 1970s, FM radio was a relatively new service; today, there

[1] 47 C.F.R. § 73.3555(d) (the "rule").

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996).

[3] *Multiple Ownership of Standard, FM and Television Broadcast Stations, Second Report and Order*, 50 F.C.C.2d 1046, 1048 (1975), *aff'd sub nom. FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[4] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

[5] *See, e.g., Second Report and Order*, 50 F.C.C.2d at 1065.

are approximately 6,000 FM radio stations in operation. When the rule was adopted, the big boom in cable television franchising had not yet begun; today, cable television passes more than 97% of households, of which approximately two-thirds subscribe. At the time the Commission adopted the rule, DBS had not yet been launched; today, DBS is ubiquitously available, with more than 10 million subscribers. The rule was adopted decades before the Internet would become available for public use; today, the Internet is rapidly capturing the American imagination and consumer's free time. Given such profound changes, it is not only timely, but essential for the Commission to revisit the newspaper/broadcast cross-ownership rule to ensure that it reflects contemporary marketplace realities, preserving local viewpoint diversity while still tailoring the rule to be restrictive only where necessary.

Ironically, the rule's underlying purpose of preserving diversity and competition in local markets may be undermined in some situations by the rule's current structure. For example, radio stations that do not have their own local news organizations are prohibited from being co-owned with daily newspapers, thus reducing the potential number of news outlets in a given community. Similarly, independent UHF television stations might provide more local news and information, if they could realize efficiencies from co-ownership with a local newspaper. Struggling daily newspapers might stand a better chance of contributing to public discourse and the dissemination of local news and information if they were allowed to combine with local broadcast licensees, thereby maintaining viewpoint diversity. At the very least, the Commission should consider changes to the rule that would address these potentially counter-productive effects.

At the same time, the rule has performed a necessary function in maintaining a critical threshold of local viewpoint diversity. The Commission has recognized that broadcast services, particularly television, and newspapers still are the dominant sources of local news and information in any given market.[6] Particularly in small markets with a single daily newspaper and less than a handful of broadcast stations, the combination of newspaper and broadcast assets might well severely and significantly reduce viewpoint diversity. And keep in mind that most cable and DBS services do not independently provide local news and information so vital to an informed public. Thus, they may not yet be adequate substitutes for broadcast stations or newspapers. Therefore, the rule has served and, in my opinion, continues to serve an important function in maintaining local viewpoint diversity and competition.

I do not believe that the rapidly changing media landscape, on the one hand, and the preservation of viewpoint diversity, on the other, present a binary choice between eliminating the rule or maintaining the status quo. Rather, I believe that the Commission

[6] *Further Notice of Proposed Rule Making in Television Ownership*, 10 FCC Rcd. 3524, 3555-57 (1995).

should carefully and methodically consider modifying the rule to make it more relevant to contemporary circumstances. For example, commenters ask whether the same rule apply to a top-ten market like New York City or Chicago, with dozens of independent media voices, and to a small city with only one daily newspaper and a few TV stations. Should radio licensees face the same newspaper cross-ownership restrictions as television licensees, or are these two media sufficiently distinguishable to apply the newspaper broadcast cross-ownership ban differently to each? Should the rule, in its current or modified form, be consistently applied to all merging combinations of newspapers and broadcast stations under a similar timeframe? Some commenters suggested that the rule could apply to varying degrees depending on market size by, for example, counting newspapers as a "voice" and allowing newspaper and broadcast cross-ownership where a certain number of independent voices remained in a market.[7]

While the record reflects a continued need to restrict newspaper/broadcast cross-ownership in some fashion, I believe that the questions concerning the possible modifications to the rule deserve a full airing and spirited debate. I have not made up my mind regarding the merits of any of these proposals; my only conclusion at this point is that an absolute ban is not necessary to achieve the purpose of the rule. It is time for the Commission to engage in a robust debate on the most appropriate ways to modify the rule to best serve the public in this information age.

Radio Market Definition

I have long supported revising our rules to correct our convoluted definition of radio markets and look forward to reviewing comments filed in the rulemaking proceeding we will initiate shortly. I believe, however, that any changes the Commission might make should be prospective only and should not undermine the legitimate investment expectations of parties who hold combinations lawfully assembled under our current rules. Whatever definition we adopt should also remain consistent with the intent of Congress under the Telecommunications Act of 1996 in relaxing the radio ownership restrictions.

[7] *See, e.g.*, Elyria/Lorain Comments at 19-20; Freedom of Expression Comments at 25-26; Gannett Comments at 38; West Virginia Radio Comments at 21-22; Newspaper Association of America, Emergency Petition, August 23, 1999.

DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH

In the Matter of 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act

I respectfully dissent from the Commission's decision to retain the national television ownership and cable/television cross-ownership rules and from its refusal to even consider repeal of the newspaper/broadcast cross-ownership rule.[1] For the reasons that follow, I believe that the Commission's rationale for refusing to repeal or modify these rules is fatally flawed. In my view, these rules simply should be repealed.[2]

I. The Commission's Rationale For Refusing To Repeal Or Modify The Regulations Is Fatally Flawed

The Commission claims that it should not take any action on the national television ownership and crossownership rules chiefly because it needs to assess the effects of last year's relaxation of local broadcast ownership rules. *See Biennial Review Report ("Report")* at para. 4, 25-26, 93, 109. This rationale for refusing to deregulate suffers from fatal flaws. As discussed below, this reasoning fails to respond to the actual question posed by the statute; is weak as a factual and logical matter; and constitutes, at least with respect to nationally applicable rules, an unexplained departure from past policy assessments of such rules.

A. The Commission Fails To Apply The Statutory Test For Repeal or Modification

The main problem with the Commission's argument – that it needs to study the effects of last August's limited local deregulation -- is that it is utterly nonresponsive to

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[1] Specifically, I do not believe, for the reasons persuasively given by Commissioner Powell, that the Commission has carried its burden of showing that competition has not eroded the very foundation of the newspaper/broadcast rule. I thus cannot sign on to the Commission's "general conclusion that the rule should be retained." *Report* at para. 95.

[2] I agree, however, that the experimental license limit should be eliminated. I also concur in the decision to cut back on the reach of the dual network rule, but I would have gone further and asked whether the rule remains necessary at all. Finally, I concur in the rulemaking on the radio rules for the limited purpose of rationalizing our arguably arbitrary and capricious methodology of counting radio stations of section 202(h); my purpose is not, as the Report unfortunately suggests, to cut back by rulemaking on the concentration levels that Congress expressly set.

the statute. Under section 202(h), the Commission's job is to explain why changes in competition have not rendered broadcast ownership rules superfluous in promoting the public interest. *See* 47 U.S.C. section 202(h) (Commission "shall determine whether any of [its broadcast ownership] rules are necessary in the public interest as the result of competition"). This Report does not fulfill that obligation.

As I explained in the Notice of Inquiry, a helpful analytical approach for answering the statutory question posed by section 202(h) would be to consider:

> (i) the original purpose of the particular rule in question; (ii) the means by which the rule was meant to further that purpose; (iii) the state of competition in the relevant market at the time the rule was promulgated; (iv) the current state of competition as compared to that which existed at the time of the rule's adoption; (v) and, finally, how any changes in competitive market conditions between the time the rule was promulgated and the present might obviate, remedy, or otherwise eliminate the concerns that originally motivated the adoption of the rule.

Separate Statement of Commissioner Harold W. Furchtgott-Roth, *Notice of Inquiry, 1998 Biennial Regulatory Review*, 13 FCC Rcd 11,276 (1998).

In its analysis of whether to repeal or modify the national cap or crossownership rules, however, the Commission *never* analyzes the continued utility of the rules "as the result of competition," as the statute requires. Instead of considering the effect of competition on the need for the rules, the Commission myopically discusses the effect of regulatory action on the rules – namely, the impact of its 1999 local broadcast rulemaking. *See Report* at paras. 25-29 (concluding that national television ownership rule should be retained because effects of local changes should be observed and last increase in cap resulted in acquisitions that need to be studied as well); paras. 95-102 (concluding that cable/television crossownership rule should be retained because it furthers policies of competition and diversity and prevents discrimination against competitors).

This discussion fails to broach -- much less answer in a persuasive way -- the question asked by the statute. Section 202(h) says nothing about basing decisions regarding deregulation on past regulatory action. Rather, it requires us to consider changes in the market landscape in deciding whether to keep the rules. That the Commission simply has not done. And the analysis that it does provide gets the statute exactly backwards; the question is not "what are the effects of the rule on competition?", *see, e.g., id.* at para. 94, but "what are the effects of competition on the continued need for the rule?." This latter question is never asked or answered in the discussion of the

decision to retain any of these rules.

Finally, and for the record, I feel compelled to note that the Report that the Commission actually voted to adopt on May 26, 2000, did not include any findings of facts on the state of competition in the services relevant to the national cap. *Cf.* Report at para. 28 & nn. 80-82. Thus, not only did the Commission fail to ask and answer the statutory question, it did not discuss competition *at all*. The Report likewise did not include the (x-ray thin) "public interest" analysis of the lifting of the cap. *See id.* at para. 30. It gave only its "wait and see" reason in connection with local deregulation and Congress' 1996 increase in the cap. These are not just ministerial or non-substantive changes. Rather, this material provides an entirely new rationale and makes new findings of fact to support the decision to keep the cap.

This language was added more than two weeks after the Commission formally voted to adopt the Report and publicly announced its action.[3] Not coincidentally, these revisions immediately followed one prominent broadcasting company's public announcement of its intent to appeal the national cap decision.[4] Putting aside the related issue whether a majority of the Commission can agree to make these sorts of changes before an adopted document is officially released, I question here which Report it is that the Commission actually voted to adopt.

For we cast only one set of votes, and it was on the first Report, which we then publicly announced as adopted. There was no withdrawal of those votes or a revote on the materially revised version. If the first document represents the officially adopted

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[3] *See* www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0028.htm (describing Report as "[a]ction by the Commission, May 26, 2000"). Although the press release certainly does not represent a formal decision of the Commission, it does faithfully summarize the relevant content of the Report that was before the Commissioners at the time we cast our votes:

> The Commission determined to retain the 35% aggregate national television audience reach of a television group. It said the effects of recent FCC changes to the local television "duopoly" rule should be observed and assessed before making any alteration to the national limit. It also said the trend, since the cap was increased to 35% in 1996, of many group owners acquiring large numbers of stations nationwide needs further observation before making any changes in the cap.

Id. at para. 10. This reasoning is based solely on the "wait and see" argument. Our press office, of course, had no way of knowing that the voted and adopted document from which it was working would change so substantially as to render its release inaccurate.

[4] *See* 20 Comm. Daily 105 (May 31, 2000), 2000 WL 4695422 ("Fox TV immediately said it will challenge national ownership cap in federal court. . . . Fox said it will appeal as soon as FCC issues final decision.").

Report of the Commission, then the original analysis, absent the findings of facts on competition and explication of the public interest, controls. And if the second, materially retooled document is the official one, then the Report issued today violates the statutory deadline[5] and thus may well be invalid for that procedural reason alone.[6] In the end, however, the Commission cannot have it both ways: it must either claim the benefit (such as it is) of the new rationale and findings of fact, or it must confess error in transgressing the statutory deadline.

For the foregoing reasons, I do not think the Commission adequately justifies the decision to retain the rules in their present form. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts in arbitrary and capricious fashion if it "has relied in factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem"). The to-ing and fro-ing on why to keep the cap and post-adoption backfilling of the Report well illustrate the capricious, results-oriented nature of the Commission's decisionmaking.

B. The Commission's Rationale For Retaining The Ownership Rules Is Weak

Apart from failing to address the inquiry required by the statute, the Commission's "wait and see" reasoning suffers from several factual and logical infirmities.

First, although the Commission and most commentators generally anticipated a flood of applications under the newly revised local broadcast rules, the fact is that the Mass Media Bureau has received very few such applications. Specifically, since the rules went into effect, broadcast interests have filed a total of 101 television station assignment or transfer applications. Of those 100 applications, however, only 42 were duopoly requests and 19 of those requests involved the purchase of television stations already programmed by the buyer pursuant to local marketing or time brokerage agreements. Thus, the Commission has received just 23 applications to create new television duopolies – even assuming that every application is granted, this is hardly the sort of seismic change in the broadcast landscape that requires extensive study. As for radio and television cross-ownership requests, broadcasters have filed about 30 of those; this is likewise not a surge towards consolidation.[7] Simply put, the reality is that there is

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[5] Section 5003, Pub. L. 106-113 Stat. 1501 (1999).

[6] *See* 5 U.S.C. section 706 (under the Administrative Procedure Act, "a reviewing court shall. . . hold unlawful and set aside agency action, findings or conclusions found to be . . . without observance of procedure required by law").

[7] This filing phenomenon (or the lack of one) is probably explained by the fact that the changes in the ownership rules were actually quite marginal and, in any event, the market had already ordered itself

very little of an "effect" to be assessed here, which deprives the Commission's rationale of much persuasive force.

Second, even if the amount of filings under the newly loosened rules had been numerous, I fail to see why we could not have satisfactorily reviewed their impact in this Report. Far from being unavailable, the information necessary to evaluate consolidation ensuing from the new rules is uniquely in the Commission's possession. We need only have pulled the filings described above in order to find facts about that consolidation. Surely we have had enough time to perform such an assessment: this Report is being issued well into the second year since the release of the Notice of Inquiry.

Third, if one accepts the assertion that the Commission lacks sufficient information to assess the effect of the new local rules, that rationale applies with equal force to the other ownership rules included in the Report. Today the Commission decides to change some of those other rules, for example, the dual network rule or the experimental license rule. But the Commission never explains why it lacks sufficient information on the effect of the 1999 changes in order to modify the national cap and cross-ownership rules but why it has enough such information to go forward with these others. This flat inconsistency suggests, to me at least, that the argument from "lack of information" is pretextual.

Finally, even assuming that I am wrong about all of the foregoing, there remains the question of the relevance of changes in *local* rules to *national* rules such as the broadcast cap. As the Commission itself has often recognized, local information is not pertinent to a discussion of nationally applicable rules. *See, e.g., Amendment of Multiple Ownership Rules*, 100 FCC 2d 17, 37 (1984) (noting irrelevance of national rules to diversity in local markets). If this is so, as Commission precedent has it, then I fail to see how local deregulation rationally could bear on our decisions with respect to national deregulation.

The Commission's reason for maintaining the subject rules boils down to this: it feels that it has deregulated enough for the time being and simply does not want to go any further. This rationale is wholly unsatisfying to those regulated entities whose rulemaking happened to come second in time. They possess a statutory right to regulatory review and, if warranted by the effect of competition on regulation, deregulatory action. To say that other, tangentially-related deregulation occurred first, and therefore they can not have any regulatory relief, is a sorely inadequate response.

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fairly efficiently under the Commission's previously liberal waiver process.

C. *The Commission Departs Without Explanation From Prior Findings Regarding The Necessity of National Ownership Limits and The State of Competition In The Broadcast Industry*

The Commission's refusal to modify the national broadcast ownership cap in even in the smallest way contradicts its prior conclusions about the utility of national ownership limits. Specifically, in an Order repealing the former "Seven Stations rule," the Commission found that "as a policy matter, the total elimination of presumptive national ownership rule[s] would benefit the public interest." *Amendment of the Commission's Rules Relating to Multiple Ownership*, 100 FCC 2d 74 at para. 50 (1984).

The Commission based this conclusion on the fact that, while competition and diversity are traditional broadcast policy goals, national ownership rules are "irrelevant" to viewpoint diversity and "unnecessary" to prevent competitive harm. *Amendment of the Commission's Rules Relating to Multiple Ownership*, 100 FCC 2d 17 at paras. 63, 73. The "more correct focus for addressing viewpoint diversity and economic competition concerns is the number and variety of information and advertising in local markets." *Id.* at para. 10. In addition, multiple ownership of broadcast stations can "foster news gathering, editorializing and public affairs programming, and the development of independent programming by regional or national *ad hoc* networks." *Id.* at para. 82.

Moreover, in the Order deregulating local broadcast markets, the Commission expressly recognized the dramatic shifts in the competitive position of the industry as a general matter. *See Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12,903 at para. 1 (1999) ("The new rules we adopt today reflect a recognition of the growth in the number of and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership."). But here the Commission refuses even to engage in that analysis. Having found enough evidence of increased competition and market changes in the industry to warrant deregulation of local broadcast markets, the Commission will be hard pressed to explain why those findings do not carry over to the national context. This differing approach is especially hard to justify when, as the Commission has found, diversity and competition concerns are foremost in the local, not the national, context.

These flat inconsistencies with respect to the Commission's assessment of nationally applicable broadcast ownership rules and the competitive nature of the broadcast industry leave us open to legitimate charges of arbitrary decisionmaking. *See generally Sangre de Cristo Communications, Inc., v. FCC*, 139 F.3d 953, 958 (D.C.Cir. 1998) (agency cannot inexplicably act inconsistently with prior decisions). Although the Commission has a duty to explain this disparate treatment, *cf. Radio and Television News*

Directors Association v. FCC, 184 F.3d 872, 886 (1999) (where there is "agency precedent for declining to use the FCC's power to redress a[n] [alleged] market failure in provision of [broadcast services]. . . the agency must offer clear, cogent explanations for treating the two cases differently"), it has not even attempted to do so.

II. The Rules Impose Heavy Burdens On Speech In Potential Contravention of the First Amendment

There is a final reason to be wary of these rules: they impose a direct and substantial burden on speech and thus run the risk of violating the First Amendment.

To be sure, the Supreme Court in the past has affirmed the constitutionality of some of these rules. *See, e.g, FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)(rejecting First Amendment challenge to newspaper/broadcast crossownership rule). At the same time, however, the Court has observed that balancing First Amendment interests in the broadcast context is not a static enterprise: "[B]ecause the [] industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys., Inc. v. Democratic National Comm'n*, 412 U.S. 94, 102 (1972).

I believe that the ownership limits now have become constitutionally "outmoded," as the Court itself suggested might happen. If rules restricting ownership of broadcast stations were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications industry. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) (ownership rules justified by "a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination"); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (justifying "less rigorous standard of First Amendment scrutiny" on basis of "spectrum scarcity").

The facts underlying this justification are simply no longer true, however, as the Commission has repeatedly recognized. *See* 1985 Fairness Report, 102 FCC 2d 145, 198-221 (1985); *Syracuse Peace Council*, 2 FCC Rcd 5043, 5053 (1985). Today, broadcasters face such a fierce array of competitors – from cable operators, cable overbuilders, cable networks, internet service providers, wireless video systems, and direct satellite systems – that their previously supposed ability to influence the content and control the flow of information is greatly diffused. *See* Joint Statement of Commissioners Powell and Furchtgott-Roth, *In re Personal Attack and Political Editorial Rules,* FCC Gen. Docket No. 83-484, at 5 and n. 15 (citing statistics on boom in communications outlets). Moreover, the number of broadcasters alone has grown

exponentially since the time the rule was adopted.[8] In sum, over time, as alternative means of communication and even other broadcasters have proliferated in the marketplace, the burdens imposed on broadcasters by these restrictions have increased dramatically relative to the benefits that they produce.

For these reasons, I think that the lenient standard of review for regulation of broadcast speech formally announced in *Red Lion* rests today on a shaky empirical foundation. As I noted in the Notice of Inquiry, such an assertion is not only an appropriate one for this Commission to make, but in fact has been affirmatively invited by the Supreme Court:

> [T]he Supreme Court has clearly indicated that it might revisit its constitutional jurisprudence in this area if the FCC "signal[ed] . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters*, 468 U.S. 364, 377 n.11 (1984); *see also Telecommunications Research and Action Center*, 801 F.2d at 509 n.5 (explaining that, in *League of Women Voters*, "the [Supreme] Court . . . suggested that the advent of cable and satellite technologies may soon render the scarcity doctrine obsolete."). [And] [t]he D.C. Circuit recently ventured to say that the Court's "suggestion" in *League of Women Voters* "may impose an implicit obligation on the Commission to review the spectrum scarcity rationale." *Tribune Co. v. FCC*, 133 F.3d 61, 68 (1998).

Separate Statement of Commissioner Harold W. Furchtgott-Roth, *Notice of Inquiry, 1998 Biennial Regulatory Review*, 13 FCC Rcd 11,276 (1998) (footnote omitted); *see also RTNDA v. FCC*, 184 F.3d at 887 n. 19 (noting that Supreme Court in *Red Lion* "recognized that changed circumstances might be salient in future cases" and that "since *Red Lion*" the Court has "increasingly focused on the editorial discretion of broadcasters indicating that while the *Red Lion* framework may still be good law, its application . . . may require updating").

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[8] The total number of broadcasters increased by more than 50% between 1975 and 1990, and independent broadcast stations increased by more than 400%. *See Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996, 4011(1991); *see also* Michael L. Katz, *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition*, at 34 (Sept. 1999) (attachment to comments of Fox) (in 1946 there were only six authorized television stations, and today there are over 1,200 such stations). During that period, the number of over-the-air broadcast stations available to the median household increased from six to ten stations. *See* FCC Working Paper, 6 FCC Rcd at 4011; *see also Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1090 (1998); Katz Paper at 39 ("In 1979, only 33 markets had seven or more television stations. Today, 114 markets – more than half of all television markets – have seven or more television stations.").

While I personally have come to the conclusion that technology has advanced to the point where revision of broadcast regulation is now warranted, if not overdue, I note that the Commission itself has *already* come to this conclusion. Specifically, the Commission has found that "[t]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press." *Syracuse Peace Council*, 2 FCC Rcd. 5043 at para. 65. In my view, the administrative basis for challenging this constitutional framework has been well laid, and the issue is ripe for review.

* * *

In this first biennial review of broadcast ownership regulations, many of which are over fifty years old, this Commission can ultimately find only one, obscure rule to be repealed. To my mind, however, it is simply untenable to assert, in the face of the record before us on competitive change since the adoption of ownership regulations, that retention of the vast majority is warranted. This Report, which regrettably turns section 202(h) on its head by asking how the rules promote diversity and competition instead of asking how the forces of competition itself produce those results and thus obviate the need for the rules, disserves the concept of regulatory reform embodied in section 202(h). This is not an effort at meaningful reform, but agency retrenchment in the face of a deregulatory provision. I therefore concur only in part and dissent in part.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL K. POWELL

Re: 1998 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.

The majority of the rules we review today are old. The National Ownership Cap rule was first adopted in 1941. The Newspaper/Broadcast[1] and Cable/Television Cross-Ownership[2] rules were adopted in the 1970s. Though some of these rules have been modified slightly over the years, their predicates have remained the same, namely, that networks and stations enjoy tremendous market power that can lead to anticompetitive effects. Moreover, the goals of our structural rules also remain largely unchanged: (1) to guard against ill-effects in advertising and programming markets, (2) to promote diversity in programming, and (3) to promote locally-originated content.

Time does not stand still, however, and the highly concentrated video entertainment, news and information markets of the past, with their attendant limited programming offerings, have changed dramatically. Congress' recognition of this dramatically changed and changing landscape stands behind the Biennial Review process where we are charged to "determine whether any of such rules are necessary in the public interest as a result of competition."[3] My dissatisfaction with the present review is its stubborn refusal to fully consider the competitive landscape today and validate that these structural rules still serve their stated purposes—particularly in light of significant evidence that the rules are unnecessary to protect competition (and may even be causing competitive harm) and that diversity and localism are prospering as a consequence of new venues and greater capacity available to consumers. For these reasons, I concur in part and dissent

[1] Amendments of §§ 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, *Second Report and Order in Docket 18110*, 50 FCC 2d 1046 (1975), *recon.*, 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[2] Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, Docket No. 18397, *Second Report and Order*, 23 FCC 2d 816 (1970), *recon.*, 39 FCC 2d 377 (1973).

[3] Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56 (1996).

in part from this *Order*.

I. GENERAL CRITIQUE OF STRUCTURAL BROADCAST REGULATIONS

Before turning to my critique of particular rules, I first will sketch the breadth of change that should compel a more fulsome review of the rules than is represented by this Biennial Review. Second, I will generally outline the government's stated interest in these rules and challenge some of their underpinnings in light of the dramatically altered video landscape.

The Video Marketplace: Take the Mask off the Old Lone Ranger

"Return with us now to those thrilling days of yesteryear."[4] A time when there were three television networks that dominated the land (NBC, CBS and ABC). A time when there were only six television stations. A time before cable television, before direct broadcast satellite (DBS), before VCRs, before the Internet. It was a time of highly concentrated video markets in which only one medium—television—reigned. It was a time of nascent video advertising markets, and of very limited program sources. In this era, there were few around to curtail the power of these rustlers. There was only one Lone Ranger to discipline the dominance of the "Network Gang of Three." But "who was that masked man?" "A fiery horse with the speed of light, a cloud of dust and a hearty 'Hi-Yo Silver.'" The FCC!

Today, over fifty years after *The Lone Ranger* television show filled the bubbled screens of our black and white sets, the Lone Ranger rides again in an episode entitled *The 1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules.* So much has changed since the days that Tootsie Roll, "America's favorite candy," and General Mills brought to Americans the Ranger and his companion Tonto. Yet, the nostalgic FCC Ranger cannot bring itself to take full cognizance of this change and face whether it is time to retire the mask and let other forces do the job. Instead, we continue to sprint ahead kicking these rules forward, while being chased by a growing multitude (of new media, of economic change, of logic).

By any measure, the market, and thus the foundation of the FCC's structural ownership rules, has changed dramatically in ways that should lessen the dangers we

[4] This is the opening line of the television series *The Lone Ranger* which ran from 1949 to 1950, 1954-56. *See* <http://www.geocities.com/TelevisionCity/7286>.

purport to address that are associated with market dominance. The actor Clayton Moore starred in *The Lone Ranger* television series from 1949 to 1956. Mr. Moore passed away just last year, and in his name I couch my argument for a more thorough examination. Simply put, there is *MORE*, more of everything:

> *MORE Broadcast Networks*: In the 1940s and 1950s there were only three networks (NBC, CBS and ABC). Today, those three are joined by Fox, WB, UPN, and PAX to yield seven networks competing for programming and advertising dollars.
>
> *MORE Broadcast Stations*: Most households live in a television market served by eleven or more local stations. In 1946 there were only six stations nationwide.[5] Today there are over 1,600.[6]
>
> *MORE Video Outlets*: Today approximately 81 percent of all Americans subscribe to either cable, DBS, or another multi-channel service provider, rather than receive their signal free and over the air.[7] That is, the invention and ubiquitous deployment of cable and DBS services have given advertisers, programmers and Americans substantial alternatives to broadcast. These systems offer viewers a plethora of options unimagined when many of the rules reviewed in the *Order* were adopted. The average cable subscriber has 54 channels available to him.[8]

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[5] *See* Warren Publishing, Inc., Television & Cable Factbook: Services Volume No. 68, 2000 Ed., at I-45.

[6] According to the FCC's most recent broadcast station tabulation, there were 1,616 television stations (VHF, UHF, and educational) licensed on September 30, 2000. *See* Station Totals prepared by Mass Media Bureau, Audio Services Division (rel. Nov. 22, 1999) at <http://www.fcc.gov/mmb/asd/totals/bt990930.html>.

[7] According to the FCC's sixth annual report on the competitive status of markets for the delivery of video programming, a total of 80.9 million households subscribed to multichannel video programming services (i.e., cable and noncable MVPDs) as of June 1999, up 5.5% over the 76.6 million households subscribing to MVPDs in June 1998. This subscriber growth translates into a 3.2 percentage point increase in multichannel video programming subscribership to 81.4% as of June 1999, *i.e.*, 99.4 million U.S. homes with at least one television divided by 80.9 million households subscribed to multichannel video programming services. *See* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, Sixth Annual Report ["*1999 Report*"], 15 FCC Rcd 978, ¶¶ 6, 19 (2000).

[8] The *1999 Report* noted 98.6% of all cable customers subscribed to systems with capacities of 30 channels or more, and 64.2% of all subscribers were served by systems with capacities of 54 or more channels in October 1999. *Id*, ¶ 23. In addition, 4.8% of all subscribers are reportedly served by systems with capacities of 91 or more channels. *Id.*

The average DBS subscriber has hundreds of channels available to her.[9] Additionally, 50% of Americans have access to the Internet.[10] Moreover, the ubiquity of VCRs, DVD players and other video medium offer consumers additional entertainment, news and information sources. And, more recently the Internet is adding yet another. Most importantly, there is no end in sight to this trend.

MORE Programming: There are more sources of programming than any time in history. There are 170 cable networks and seven broadcast networks.[11] The programs are also more diverse than in the "golden age of television," when Americans sat around watching the same basic shows. It was inconceivable in days of old that there would be channels dedicated to news 24 hours a day like CNN or Fox News. Or, that there would be channels dedicated not only to sports, like ESPN, but single sports like the Golf Channel. Or, that hundreds of movie channels would be available on their televisions, many on demand, with hundreds more titles in their local video store. Even on pure broadcast stations, there are more sports, movies, drama, and national and local news than at any time previously.

With so much more in the market, one can expect to find more competition and more diversity. Advertisers have many more choices to display their products. And, consumers have many more options to choose from as sources for entertainment, information, and news. If, as I believe, the good and plenty of outlets and programming is fertile ground for a healthy marketplace, there is clear reason to question why such forces (where consumers and producers interact) will not produce competitive prices, competitive opportunities for programming, and robust options for viewers. Yet, the

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[9] The 1999 Report noted DBS operators DirecTV and EchoStar offer up to 350 channels of video programming and serve more than ten million subscribers. Id., ¶ 69.

[10] It is currently estimated that roughly 50 percent of American homes possess a personal computer and nearly 50 percent have Internet access. *See, e.g.,* Consumer Electronics Manufacturer Association, U.S. *Consumer Electronic Industry Today*, 1999 Ed., at 5 ("Computers now are in almost half of all American households, 45 percent, and some 60 percent of those homes have two machines in use."); Christine Doherty, *Online Market Is Hotting Up*, Sunday Business Post, May 14, 2000 (currently "49 percent of Americans enjoy internet access from their homes"); Business Wire, *Internet-Connected Households Soar to 60 Percent in 2000*, Mar. 28, 2000 (consultancy notes "majority of U.S. household, approximately 60 percent, will have personal Internet access in the year 2000").

[11] The 1999 Report noted a total of 171 basic, premium and pay-per-view cable networks. See 1999 Report, supra inote 6, ¶ 25.

Commission continues to place unsupportable faith in the concept that such things can only happen by government fiat and not by the natural forces of the market.

To Question the Rules is not to Question the Venerable Goals of Broadcast Regulation

The goals of our broadcasting rules are laudable. They seek: (1) to constrain undue economic power, (2) to promote diversity and (3) to promote locally originated programming. There may have been a time in which such objectives could not be achieved without regulatory intervention (though I question it). But, surely these values are not incompatible with market forces, or market failures in the classic sense. Thus, one does not abandon these objectives by calling on the Commission to consider if the rules are necessary at all or in their present form, particularly in the face of substantial evidence that they are unsupported by the facts, and that they may actually in some instances harm producers, suppliers and consumers. For an outstanding overview of the current market conditions and public harms being caused by some of our structural rules, I would direct the reader to *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition*,[12] by Michael L. Katz, which is included in the record of this proceeding.

Broadcast Economic Power in the Video Market

Video producers make money by inducing viewers to watch their products. If one follows the broadcast model, the product is free to viewers and revenue is generated through advertising. The game here is to get the most eyeballs you can, regardless of the type of program. Where one can charge for subscribers, as can cable, DBS and MMDS, you can make money both through advertising and by inducing viewers to pay for programming.

If the video market was highly concentrated, leaving few avenues to reach audiences, that unquestionably could result in harm. For instance, as is assumed by many of our broadcast structural rules, if a broadcaster enjoyed undue market power it could theoretically raise advertising rates to non-competitive, monopolistic levels, thereby harming advertisers. Similarly, if broadcasters (individually or collectively) could monopolize audiences they could harm suppliers of programming by demanding uneconomically low program prices.

[12] Michael L. Katz, *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition* ("*Old Rules and New Rivals*"), Sept. 1999.

Yet, again, if one notes the dramatic change in the market (which the majority only does superficially) one can see how questionable many of the suppositions are that undergird our ownership rules. For example, television networks have lost a substantial share of the national viewing audience. Between 1952 and 1991, the prime time ratings of the three major networks fell from 75 to 37.5, and by 1998 had fallen another 25 percent to 28.3 percent.[13] Are today's broadcast shares large enough to allow broadcasters to unilaterally raise advertising rates without constraint? This is just one question that deserves review if we wish to continue to justify ownership restraints on our fear of the impact on advertising markets.[14]

Additionally, there has been an explosion of media outlets to which both advertisers and programmers may turn, lessening the ability and incentives of broadcasters to unilaterally dictate rates. With regard to cable service, 67 percent of all Americans subscribe to this medium and nearly 97 percent have cable available.[15] Another 12.5 percent subscribe to DBS, which is virtually available to 100% of Americans within the continental U.S.[16] Consequently, advertisers now have other options from which to choose in reaching a national audience. In the vernacular of antitrust, there are substitutes. If a network or station owner attempted to extract monopoly rents, advertisers would have other options for reaching consumers. Moreover, other medium may prove more attractive to advertisers who can more carefully tailor their messages to particular demographics on media like cable or DBS. At a minimum, there is reason to question the blind assumption that advertisers would be harmed without the protections of our ownership rules, given the increased availability of other outlets.

The proliferation of other distribution outlets has also constrained broadcast program purchasers from depressing the prices program suppliers get. In fact, with more outlets, high quality programming can "shop" for the highest rents. This explains the trend we see toward cable and DBS capturing marquee programming such as sporting events, top movies and increasingly major news, history, public affairs, and arts programming. Indeed, contrary to what should be predicted if network concentration

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[13] *Id.* at 11 (citing Paul Kagan Associates, *The Economics of TV programming and Syndication,* 1999 at 21-22).

[14] I would add that I have always questioned why the FCC should concern itself with advertising rates. We do not regulate advertising and the price impacts there do not have a secondary effect on viewers in a manner cognizable by the Communications Act. The antitrust statutes adequately address advertising concerns as they do generally for all markets.

[15] *1999 Report, supra.* Note 6, ¶¶ 19-20

[16] *Id.* ¶ 15.

were substantial, programmers are able to command a premium for shows like *E.R.*,[17] NFL Football,[18] and NHL Hockey.[19] In short, it is hard to defend the assumption that broadcasters have sufficient market power to command monopoly rents for advertisements or to deflate prices for programming. Surely, one sees no evidence to justify a standing structural rule, rather than rely on antitrust enforcement.

Diversity in the Market

Diversity is also an admirable goal, yet, it is an elusive concept. It has come to mean many things. Limiting ownership concentration does one obvious thing; it increases or maintains the number of different owners. Limiting ownership and allowing more owners has three primary diversity effects: For one, there are more broadcast properties and more ownership opportunities available for more people. Protecting opportunity is one way of promoting minority and female ownership. This is sometimes called "source diversity."[20] I will not discuss this point in this statement. Second, more owners might mean more from which to choose. Viewers will be able to see the different programming choices of different owners, and it is hoped that these programs will vary in content and style. This is what we often call "program diversity." The third point is a subtle variation on the second. Proponents often urge rules to promote not just different program genres or styles to capture viewer interest, but different "viewpoints." That is, by the fact that owners are different people or institutions, one might expect to see

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[17] See id. ¶ *26.* See also *Kyle Pope,* Network Makes $850 Million Deal with Warner Bros., *Wall St. J., Jan. 15, 1998, at B1 (NBC strikes "a record $850 million deal to keep the nation's top-rated show, ER); Peter Kaplan,* NBC Pays Top Dollar to Keep No. 1-Rated "ER" on Board, *Wash. Times, Jan. 15, 1998, at B6 (same); Brian Lowry,* NBC's Prescription for Success: Keep "ER" TV, *L.A. Times, Jan. 15, 1998, at A1 (same).*

[18] See, e.g., NFL Buyers, Sellers Could Butt Heads on Rates, *Multichannel News, Jan. 26, 1998, at 28 ("Fox Broadcasting, ABC, CBS and ESPN will shell out a combined $17.6 billion across eight [NFL] seasons."); John M. Higgins,* Cable Operators Blast ESPN for NFL Megabid, *Broadcasting & Cable, Jan. 19, 1998, at 10 (Of $17.6 billion total, ESPN "agreed to pay $600 million per season for 18 Sunday night games");* MSOs Await Bill as ESPN Grabs NFL, *Multichannel News, Jan. 19, 1998, at 1 (same).*

[19] See Disney Offer Would Triple NHL's Current TV Deal, *Palm Beach Post, Aug. 6, 1998, at 8C (Walt Disney Co. offered "to pay the [NHL] almost $600 million for exclusive U.S. broadcast rights for five years". . .the deal "would triple the amount Fox Sport and ESPN [paid] the league" under the prior deal).*

[20] Source diversity refers to "promoting a variety of program or information producers and owners." *In the matter of 1998 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,* Notice of Inquiry, MM Docket 98-35, rel. Mar. 13, 1998, ¶ 6.

different perspectives that are "antagonistic" to those of other programmers. Let me first make some general observations about the number of distinct program choices available to consumers.

It is said, "beauty is in the eye of the beholder."[21] The same could be said for television. It is difficult and perhaps constitutionally impermissible for government to impose its conception of worthiness or beauty on viewers.[22] Yet, it is understandable to craft rules that promote the widest swath of programming choice to match the infinite variety of interests of the American consumer. Whether your taste runs to WWF wrestling (perhaps the most popular programming on television today), the symphony, sports, comedy, news, drama, feature film, cartoons, music videos, history, public affairs, or shopping, the video marketplace has more of it, in more colors and flavors, than ever before.

To make my point I highlight a powerful and persistent trend in programming—movement from broadcasting to narrowcasting. In the early period of television, broadcasting was the primary means of receiving video content (excluding the movie theatre). Broadcast is a medium that provides one signal to many people. That is its central virtue, but also its central limitation. Because it can only serve up one program at any given moment in time, it has to find a program that appeals to the broadest possible audience. This is particularly the case since broadcasting is solely advertiser supported. Thus, almost by its nature, broadcast has trouble being diverse—that is, serving a more narrow, particularized community of interest is difficult, both in technical terms (the signal goes everywhere) and in economic terms (to remain viable a station must maximize eyeballs, *i.e*, aggregate interests). When broadcasting dominated video programming the challenges of program diversity were quite acute.

Cable, and later DBS, brought to the marketplace a new medium that had

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[21] Apparently, "beauty is in the eye of the beholder" is a misinterpretation of the following aphorism by Plato:

> *"Remember how in that communion only, beholding beauty with the eye of the mind, he will be enabled to bring forth, not images of beauty, but realities (for he has hold not of an image but of a reality), and bringing forth and nourishing true virtue to become the friend of God and be immortal, if mortal man may."*

See *Quoteland.com* <http://www.quoteland.com>.

[22] *See United States v. Playboy Entertainment Group, Inc.*, 529 U.S. ___, 2000 WL 646196, at *13 (2000) (Asserting that the Constitution exists to grant the people, rather than the Government, the ability to evaluate moral, artistic, and intellectual content.)

characteristics that clearly enhanced program diversity and choice. A cable system offers subscribers multiple channels. A subscriber that hungers for sports might watch a channel dedicated to that genre (*e.g.*, ESPN, Fox Sports). A history buff the same (*e.g*, History Channel). A movie fanatic the same (*e.g.*, HBO, Showtime, Cinemax). A news and public affairs junkie the same (*e.g.*, CNN, MSNBC, Fox News, C-Span), and WWF fans can watch all day and night to their hearts content. A system operator can offer this diverse programming economically because he draws both from advertising and subscription revenue. Subscription fees also allow a program producer to gauge a viewer's preference. Programs that are strongly desired are more valuable and thus more can be charged. (This is why there are tiers and programming packages offered.) Additionally, the technical nature of the system allows for this variety. Because cable is not hindered by interference problems, like broadcasters, the system can be upgraded continually to increase capacity and thus provide more channels.[23] The importance of cable, DBS and other systems is not just to increase video competition. These mediums also have ushered in greater diversity, for they can program to distinct parochial interest on a daily basis in a manner that is challenging for broadcasting. The ability to program to a wider variety of interests is what, in part, accounts for the fact that the majority of Americans (nearly 80 percent) subscribe to some multichannel service.

Of late, the trend toward tailored programming is getting finer with the advent of digitalization and the Internet. Perhaps the penultimate expression of diversity is the ability to program for a single individual's unique interest. The video landscape is moving in this direction. On the Internet one clearly sees the trend: "My Yahoo" and "My AOL" for example. Products like WebTV, AOL TV, Geocast, and Excite@Home, all promise to enhance traditional television product with personalized, tailored content. These trends show clearly that the breadth of unique and different programming has exploded and is growing exponentially. Under the weight of such trends, I cannot begin to see how one can claim the loss or fear of loss of diverse programs and choices for consumers.

[23] Bear, Stearns & Co., Inc., Byte Fight!: Cable TV & Broadband Report (rel. Apr. 2000), at 59 (With hybrid fiber optic-coaxial upgrade, "[a] cable operator with 750 MHz system can ultimately offer the equivalent of 240 channels (both analog and digital) while having 50 MHz, or the equivalent of 80-100 digital channels held in reserve." With eventual digitalization of cable plant, operator "will be able to offer the *equivalent of 1,100-1,600 digital channels*") (emphasis added).

Viewpoint Diversity

The strongest proponents of diversity in programming will insist that it is not multiple, different choices that matter, but "viewpoint diversity." Given the facts of the marketplace, I believe this to really be the crux of the government's purported diversity interest. The goal is not simply to provide choices that appeal to diverse interests. The proponents want shows that are "antagonistic to each other."[24] The first problem with this conception is that it is unclear that a market that produces programming that serves the interests of a broad and varied audience does not also represent a sufficient number of "viewpoints" from which consumers can choose.

Secondly, I question what the concept means for the vast majority of programs consumers watch. Is NBC's *Friends* antagonistic to WB's *Dawson's Creek?* Is ABC's *Who Wants to be a Millionaire* antagonistic to CBS' *Touched by an Angel*? Or, is ABC's *Monday Night Football* antagonistic to Fox's *Football Sunday*? It's hard to see the relevance of this concept. Perhaps, the viewpoint interest is reserved for public affairs and news programs, where issues might be presented and debated. But, here, too, one questions its meaning. Local news programs rarely editorialize, or pick political candidates, or take stands on major issues such as abortion or gun control. The reason is simple enough: because consumers do not pay to watch, broadcasters make money by reaching the largest possible audience. They rarely take the kind of risks that might endear them to some in the viewing area and raise the ire of others. They are not in the "antagonizing" business. Moreover, I am not sure why we are certain "antagonistic" programs do not sell. I see plenty of evidence of opinionated programming: *Crossfire*, *Face the Nation*, *Hardball*, *Larry King Live*, and why not *Jerry Springer*, for examples. Are we to believe all of this would vanish absent our structural ownership rules?

I also fail to see how ownership restrictions in themselves do much to promote the goal of antagonism. Different owners may have different perspectives, but they probably have more in common as commercial interests than not, for each must compete for maximum audience share to remain profitable. Moreover, the ownership class may include different people, but it is hard to see how that ensures that they are different in their viewpoints. We do not and could not possibly insist there be Republican owners and Democratic owners, pro-gun and anti-gun owners, etc. I would suggest some amount of "antagonism" sells. Controversy and conflict are the stuff of good story. If different viewpoints are to be found, I think they will be the products of the commercial market

[24] "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 . . .'" *Order* (quoting *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945)).

much more than by our rules and our adherence to the high-brow ideal we used to defend them.

Localism

Finally, I would like to say a brief word about localism, which is often subtly distinguished from diversity in general. The principle is that the government favors locally originated programming because that is the programming most likely to serve the interests of those viewers and listeners in the community of the licensed station. The majority of stations are affiliated with a national network. Because the broadcasting business seeks to maximize viewers, there has always been concern that a powerful network would force local stations to carry their national program, theoretically to the detriment of local viewers and local interests. For decades, the Commission has pursued rules intended to ensure networks do not dominate local stations and their programming preferences.[25]

One central failing of regulations intended to promote localism is that they assume that such programming would not flower if networks and stations were too large. One is hard pressed, however, to see why, in a healthy marketplace, if the public values local programming, producers would not supply it. If a local audience desires a program, and is willing to watch the program, that program will attract advertising dollars and thus a station or network will have an incentive to produce and provide that show. Indeed, since most consumers purchase advertised product in their local towns and communities, advertisers—even national ones with local franchises—would favor programs that appeal to local audiences.

I remain struck how often we simply assume that such programming will vanish if we do not require it. Of course, if consumers do not want certain kinds of local programming and it is not provided as a consequence, there is no justification for the government to compel it. Where government attempts to promote the messages and images that it prefers, even where consumers themselves do not, we are no longer in America and the First Amendment has been abandoned.[26]

II. CRITIQUE OF THE BIENNIAL REVIEW

[25] One example is the "right to reject rule." *See generally,* 47 C.F.R. § 73.658.

[26] *See Playboy*, 2000 WL 646196, at *13 (Stating that "these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of the majority.")

I will now turn and address the specifics of today's *Order*. The Commission has taken steps today to modify some of its broadcast ownership rules in an attempt to make our regulations more consistent with current marketplace conditions. While I support these steps, I believe they are too limited in scope and reflect a continuing reluctance to examine in a meaningful way the legacy of our broadcast regulations. As a result, I concur in part and dissent in part to the *Order* released today. I will address the rules to which I dissent or concur below.

Before doing so, I wish to state my approach to the Biennial Review of structural ownership rules. Since our charge is to examine whether a rule continues to serve the public interest in light of competition, I feel it imperative to always fully examine the state of the video market—market share, number of competitors, competitive effects, ease of entry and inefficiencies—and challenge the continued validity of prophylactic ownership rules in light of this examination.[27] I believe the clear bent of the biennial review process set out by Congress is deregulatory, in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interests in competition and diversity. Thus, contrary to the approach of the majority, I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity. Against that backdrop, I turn to today's decision.

National Television Ownership Rule and UHF Discount

I respectfully dissent from the majority's conclusion that, based on the record before us, the national ownership cap still serves the public interest. The *Order* contains no meaningful examination of the market or the state of competition, a glaring omission given Section 202(h)'s directive to consider whether competition obviates the need for such rules. This is particularly disturbing, since serious questions have been raised (but not adequately addressed) as to whether this rule is substantially related to the stated government interests of protecting local competition and promoting local diversity, and evidence has been presented that the rule may actually cause harm to the public interest.[28]

In the Notice of Proposed Rulemaking, we asked for comment on the effect of the rule on competition in the national advertising and program production markets. We also asked about the effect of the rule on existing television networks and the formation of

[27] I believe the guiding principles articulated in Commissioner Furchtgott-Roth's separate statement have merit.

[28] *See Old Rules and New Rivals, supra* note 11.

new networks. These points of inquiry go to issues of competition in the national markets. One would expect to see an examination of market concentration, advertising and programming price effects, etc. The *Order*, however, lacks any meaningful discussion of either of the national markets or the formation of new networks. If it had, it would have noted the substantial change that has occurred offering greater competitive discipline and substantially increased diversity. *See* Section I, *supra*.

Instead, the *Order* validates the rule on two other grounds: It states that (1) additional time is needed to assess the impact of the local ownership rule changes made last August;[29] and (2) expresses concern about the growing number of large group owners and the potential for disruptive restructuring. None of these articulated reasons address the national programming or advertising markets, or the rules' impact on new or existing networks.

Indeed, the justifications appear to focus almost exclusively on competition and diversity at the *local* level.[30] It is not intuitive why national ownership restrictions have any meaningful impact on local competition or local diversity. We have very detailed rules limiting the number of stations one may own in a given local market. Thus, no matter how many stations one owns nationally, he cannot increase concentration in the local market, by operation of our local ownership rules. Indeed, these rules were modified less than a year ago to reflect our present views on local competition and diversity. Consequently, I fail to see the relationship between the national cap and the stated government interest in local competition and diversity. Further, the *Order* does not offer a meaningful explanation. I would note that on many previous occasions the Commission has itself squarely expressed doubt about the linkage between the national cap and its stated goals.[31]

Not only are the stated rationales for retaining the rule in its current form not persuasive, but the *Order* lacks any meaningful discussion of the potential harms posed by the rule. For example, the study completed by Professor Michael Katz raises the

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[29] *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policies and Rules*, 14 FCC Rcd 12903 (1999).

[30] The *Order* finds that applications for duopolies under our new local television ownership rule were only filed this past November and, as a result, they should monitor developments under this new rule prior to making any changes to the national television ownership reach cap.

[31] *See, e.g., Amendment of Multiple Ownership Rules*, 100 FCC 2d 17, 37 (1984) (noting irrelevance of national rules to diversity in local markets). *See also Old Rules and New Rivals supra* note x, at 61 (discussing Department of Justice opinion in 1983 that eliminating the national multiple ownership rules would raise little risk of adverse competitive effects in any market).

possibility of some non-trivial harms associated with this rule. The study finds that the rule: (1) limits economies of scale associated with common ownership, thus raising costs and reducing incentives to invest in over the air television; (2) blocks the expansion of particularly well-run station groups; and (3) limits the ability of broadcast networks to own stations, an arrangement that would improve coordination and lower the risks associated with investing in high-quality, innovative programming.[32] These harms are not small concerns to an industry in the midst of remaking itself in digital form and for whom every day the number of competitors increases while total viewership declines.

These concerns are also strikingly similar to those raised by the Commission in its decision to modify the Dual Network Rule. In the Notice of Proposed Rulemaking in that proceeding, also issued today, the Commission reviews with some specificity the current economies of the network broadcasting market. As noted in the *NPRM*, networks are in the business of producing mass audiences, and the size of that audience is facing continuing erosion from cable and DBS. The *NPRM* finds that in order for networks to be economically viable they must be "larger rather than smaller as measured in terms of affiliated stations and the viewers produced and sold to advertisers."[33] In the dual network context, the Commission finds that contract negotiations between program producers and networks are extremely complex and, as a result, the costs of these contracts are high. Integration allows for lower costs and better allocation of risks.[34] The NPRM also points to the amount of integration that has occurred in this market after the repeal of our financial interest and syndicated exclusivity rules (fin/syn) as reflective of the difficulty in negotiating contracts.[35]

I would argue that these same economic costs and efficiencies accrue to a network's affiliate relationships as well. Contract negotiations between networks and affiliates are also complex and the costs high. And as in the case of the fin/syn rules, I would point to the number of networks that are either closing in or at the cap as evidence of the difficulty and costs associated with contracting with affiliates.[36] For those companies that are at the cap, these costs are a direct result of our rules. But the *Order* not only fails to analyze these costs, but also whether the costs associated with the rule

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[32] *See Old Rules and New Rivals, supra.*, note 12, at ii-iv.

[33] Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule, Notice of Proposed Rulemaking, FCC #00-213, Adopted Jun. 8, 2000, Rel. Jun. 20, 2000, at ¶ 12.

[34] *Id.*, at ¶ 18.

[35] *Id.*, at ¶ 15.

[36] CBS is currently at 40 percent audience reach, FOX at 35 percent, PAX at 34 percent and Tribune at 29 percent. *See Special Report Top 25 Television Groups, Broadcasting and Cable,* Apr. 10, 2000, at 72-98.

are justified on the basis of our interest in preserving competition in the national programming or advertising markets, or even competition or diversity at the local level.

The *Order* also states that a change in the cap may well influence the bargaining positions between broadcast television networks and their affiliates, and that we should proceed cautiously, particularly given the restructuring that may be taking place concurrently on the local level. However, we do not have evidence of a massive restructuring taking place at the local level. Only 42 applications for duopolies in local markets have been filed since we modified our local ownership rules, and 19 of those reflect purchases of television stations that the buyer already programs through local marketing or time brokerage agreements. And, while I am sensitive to the shifts currently taking place in the network/affiliate relationship, I am unconvinced that these concerns necessarily implicate issues of diversity and competition at the local level. Protecting one group of station owners over another for its own sake is not a valid function of government. Nonetheless, I would have liked to hear much more about the impact on local stations and how that impact undermines the public interest in an NPRM that would more comprehensively examine the 35 percent audience reach cap.

In short, the Commission's decision is deficient in several ways. It fails to fully examine the video market and consider the changes in that market. It merely assumes a valid link between a national limit and local competition and diversity, despite fairly substantial evidence to the contrary. And, it fails to consider the public interest harms that may flow from the rule. I believe there is more than enough on the record of this proceeding to call into question whether the public is being served by the 35 percent audience reach cap, and I would have supported a Notice to examine more thoroughly the possibility of its modification or repeal. Further, I support the Commission's decision not to amend the UHF discount. Any action on the discount should be considered in conjunction with a thorough analysis of the cap.

Newspaper/Broadcast Cross-Ownership Rule

I also must respectfully dissent from the majority's conclusion that the newspaper/broadcast cross-ownership rule continues to serve the public interest. While I welcome the decision to issue an *NPRM* to look at the impact of the rule in particular circumstances, I am disappointed that the Commission appears unwilling to engage in a broader debate about the continuing validity of this 25-year-old rule, which has never been modified. This rule raises significant First Amendment concerns, and, as a result, requires rigorous analysis in support of its continuing validity. To my mind, the *Order* falls short of that bar, and I cannot conclude that the rule continues to serve the public interest as a result of competition.

As I predicted in my separate statement to the *NOI*, the pivotal issues in this entire proceeding evolve around the issue of diversity. Nowhere is this more the case than in the analysis surrounding the newspaper/broadcast cross-ownership rule. With respect to this rule, the Commission relies heavily on its goal of promoting "viewpoint diversity," which looks specifically at the amount of "local" programming in a market. While the *Order* considers the effect of the rule on competition, it limits its discussion to whether meaningful efficiencies derive from existing combinations. A more thorough competitive analysis would also discuss, for example, the relationship between the advertising markets for broadcasting and newspapers and the substitutability of the television and newspaper products. If they are the same products, then the Commission should justify its decision to permit television duopolies but not newspaper/television combinations in local markets. If they are different products, then the Commission should justify why it will continue to apply a complete ban on cross-ownership between the mediums, based simply on their character.

The heart of the newspaper/broadcast cross-ownership rule is the Commission's belief that these two mediums are the only two suited to providing content oriented toward the local community.[37] This *Order* retains that thesis by rejecting the proposition that the explosion in alternate sources of programming obviates the need for the rule. It finds that: (1) "new outlets" (DBS/MMDS) are not substitutes for newspapers or broadcasters on the local level; and (2) that cable is a poor substitute because it is not required by law to provide locally originated content, even though some systems do. By contrast, the *Order* places faith in broadcasting, because broadcasters are required, pursuant to their public interest obligations, to provide programming responsive to the needs of the local community, and newspapers, even though they are not required to, typically cover local issues. From these observations, the *Order* concludes that broadcast television and newspapers continue to be the dominant source of local news and public affairs information in any given market. Let me address each of these two propositions.

As configured today, it is true that most satellite and wireless based video providers offer primarily national programming. The central reason for this is technical. Satellite technology has had difficulty beaming unique programming into local communities from hundreds of miles in space. The technology is changing, however, and with spot beam technology DBS providers are pursuing localized carriage. Indeed, they fought aggressively to modify the Satellite Home Viewer Act to allow them to carry local broadcast signals, feeling that it was a competitive disadvantage not to have local

[37] *See* Amendment of §§ 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, Second Report and Order in Docket 18110, 50 FCC 2d 1046, 1057-58 (1975).

content.[38] Some companies appear to be pursuing a satellite service that would include multiple channels of tailored 24 hour local programming, including weather, sports, traffic, arts and community affairs. Thus, as competition increases in providing national programming content (broadcast, cable, DBS, MMDS, Internet) carriers will naturally push into local content to differentiate their offerings. It is clear, in my view, that content as an important competitive offering. So, while I would concede that these services provide limited local programming today, it is clear that video competition is driving them to provide localized content and they should not be dismissed as viable alternatives out of hand.

The majority's rejection of cable as a viable medium for local content is more baffling. The fact is that many cable systems are offering local programming, perhaps for more concentrated periods than broadcast television. News Channel 8 in our own area offers just one example. Cablevision's New York Metro service offering local news, weather, traffic, sports and community affairs is another. Most cable systems offer community PEG channels. Many systems offer local high school sports, such as the Home Team Sports channel. HTS is apparently valuable enough to consumers that it costs extra to have access to it. Moreover, cable systems are operated locally, just as stations are, and I see no real impediment to them offering local services if their community wishes to have them. In fact, local cable systems are regulated by local franchises that often extract local community services as a condition of receiving a local franchise. Broadcast stations have no local regulatory oversight. Despite all of this, the Commission turns a blind eye, refusing to survey the breadth of local cable programming and dismissing the argument by holding that because federal law does not mandate local content, we cannot count on such systems providing it.

The Commission, however, repeats the same error I note in Section I. It seems unwilling to recognize that localism sells. There are a bevy of commercial motivations for offering such fare: advertisers want to target groups with similar demographics and interests. National programmers want to differentiate their products. Multichannel systems want to increase the value of subscription fees. I find it a bit remarkable we will not look to or credit competitive content, where there is not a regulation compelling it, when reviewing the market to see if competition has obviated the need for a regulation! Moreover, the *Order* refuses to consider local content in cable systems, because it is not required, but in direct contradiction is unobstructed in crediting regulation-free local newspaper coverage because that medium "typically" covers local issues. This is

[38] *See, e.g.*, *Audio Notes*, Audio Week, Nov. 15, 1999, *available in* 1999 WL 7563749 ("CEA Pres. Gary Shapiro . . . said CE companies 'have long believed that the ability of DBS subscribers to receive local network signals is critical to the success of the home satellite market.' "); *Capitol Hill*, Warren's Cable Regulation Monitor, Nov. 29, 1999, *available in* 1999 WL 6826333 (DirecTV and EchoStar planned to provide local broadcast network channels to their customers as soon as President Clinton signed SHVA into law).

unquestionably arbitrary analysis.

In defending this rule, the Commission again trumpets the value of "antagonistic voices," or "viewpoint diversity." I question generally some aspects of this governmental interest, which I discussed more fully in Section I. I would only add a few points. For one, I do not see how one can demonstrate that newspapers, by their very nature, are antagonistic to broadcasters and, thus, their combination would frustrate our stated goal. I have not observed or been shown any particular give and take between these two mediums. I don't believe we have even genuinely examined this proposition. Surely, one can hypothesize that if a local paper and local station combined, there may be some homogenization of news and information. But, one can equally imagine that the combined resources may allow for greater and more efficient coverage of local events that could not be covered by the two individually. (There is some evidence of this where certain combinations have been grandfathered). Second, I would note that a broadcast station is the most likely candidate to take views antagonistic to another station, since they directly compete for audience share. Yet, we allow a single entity to own two broadcast stations in many markets, if enough "voices" remain in the market. I do not see why newspaper/broadcast combinations could not be regulated the same way.

Based on the above considerations, I cannot support the conclusion that the newspaper/broadcast cross-ownership restrictions continue to serve the public. I would support a proceeding that would look critically at how the significant and far reaching changes in the video marketplace since 1975 have eviscerated the need for what is an extremely prohibitive regulation.

The Cable/Broadcast Cross-Ownership Rule

I also dissent from the *Order's* decision to retain the Cable/Broadcast Cross-Ownership rule. The rule is 30 years old, and, as in the case of the rules discussed above, I believe there have been sweeping and pervasive changes in the local video programming market that warrant a more critical analysis of the benefits associated with this rule than has been undertaken in the context of the instant *NOI*. I believe that many of the harms, such as channel positioning, asserted in the context of this rule may be adequately addressed by other rules the Commission regularly enforces. For example, I would observe that even if one were concerned that cable might have an incentive in favoring its own local station on its cable system, the "must carry" rules would largely deny it the ability to do so.

Finally, I find it ironic that the majority is concerned that it will lose an "antagonistic voice" if a local cable system is co-owned with a broadcast station,

but is unwilling to count that same voice as viable in the broadcast/newspaper cross-ownership context. For all of the above reasons, I would have supported a rulemaking to more adequately and thoroughly examine whether this rule is still necessary to promote the public's interest.

The Dual Network Rule

I concur in the *Order's* conclusion that the Dual Network Rule as it applies to UPN and the WB may no longer serve the public interest and the decision to issue an *NPRM* to evaluate possible modifications to the rule. While I would support an *NPRM* that would also consider repeal of the current rule as it applies to the top four networks, I believe that the record supports this more limited *NPRM* as an adequate first step. I look forward, however, to continuing to review this rule in our upcoming biennial reviews.

Local Radio Ownership

I also concur in the decision today to retain the current local radio ownership rules. However, I am unconvinced that the further proceeding contemplated by the *Order* is warranted, nor do I believe, as a general matter, that consolidation in the industry has threatened local competition and diversity in a manner inconsistent with the intent of Congress.

The *Order* contemplates a Notice of Proposed Rulemaking (NPRM) to address several radio market issues. One issue is how to harmonize the counting methods we use to determine both the size of the market and the number of stations in the market that count toward the cap. To the extent that this NPRM addresses what may be an arbitrary distinction between counting methods, I support its issuance.

The NPRM will also ask whether the Commission should adopt a different (and more restrictive) method for determining the relevant "market" because our current definition may be "producing unintended results that are contrary to Congress' intent." My single greatest problem with the proposed action here is one of statutory interpretation. The effect of its proposal would be to shrink markets and thereby substantially limit the number of stations that one could own. When Congress adopted its radio ownership provision, Commission regulations defined these markets in a particular way. That way was the law of the land. The Arbitron market definitions were in existence, but they were not used for regulatory purposes, and Congress did not specifically incorporate them. I believe that it is disingenuous to suggest at this late date that only by changing the market definition to Arbitron can we effectuate what Congress "really meant." I believe proper statutory interpretation would lead one to conclude that

Congress set its numerical limits against the market definition that prevailed in regulation at the time, and not a definition that had not been used for this purpose previously.[39] Moreover, if Congress did not mean to set the appropriate level of concentration, or the acceptable level of diversity, what on earth are the numerical market levels meant to do?

III. CONCLUSION

In conclusion, I do not believe that the Commission has justified its decision that the 35 percent audience reach cap, the newspaper/broadcast cross-ownership rule or the cable/broadcast cross-ownership rule continue to serve the public interest as a result of competition as Section 202(h) requires. With respect to each of these rules, I would have supported further proceedings to more thoroughly evaluate the pervasive changes that have occurred in the video marketplace, and whether these rules continue to achieve the goals for which they were intended. I think such an analysis is critical in light of the challenges facing the broadcasting industry, especially the reality that the technical advances in digital capabilities will allow more and more platforms to deliver video programming. This Commission must look forward if it is to foster, and not stand in the way of, the digital revolution that is occurring across all of the communications industries. The approach taken by the Commission today, however, continues to look to "the days of yesteryear," to justify its rules. It is time to take the mask off this old Lone Ranger and look more deeply into the face of change.

ADDENDUM

The purpose of this Addendum is to address material that was added by the majority to the item after its adoption and after the preceding statement was completed. Specifically, the facts in paragraph 28 and the analysis contained in the last four sentences in paragraph 30 were circulated two weeks after the item was adopted. As a procedural matter, I am concerned that the changes, which I believe are substantive, have been inappropriately added after the item's adoption on May 26, 2000 and may change the adoption date of the item to no sooner than June 13, 2000, well past the statutory deadline.[40] In any case, I will respond to the newly added material below.

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[39] "It is a commonplace of statutory construction that the specific governs the general," *Morales v. Trans World Airlines,* 504 U.S. 374, 384-385 (1992) (citing, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

[40] Section 5003, Pub. L. 106-113 Stat. 1501 (1999). *See also* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth.

The majority now maintains that elimination or relaxation of the national cap rule would lead to "the consolidation of ownership of all or most of the television stations in the country in the hands of a few national networks."[41] This apocalyptic pronouncement is without foundation. As the *Order* itself points out, large numbers of stations are currently owned by group owners and there is not even a hypothesis proffered as to why such major commercial interests would suddenly sell their full complement of stations to the networks.[42]

While it may be a valid hypothesis that network-owned stations have an incentive to clear the majority of their network programming, it is far from clear that they would not also have economic incentives to program local content that would attract both viewers and advertisers. Clearly, competitive video service providers believe local content is key to the success of their product.[43] Moreover, every station, regardless of ownership, is required to serve its local community, a point relied on by the majority in distinguishing broadcasters from other providers of programming,[44] Thus, network-owned stations could not, arguably, run national programming exclusively.

The majority also now for the first time says that we should be concerned that there is a loss of an outlet for non-network programming sources, but I am not sure that this concern comports with the facts. Do the current network owned and operated stations have higher clearance rates for network programming? Do they serve their local communities with less local content than affiliated stations? Do national programmers find themselves blocked from distributing their product through stations owned and operated by the networks? Who knows? We certainly have not bothered to look.

The majority is correct in noting that Congress chose not to eliminate the cap, but only to liberalize it in the 1996 Telecom Act. But Congress also clearly instructed the Commission to continually evaluate market and competitive conditions to determine whether rules remain in the public interest. Failing to have done so fully, it cannot glibly escape its responsibility by deferring, without more, to a judgment Congress made four years ago and one that Congress specifically directed us to continually revisit.

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[41] *See Order,* ¶ 30.

[42] The Commission's *Order* at the Appendix indicates that the top 25 group owners own 527 of the over 1600 television stations operating today. The average number of stations owned by the top 25 group owners is 21. NBC owns 13 stations, ABC owns 10, Fox owns 23 and the newly merged Viacom/CBS owns 35, but is subject to divestiture conditions to come into compliance with the 35% cap.

[43] *See* p. 15, *infra.*

[44] *See* p. 14, *infra.*

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

In the Matter of 1998 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—MM Docket No. 98-35

I dissent from the majority's conclusion that the dual network rule should be modified to permit ABC, CBS, Fox, or NBC to combine with UPN or WB. Such a modification is unsupported by the record and, if ultimately adopted, would further erode the already tenuous level of diversity available on the public airwaves.

Congress itself modified the dual network rule only four years ago, as part of the Telecommunications Act of 1996. In describing the networks covered by its amended rule, Congress expressly referred to "emerging networks (WBTN, UPN)," a fact recently relied on by the Commission in applying the rule to UPN in connection with the CBS-Viacom merger.[1] Thus, in 1996, Congress found that the state of competition warranted continued application of the dual network rule to UPN and WB. Admittedly, the Commission may change the rule adopted by Congress pursuant to the biennial review provisions of the 1996 Act. But nothing has occurred in the past four years that should lead us to question Congress' judgment.

To the contrary, all of the arguments advanced by the majority as justifying modification of the rule were as true, if not more true, in 1996 than they are today. First, the majority asserts that program production and networking are complementary inputs that make vertical integration desirable, and that a merger of one of the top four networks with UPN or WB could be characterized as a merger of an established broadcast network with an established program producer. Leaving aside the factual inaccuracies of this argument (e.g., ABC and Fox are affiliated with major production studios just like UPN and WB), this characterization was equally true in 1996. Second, the majority argues that the rule should be retained for the top four networks but repealed for UPN and WB because the former are "established" broadcast networks, while the latter are still "nascent." Again, however, even assuming that UPN and WB are still "nascent" networks, they were far more nascent in 1996, when Congress specifically decided that they should fall within the dual network rule's application.

[1] *See* Mem. Op. and Order, FCC 00-155 (rel. May 3, 2000) at para. 10, *citing* 142 Cong. Rec. H1078-03, *H1121.

It is not hard to anticipate the effect that modification of the rule will have. It will reduce diversity on the public airwaves by reducing the number of outlets available to independent program producers. Independent programmers are already having a difficult time gaining network carriage. For the new television season, a record 24 of 37 new series are either owned or co-owned by the television networks which will air them.[2] Disney will own or co-own an interest in 3 out of 4 of ABC's new programs; CBS owns an interest in 6 of 7 new shows; NBC owns an interest in 4 of 7 new shows; 20th Century Fox will own or co-own 5 of Fox's 9 new shows; Paramount will produce 2 of UPN's 4 new series; Warner Brothers will own or co-own 4 of 6 new shows for WB.[3] Far from demonstrating that the rule has outlived its usefulness, the marketplace shows that the rule may be needed more today than ever.

The Order emphasizes the economic efficiencies that would accrue to incumbent networks by modifying the rule. This I do not doubt. But we have a higher duty than helping broadcasters maximize their private gain. Our first duty is to manage the airwaves in a manner that promotes the public's interest in competition and diversity. In the absence of evidence that more than four independent networks are not economically feasible, we should be cautious about changing our priorities.

[2] Joe Schlosser and Steve McClellan, "*Moneyphilia*," Broadcasting and Cable, May 22, 2000 at 17.

[3] *Id.*