EXHIBIT 1

Exhibit 1

Statutory Analysis

Legal Standards Governing The FCC's Mass Media Biennial Review Proceedings

INTRODUCTION AND SUMMARY

Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") specifies that, on a biennial basis, the Commission must reexamine each of its media ownership rules and determine whether such rules continue to be "necessary in the public interest as the result of competition." It also provides that "the Commission shall repeal or modify any regulation it determines to be no longer in the public interest."

The FCC's efforts to implement these requirements have led to a series of judicial decisions that invalidated, in whole or in part, agency orders dealing with the national television ownership cap, the cable/broadcast cross-ownership rule, and the duopoly rule. In response, the Commission has now embarked on an omnibus rulemaking proceeding in which it proposes to reexamine the basis for each of its media ownership rules. A critical prerequisite to the Commission's decision-making is achieving a clear understanding of the standards that Congress has established to govern biennial review proceedings.

Those standards were most thoroughly addressed by the U.S. Court of Appeals for the D.C. Circuit in *Fox Television Stations, Inc. v. FCC*. In that decision, the Court initially found that the biennial review mandate established a deregulatory "presumption" and that the term "necessary in the public interest" requires much more than a showing that a rule is useful for or consonant with the public interest. Indeed, the Court found that, to be considered necessary, a rule must be "required" or "indispensable."

The FCC took exception to this determination and, on rehearing, the Court excised the portion of its opinion dealing with the meaning of the term "necessary." In so doing, however, it refused to accept the agency's contrary claim that "necessary" should be interpreted as meaning merely "useful" or "appropriate." Instead, it left this entire question open for resolution in later proceedings.

This Statutory Analysis examines the substantive legal standards that should govern the Commission's Section 202(h) biennial review proceedings in light of the *Fox* decision and the rehearing order. Our conclusions are as follows:

The* Fox *case makes clear that Section 202(h) has a substantial deregulatory purpose. The main body of the original *Fox* decision was left largely undisturbed by the rehearing order. The decision, even as edited, clearly establishes the following principles:

- **A deregulatory presumption.** The Court expressly found that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules."

- **No procrastination.** The decision firmly rejected the FCC practice of continually deferring decisions to re-examine the public interest merits of its rules (as it, e.g., "monitors" market-place developments).

- **Consistency.** The decision directed the agency to maintain consistency in its ownership rulemaking decisions, in its treatment of the ownership combinations governed by its rules, and among its various ownership rules.

- **Reviewability.** The Court rejected the FCC's claim that its biennial review determinations are not subject to judicial review.

The original* Fox *case definition of the term "necessary" is fully supported when examined pursuant to the conventional standards of legislative analysis. In evaluating an agency's interpretation of a statute, reviewing courts draw on a wide array of "traditional tools," which include consideration of the language, structure, and design of the statute as a whole—as well as the legislative history. As set forth below, the use of these tools fully supports the *Fox* Court's original interpretation of the statutory language:

- **Following the "plain meaning" of the statutory language.** A statutory word or phrase is usually given its ordinary meaning. The ordinary, dictionary meaning of "necessary" is "logically unavoidable," "compulsory," "needed," or "required."

- **Examining the meaning of the same language appearing elsewhere in the same statute.** The term "necessary" in Section 251(c)(6) of the 1996 Act has been construed to mean "that which is required to achieve a desired goal."

- **Attributing genuine significance to each legislative word and phrase.** Statutes are to be construed "so that no provision is rendered inoperative or superfluous, void or insignificant." Conventional principles of administrative law already require the FCC to review its rules on an ongoing basis and make adjustments based on changed circumstances. Utilization of the same standard in biennial review proceedings, as proposed by the Commission, would rob Section 202(h) of all substantive meaning.

- **Giving effect to the Congressionally expressed statutory purpose.** The purpose of the 1996 Act (as set forth in its preamble) is "to promote competition and reduce regulation." This contrasts sharply with the broadly stated purpose of the original Communications Act, which was to "provide for . . . regulation" (1934 Act, Preamble) by endowing the Commission with comprehensive powers to promote and realize the vast potential of radio. It would be anomalous, to say the least, to treat the operative provisions of these two very different statutes as being synonymous and therefore redundant.

- **Respecting the structure and design of the statute.** As noted in the Fox opinion, "in the Telecommunications Act of 1996, Congress set in motion a process to deregulate the structure of the broadcast and telecommunications industries." It did this, first, by directly mandating a series of specific deregulatory actions. Then, "in Section 202(h) of the Act, the Congress instructed the Commission, in order to continue the process of deregulation, to review each of the Commission's ownership rules every two years . . . ." Structurally, this provision operates as a kind of one-way ratchet: it mandates a rigorous ongoing program of reduced regulation but never, in any circumstances, mandates increased regulation.

- **Respecting the Act's legislative history.** The legislative history of the 1996 Act makes clear Congress' intent to depart from the agency's traditional business-as-usual approach to deregulation: "the Commission must reform Federal policy and the current regulatory framework to reflect the new marketplace realities. To accomplish this goal, [we chose] to depart from the traditional notions of broadcast regulation and to rely more on competitive forces."

The FCC is not free to reject the congressionally established biennial review standards. In pleadings submitted to the *Fox* Court, counsel for the FCC asserted that it would be anomalous to apply a higher standard to retention of a rule than to initial adoption. It also has been suggested that application of such a standard in Section 11 (common carrier) biennial review proceedings would be administratively problematic. Neither of these claims warrants abandonment of a fair reading of the statute.

- **A heightened standard for retention of a rule.** It is by no means irrational for Congress to adopt a higher standard for retention of a rule than for initial adoption. After the FCC has had real-world operational experience with a rule over a period of time, it will ordinarily have a tangible basis for evaluating its public interest benefits and detriments. In contrast, at the time of initial adoption, the Commission inevitably will have to rely to a much greater extent on informed speculation and untested hypotheses.

- **Deregulatory action is required where a rule is no longer necessary.** Congress could not have meant Section 202(h) to require an inquiry as to whether the ownership rules are necessary in the public interest, but to require repeal or modification only if a rule is no longer consistent with the public interest. Such a construction of the statute would render the basic inquiry meaningless, violating numerous principles of statutory interpretation and suggesting that Congress intended to impose on the Commission a requirement that it expend a portion of its limited resources on an exercise that, in the end, would be futile. It would also require the FCC to ignore the statutory language which specifies that the agency's 202(h) biennial review proceedings are to be conducted "as part of its regulatory reform review under Section 11." Section 11, in turn, calls for the repeal of rules that are not determined to be "necessary."

- **Effect on the Commission's workload and on important regulatory policies.** While the existence of the biennial review undoubtedly increases agency responsibilities, the substantive legal standard embodied in the rule of "necessity" will generally not increase these burdens.

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In sum, Congress has established a rigorous biennial review program that includes a deregulatory presumption, an insistence on punctuality and consistency, and a requirement that the agency retain only those rules that are necessary to achieve identified public interest objectives.

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I. BACKGROUND

A. The Biennial Review Mandate

The preamble to the Telecommunications Act of 1996 ("1996 Act") states that the purpose of the statute is "to *promote competition* and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[1] Section 202 promotes this purpose in two stages. First, it mandates an initial specified set of deregulatory changes to rules governing national radio station ownership, local radio diversity, national television station ownership, "one-to-a-market" ownership, dual network operations, and cable cross-ownership.[2] Second, it directs the Commission to carry this process forward by (1) reviewing its remaining rules every two years to determine whether they continue to be "necessary in the public interest as the result of competition"[3] and (2) repealing or modifying any rule it finds to no longer be in the public interest.[4]

Congress envisioned that these new provisions would affect a fundamental "reform" of the existing regulatory framework by "depart[ing] from traditional notions of broadcast regulations" and placing greater reliance on competitive forces.[5]

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1 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), Preamble (emphasis added).

2 1996 Act, §202(a)-(f).

3 1996 Act, § 202(h). Section 202(h) provides that:

> Further Commission Review—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

4 *Id.*

5 H.R. Rep. No. 104-204, at 55 (1995).

B. The Commission's Response

As the D.C. Circuit recently found, the FCC (under then-Chairman William Kennard) did not follow Congress' directive. First, the Commission followed a very deliberate pace in reaching its "biennial review" determinations. When the FCC finally released the required "1998" biennial review determination in *June 2000*[6] *in response to a supplemental mandate issued by Congress*,[7] the Commission still failed to make the specific public interest determinations that Congress directed it to make—arguing that it should be allowed to continue to "observe" marketplace developments before reaching a definitive determination concerning the need for continued regulation.[8]

Second, with respect to substantive analysis, the Commission's evaluation of the media marketplace and its legal reasoning were so limited as to later be characterized by the D.C. Circuit as "unpersuasive," "flimsy," "half-hearted," and "woefully inadequate."[9] In separate (dissenting) statements, then-Commissioner (now-Chairman) Michael Powell and Commissioner Harold Furchtgott-Roth specifically took issue with the Commission majority's failure to take

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6 Section 202(h) states that the FCC's media-related biennial review determinations are to take place "as part of its regulatory reform review under Section 11 of the Communications Act of 1934" which, in turn, specifies that the required determinations are to take place "[i]n every even-numbered year (beginning with 1998) . . . " 47 U.S.C. § 161. The agency's "1998" determination was not released until June 20, 2000. *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* (Biennial Review Report) 15 FCC Rcd 11058 (2000) ("*1998 Biennial Review Order*").

7 § 5003, Pub. L. 106-113, 113 Stat. 1501 (1999).

8 Brief for Respondents Federal Communications Commission and United States of America, *Fox Television Stations, Inc. v. FCC*, No. 00-1222, at 34-41 (D.C. Cir. Filed June 18, 2001) ("*Fox FCC Brief*"). In the 2000 Biennial Review Report—which was adopted just six months after the release of the 1998 Report—the Commission took a similarly minimalist approach. Indeed, with respect to the broadcast ownership rules, the order does little more than recite recent agency actions taken in other proceedings and note the recent completion of the 1998 biennial review. *In the Matter of the 2000 Biennial Regulatory Review, Report*, 16 FCC Rcd 1207, 1213, 1217-18 (2001).

9 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1044, 1049, 1053 (D.C. Cir. 2002).

proper account of the dramatic changes that have transformed the media marketplace and of the deregulatory "presumption" embodied in Section 202(h).[10]

Finally, with regard to accountability, the Commission strenuously argued that its biennial review determinations should be insulated from judicial review. Specifically, the agency suggested that defense of its public interest determinations in court would be too much of an administrative burden.[11]

C. Judicial Reversals

The FCC's implementation of the biennial review requirement has led to a series of judicial reversals. Specifically, in *Fox Television Stations v. FCC*,[12] the D.C. Circuit remanded the agency's national television station ownership ("NTSO") rule and vacated its restriction on television/cable cross-ownership. Shortly thereafter, in *Sinclair Broadcast Group v. FCC*,[13] the Court remanded certain aspects of the television duopoly rule.

In each of these opinions, the D.C. Circuit concluded that the reasoning behind the FCC's decisions was severely lacking. With respect to the NTSO rule, the Court found that the agency had "adduced not a single valid reason" to support the view that the restriction was "necessary in the public interest" to safeguard either competition or diversity.[14] The Court described the Commission's efforts to analyze the state of competition in the television industry as "woefully inadequate" and noted that the evidence it put forth to show that broadcasters have undue market

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10 *1998 Biennial Review Order*, 15 FCC Rcd 11058 (Separate Statement of Commissioner Michael K. Powell); *id* .(Dissenting Statement of Commissioner Harold Furchtgott-Roth).

11 *Fox FCC Brief*, at 13-18.

12 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox*").

13 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"); *see also Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (remanding cable horizontal and vertical ownership limits on a similar analytic critique).

14 *Fox*, 280 F.3d at 1043.

power was "barely relevant."[15] The Court further found that the agency was "simply arbitrary" in its failure to square its decision to keep the rule with the contrary position it had taken in a prior report.[16]

The Court criticized the FCC's decision to retain the television/cable cross-ownership restriction even more harshly. Once again, the Court stressed the agency's failure to take into consideration relevant competitive factors and to harmonize prior inconsistent decisions with its decision to retain the cross-ownership ban.[17] Finding that the reasons given by the Commission for retention of the restriction "were at best flimsy" and that the rule was a "hopeless cause," the Court chose to vacate the restriction rather than remand it to the agency for further consideration.[18] In the end, the FCC itself acknowledged that its analysis of both rules was inadequate under any plausible reading of the biennial review mandate.[19]

With respect to the agency's modified duopoly rule, the Court focused on the Commission's failure to justify the different voice-count standards applied to the duopoly and one-to-a-market rules. The Court found that although the FCC had concluded "for purposes of cross-ownership that counting other media voices more accurately reflects the actual level of diversity and competition in the market," the Commission never offered any explanation of "why such diversity and competition should not also be reflected in its definition of voices for the local ownership rule."[20] The Court, therefore, held that the FCC could not "escape the requirements

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15 *Id.* at 1041, 1044.

16 *Id.* at 1044.

17 *Id.* at 1050-52.

18 *Fox*, 280 F.3d at 1053; *see also Sinclair*, 284 F.3d at 159.

19 *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 538 (D.C. Cir. 2002) ("*Fox Rehearing Decision*").

20 *Sinclair*, 284 F.3d at 164.

that its action not run counter to the evidence before it and that it provide a reasoned explanation for its action."[21]

In addition to its specific findings regarding Commission action on each of these ownership rules, the D.C. Circuit interpreted the language of Section 202(h) and found that the FCC had applied "too low a standard" in carrying out its biennial review obligations.[22] The Court stated that the biennial review mandate requires the Commission to affirmatively show that its current ownership rules are not merely "consonant with the public interest," but instead are required or needed to serve the public interest.[23]

While the FCC accepted the Court's decision to remand and vacate its rules, it took exception to the Court's reading of Section 202(h). In response to a petition for rehearing filed by the Commission in the *Fox* case, the Court agreed that a determination on the meaning of the phrase "necessary in the public interest" under Section 202(h) was not yet ripe for review and excised the paragraph from its original order that had resolved this definitional issue.[24] In so doing, however, the Court specifically declined to adopt the agency's argument that "necessary" should be interpreted as meaning merely "useful" or "appropriate." Instead, it left this issue open for resolution in later proceedings.[25] The Court's rehearing decision left intact all of the

[21] *Id.* at 162 (internal quotations omitted).

[22] *Fox*, 280 F.3d at 1050.

[23] *Id.*

[24] *Fox Rehearing Decision*, 293 F.3d 537.

[25] In several subsequent statements, Commissioner Martin has aligned his interpretation of the term "necessary" in Section 202(h) with the Court's original interpretation, stating his belief that "the term 'necessary' should be read in accordance with its plain meaning, to mean something closer to 'essential.'" *See Year 2000 Biennial Regulatory Review—Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services*, WT Docket No. 01-108 (adopted Aug. 8, 2002) (Separate Statement of Commissioner Martin); *see also Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract*

other important findings of the original decision concerning the deregulatory intent of the biennial review provision.

D. The New Omnibus Rulemaking Proceedings

In the wake of these significant setbacks in court, the FCC has commenced an omnibus rulemaking proceeding to reconsider all of the major media ownership restrictions.[26] The comprehensive review is intended to directly address the D.C. Circuit's calls for consistency in the FCC's media ownership regulation and its extensive criticism of the agency's legal analysis. In discussing these new proceedings, Chairman Powell has acknowledged that the Commission "has a very poor history of coming up with [the] persuasive justifications"[27] called for in the biennial review mandate. Accordingly, he has stated that the FCC needs to come up with "better, more sustainable approaches" to media ownership decisions[28] that are "going to survive judicial review."[29] The *Notice*, therefore, seeks comments on the legal standards embodied in Section 202(h).[30] A detailed analysis of these standards is set forth in the sections that follow.

(Continued . . .)

Prohibition, CS Docket 01-290 (adopted June 13, 2002) (Separate Statement of Commissioner Martin); *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, WT Docket No. 01-184 (adopted July 16, 2002) (Separate Statement of Commissioner Martin).

26 *See In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets*, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244 (rel. Sept. 23, 2002) ("*Notice*").

27 Jube Shiver Jr., *FCC to Rethink Media Rules*, Los Angeles Times (Feb. 21, 2002).

28 Stephen Labaton, *Impatient Court Presses the F.C.C. to Deregulate*, The New York Times (Feb. 25, 2002).

29 Ted Hearn, *Powell: FCC Treads Carefully on Rules*, Multichannel News (May 13, 2002).

30 *Notice*, at ¶ 18.

II. SECTION 202(h) ESTABLISHES A RIGOROUS DEREGULATORY PROGRAM

A. The Deregulatory Presumption

The *Fox* case established that Section 202(h) has a substantial deregulatory purpose. In particular, the D.C. Circuit specifically found that this provision "carries with it a presumption in favor of repealing or modifying the ownership rules."[31] This finding was reiterated in the *Sinclair* decision and was unchanged by the *Fox* rehearing decision.[32]

In finding that Section 202(h) establishes a strong deregulatory presumption, the Court vindicated the view previously expressed by Chairman Powell in his dissenting statement in the *1998 Biennial Review Order*:

> 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.[33]

In a strained attempt to recast this presumption as being totally devoid of substantive import, the FCC's counsel in the *Fox* case characterized it as "a presumption in favor of *re-examining* the agency's media ownership rules on a regular basis to determine if they continue to be in the public interest."[34] This, of course, ignores the fact that, under 202(h), the agency's duty

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31 *Fox,* at 1048.

32 *Sinclair,* 284 F.3d at 152; *see generally Fox Rehearing Decision,* 293 F.3d 537.

33 *1998 Biennial Review Order,* 15 FCC Rcd 11058 (Separate Statement of Commissioner Michael K. Powell).

34 Petition for Rehearing or Rehearing En Banc, *Fox Television Stations, Inc. v. FCC,* No. 00-1222, at 9 (D.C. Cir. filed Apr. 19, 2002) ("*FCC Rehearing Petition*") (emphasis in original).

to re-examine the rules is not a "presumption"—but an absolute legal requirement.[35] Moreover, as Chairman Powell indicated in his dissent from the 1998 Biennial Review Order, the deregulatory presumption has clear-cut substantive consequences, *i.e.*, we are to "start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity."[36]

B. Punctuality

In addition to establishing a presumption in favor of repeal, the D.C. Circuit in both *Fox* and *Sinclair* rejected the FCC practice of continually deferring decisions to re-examine the public interest merits of its rules as it continues to "observe" marketplace developments.[37] The Court concluded that this "wait-and-see approach cannot be squared with [the] statutory mandate [to act] promptly—that is, by revisiting the matter biennially—to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[38] Under this regime, the FCC is not free to simply retain its rules while it gathers evidence to determine (at some future date) whether its rules remain "necessary in the public interest." If the agency cannot present a sufficient basis to justify retention of its rules at the time of the biennial review, the rules must be eliminated or modified. Accordingly, it was with good reason that the Court likened the biennial review

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35 1996 Act, § 202(h) ("The Commission *shall* review its rules . . .").

36 *1998 Biennial Review Report*, 15 FCC Rcd 11058 (Separate Statement of Commissioner Michael K. Powell).

37 *Fox*, 280 F.3d at 1044; *Sinclair*, 284 F.3d at 164. For example, in the 1998 Biennial Review the Commission decided that "prudence dictates that we should monitor the impact of our recent decisions regarding local television ownership and any impact they may have on diversity and competition prior to relaxing the national reach cap." *1998 Biennial Review Order*, 15 FCC Rcd at 11072-73. The Commission may no longer take such a position.

38 *Fox*, 280 F.3d at 1042; *Sinclair*, 284 F.3d at 164.

mandate to "Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')."[39]

C. Consistency

As noted above, the D.C. Circuit also has held that Section 202(h) amplifies the Commission's general obligation to maintain reasonable consistency in both reasoning and outcome in its various ownership rulemaking determinations. Criticizing the FCC for its failures to account for inconsistencies between its biennial review decisions and prior findings, the Court acknowledged that "[t]he Commission may, of course, change its mind," but strongly admonished the agency concerning its affirmative duty to "explain why it is reasonable to do so."[40] In *Sinclair*, the Court similarly emphasized the need for consistency among the Commission's various ownership rules, noting that the FCC's failure to explain its decision to define "voices" differently under the duopoly rule and the one-to-a-market rule "underscored" the "deficiency of [its] explanation" as to why the duopoly rule should be retained.[41]

D. Reviewability

The Court also rejected the FCC's argument that its biennial review determinations should be shielded from judicial review.[42] In so doing, the Court acknowledged that "202(h) requires the Commission to undertake a significant task in a relatively short time, but [it did] not see how subjecting the result to judicial review makes the Commission's responsibility significantly more burdensome, let alone so formidable as to be improbable."[43] Accordingly, the

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39 *Fox*, 280 F.3d at 1044; *Sinclair*, 284 F.3d at 172.

40 *Fox*, 280 F.3d at 1044-45.

41 *Sinclair*, 284 F.3d at 164.

42 *Fox*, 280 F.3d at 1038-39.

43 *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

Court found that this argument did not provide a basis for overcoming the presumption that agency actions are reviewable in the context of the biennial review.[44]

While the statutory meaning of "necessity" in Section 202(h) is still open to debate, the legal conclusions set forth above provide a substantial analytical framework for the conduct of the current and future biennial review proceedings. If the Commission steers too far from the path laid out by the Court, it may again be forced to deal with adverse judicial determinations.

III. THE FOX COURT'S ORIGINAL INTERPRETATION OF THE STATUTORY PHRASE "NECESSARY IN THE PUBLIC INTEREST" IS CLEARLY CORRECT WHEN EXAMINED IN THE CONTEXT OF THE CONVENTIONAL TOOLS OF STATUTORY CONSTRUCTION

As noted, the *Fox* Rehearing Decision explicitly left open for further review the meaning of the statutory phrase, "necessary in the public interest." This question of statutory construction must be examined through application of the "traditional tools,[45] including "examination of the statute's text, legislative history, and structure . . . as well as its purpose."[46] As set forth below, application of these standards consistently supports the D.C. Circuit's original interpretation of the statutory language.

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44 In addition to its argument that subjecting biennial review determinations to judicial review would impose an overwhelming administrative burden, the FCC contended that its findings should be exempt from review because the biennial reports did not constitute "final agency action" and were "not ripe for" judicial review. The Court rejected both arguments. *See Fox*, 280 F.3d at 1037, 1039-40.

45 This analysis would proceed under the familiar two-prong test set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under *Chevron*, the initial inquiry is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842-43. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If, after exhausting the traditional tools of statutory construction, it is concluded that the statute is ambiguous, the Court will then proceed to "step 2" in which it will examine whether the agency has followed a "permissible construction" of the statute. *Id.* at 842-44. At this stage the court will focus on whether the agency has acted in a manner that is reasonable and that furthers the Congressional purpose behind the statute. *Rettig v. Pension Benefit Guarantee Corp.*, 744 F.2d 133, 151 (D.C. Cir. 1984).

46 *Natural Resources Defense Council, Inc. v. Daley*, 209 F.3d 747, 752-53 (D.C. Cir. 2000) (citations omitted).

A. Following the "Ordinary Meaning" of the Statutory Language

The first, and most basic, principle of statutory construction is to give a word its ordinary meaning.[47] The ordinary, dictionary meaning of "necessary," is something that is "logically unavoidable," "compulsory," or "required."[48] Thus, unless other tools of construction point to a contrary result, the FCC should follow the interpretation that "[s]omething is *necessary* if it is *required* or *indispensable* to achieve a certain result."[49]

B. Examining the Meaning of the Same Language Appearing Elsewhere in the Same Statute

Another general rule of statutory construction holds that agencies should read "identical words used in different parts of the same act to have the same meaning."[50] It is relevant here that, when construing the same language in other portions of the 1996 Act, courts have found that the word "necessary" means "that which is *required* to achieve a desired goal."[51]

In *AT&T v. Iowa Utilities Board*,[52] the Supreme Court was called on to interpret the provision of the 1996 Act that requires "the Commission [to] consider ... whether access to . . . network elements as are proprietary in nature is *necessary*."[53] The FCC had reasoned that access was necessary when there was a risk of "*any* increase in cost (or decrease in quality)" of telecommunications network services.[54] The Court rejected the Commission's broad reading of

47 *FDIC v. Meyer*, 410 U.S. 471, 476 (1994).

48 *Merriam-Webster's Collegiate Dictionary* 774 (10th ed. 2001).

49 *GTE v. FCC*, 205 F.3d 416, 422 (D.C. Cir. 2000) ("*GTE*").

50 *Gustafson*, 513 U.S. at 570.

51 *GTE* at 423; *see also AT&T v. Iowa Utilities Board*, 525 U.S. 366 (1999) (*hereinafter "Iowa Utilities"*).

52 *Iowa Utilities*, 525 U.S. 366.

53 1996 Act § 251(d)(2) (emphasis added).

54 *Iowa Utilities*, 525 U.S. at 389-90.

"necessary" and stated that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act."[55] The Court further reasoned that the FCC's expansive interpretation of the term "necessary" was "simply not in accord with the ordinary and fair meaning of th[at] term[]."[56]

Then, drawing on the Supreme Court's reasoning in *Iowa Utilities*, the D.C. Circuit interpreted the word "necessary" as it appears in yet another provision of the 1996 Act.[57] Once again, the judicial interpretation was in accord with the commonly understood meaning of this term.[58] Noting that the "statutory provision is, at first blush, fairly straightforward," the Court rejected the Commission's reading of "necessary" to mean merely "useful."[59] The D.C. Circuit stated that "[s]omething is necessary if it is *required* or *indispensable* to achieve a certain result."[60] The Court further explained:

> As is clear from the Court's judgment in *Iowa Utilities Board*, a statutory reference to 'necessary' must be construed in a fashion that is consistent with the ordinary and fair meaning of the word,

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55 *Id.* at 388.

56 *Id.* at 389-90.

57 In *GTE*, the D.C. Circuit interpreted the provision of the 1996 Act that requires LECs "to provide ... physical collocation of equipment *necessary* for interconnection or access to unbundled network elements at the premises of the local exchange carrier." 1996 Act § 251(c)(6) (emphasis added)

58 *GTE*, 205 F.3d at 422-24.

59 *GTE*, 205 F.3d at 422. While the GTE Court initially found the term "necessary" as used in Section 251(c)(6) to be ambiguous, the term is unambiguous in the present context. This is true for two distinct reasons. First, as discussed herein, *each* of the traditional "tools" of statutory construction support the same understanding of the term "necessary" in Section 202(h). Second, interpretation of this word in the context of the 1996 Act is no longer a matter of first impression. The D.C. Circuit already has determined that the use of term "necessary" in one section of the 1996 Act *must* be construed in a fashion that is consistent with the ordinary and fair meaning of the world, *i.e.*, so as to limit "necessary" to that which is "*required* to achieve a desired goal." *Id.* at 423. It must now be presumed that the identical word in another part of the same Act has the same meaning.

60 *Id.* (emphasis in original).

> *i.e.*, so as to limit "necessary" to that which is *required* to achieve a desired goal.[61]

Thus, the *Fox* court's original interpretation of the term "necessary" is strongly supported by the tenet that Congress intends a word repeated in a statute to carry the same meaning in each usage.[62]

While the Commission points to the broad interpretation of the term "necessary" as used in the original 1934 Communications Act, that legislation was enacted *six decades* prior to adoption of the statutory language we are now evaluating. Moreover, as explained in Section III(D), *infra*, the basic purpose of the 1934 Act was to endow the FCC with expansive *regulatory* powers, whereas the fundamental objective of the 1996 Act was very much the opposite—*i.e.*, to compel the agency to implement a rigorous *deregulatory* program.

C. Attributing Genuine Significance to Each Legislative Word and Phrase

In carrying out its biennial review duties, the Commission also must take into consideration the familiar principle of statutory construction that no provision of an act should be rendered superfluous or inoperative.[63] The FCC would be acting in contravention of this important principle if it were to construe Section 202(h) as allowing it to retain media ownership rules where they merely are found to be generally compatible with the public interest.

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61 *Id.* at 423 (emphasis added). Although some courts have interpreted the word "necessary" to mean nothing more than "necessary and proper" rather than "indispensable," these interpretations arise in the context of a *grant* of FCC authority, rather than in provisions aimed specifically at decreasing regulation like Section 202(h). *See, e.g.*, 47 U.S.C. § 201(b) (FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."); *id.* § 154(i) (Commission may "make such rules and regulations . . . as may be necessary."); *id.* § 303(r) (same).

62 *See, e.g.*, *Gustafson*, 513 U.S. at 570 ("Only last Term we adhered to the 'normal rule of statutory construction' that 'identical words used in different parts of the same act are intended to have the same meaning.'") (quoting *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)).

63 *See, e.g.*, *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (noting the "familiar principle of statutory interpretation which requires construction so that no provision is rendered inoperative or superfluous, void or insignificant.") (internal quotations omitted); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("In construing a statute we are obliged to give effect, if possible, to every word Congress used.").

As noted above, the FCC was vested with broad authority to promulgate rules that serve the public interest through the Communications Act of 1934.[64] In addition, the FCC already has an ongoing obligation under well-established principles of administrative law to reconsider its rules in light of new developments and to adjust or repeal those regulations that no longer serve the public interest.[65] If Section 202(h) simply required the Commission to review its rules under the same expansive standard that applies under the 1934 Act, the biennial review obligation would have no meaningful or substantive role. This problem can best, and most logically, be addressed by interpreting the provision as requiring more than mere "consistency" with the public interest.

Likewise, if the FCC were to read the biennial review provision to impose nothing more than a temporal requirement to review the ownership restrictions every two years, it would render a substantial portion of the language of Section 202(h) superfluous. Had this been Congress' objective, it could simply have instructed the agency to "review its rules biennially" without saying anything more. Thus, the Commission should give substantive meaning to Congress' very specific instruction in Section 202(h) for it to determine biennially whether the ownership rules are "necessary in the public interest" given current competitive marketplace conditions and to "repeal or modify any regulation it determines to be no longer in the public interest."

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64 *See, e.g., Office of Communication of the United Church of Christ v. FCC,* 707 F.2d 1413, 1423-24 (D.C. Cir. 1983) (noting FCC's "broad mandate" to adopt rules that serve the public interest).

65 Courts repeatedly have noted the FCC's general duty to "carefully monitor the effects of its regulations and make adjustments where circumstances so require." *ACLU v. FCC,* 823 F.2d 1554, 1563-65 (D.C. Cir. 1987)*; see also Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("It is settled law that an agency may be forced to reexamine its approach if a significant factual predicate of a prior decision has been removed" and "[it] . . . should stand ready to alter its rule if necessary to serve the public interest more fully."); *United Church of Christ,* 707 F.2d at 1423, 1425 (noting FCC's "responsibility" to "reevaluate its regulatory standards over time").

D. Giving Effect to the Congressionally Expressed Statutory Purpose

An examination of the "object and purpose" of an act is another important tool in "expounding a statute."[66] In this case, the deregulatory aim of the statute is clearly articulated in its preamble. This purpose is reinforced in Section 202(h), and further corroborated in the Act's legislative history.[67]

The Preamble to the 1996 Act states that the purpose of the statute is "to promote competition and *reduce regulation* in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[68] As the Supreme Court has recognized, the 1996 Act was an "unusually important legislative enactment" whose "primary purpose"—as "stated on the first of its 103 pages"—was to "reduce regulation."[69] Notably, this deregulatory purpose contrasts sharply with that stated in the Preamble of the 1934 Act, which is "to *provide for the regulation* of interstate and foreign communication by wire or radio. . . ."[70] It would be illogical, in the extreme, for the agency to interpret the operative provisions of these two sharply contrasting statutes as simply imposing identical, and thus essentially duplicative, obligations.

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66 *See Dole*, 494 U.S. at 35 (noting that analysis of the "object and purpose" of an act are important tools in "expounding a statute").

67 When addressing an express statutory limitation on agency authority, the courts are "mindful that Congress has acted to curtail" the agency's prerogatives. *Nat'l Rifle Ass'n v. Reno*, 216 F.3d 122, 132 (D.C. Cir. 2000), *cert. denied*, 533 U.S. 928 (2001); *see Independent Ins. Agents of Am., Inc. v. Board of Governors of Fed. Reserve Sys.*, 838 F.2d 627, 632 (2d Cir. 1988) ("Courts construing statutes enacted specifically to prohibit agency action ought to be especially careful not to allow dubious arguments advanced by the agency in behalf of its proffered construction to thwart congressional intent expressed with reasonable clarity, under the guise of deferring to agency expertise on matters of minimal ambiguity.").

68 1996 Act, Preamble (emphasis added); *see also Dole*, 494 U.S. at 36 (noting that "provision detailing Congress' purposes in enacting [a] statute" is a "particularly useful" legislative analysis tool).

69 *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

70 1934 Act, Preamble (emphasis added).

The Commission also should take into account the deregulatory objective stated in Section 202(h) itself. The provision specifically directs the FCC to review all of its ownership rules biennially "as part of its *regulatory reform* review."[71] Likewise, the statute's legislative history provides additional evidence of Congress' overarching desire to get rid of unneeded media ownership restrictions.[72] Noting that many of the Commission's broadcast rules date back to the 1940s and are based on outdated "scarcity" considerations, the House Committee Report states that substantial deregulation of the industry is a primary aim of the proposed legislation:

> To ensure the industry's ability to compete effectively in a multichannel media market Congress and the Commission must reform Federal policy and the current regulatory framework to reflect the new marketplace realities. To accomplish this goal, the Committee chooses to depart from the traditional notions of broadcast regulation and to rely more on competitive forces.[73]

These plainly stated deregulatory objectives add further support to the proposition that the Act directs the FCC to systematically weed out regulatory constraints that are no longer needed.

E. Respecting the Structure and Design of the Statute

It is also important to evaluate statutory language within the context of an act's overall structure and design.[74] Indeed, individual statutory provisions are often illuminated by a review of the statutory scheme, particularly when "only one of the permissible meanings [of a provision]

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71 1996 Act, §202(h) (emphasis added). In modern parlance, "regulatory reform" has commonly been used as a shorthand reference to an overall program of re-evaluating established governmental rules and weeding out those that are no longer needed. *See, e.g.,* Noll and Owen, The Political Economy of Deregulation, at 158-62 (1983) (discussing the prospects for "regulatory reform").

72 *See Natural Resources Defense Council,* 57 F.3d at 1127 (noting that in statutory analysis, reference to "pertinent legislative history" often sheds light on congressional intent).

73 H.R. Rep. No. 104-204, at 55 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 19.

74 *Chevron,* 467 U.S. at 859-62.

produces a substantive effect that is compatible with the rest of the law."[75] That is clearly the case here.

As the D.C. Circuit noted in the *Fox* opinion, the 1996 Act "set in motion a process to deregulate the structure of the broadcast and telecommunications industries."[76] It sought to accomplish this, first, by mandating a series of specific deregulatory actions that substantially reduced the restrictions imposed under the FCC's media ownership rules. Indeed, with one exception, each of the other provisions of Section 202 requires the FCC to either eliminate or relax an existing ownership regulation.[77] For example, Section 202(a) compels the Commission to eliminate all restrictions on the number of AM or FM radio stations that may be controlled by a single entity nationally, Section 202(b) requires substantial relaxation of the caps on radio station ownership at the local level, and Section 202(c) calls on the agency to relax limitations on the national audience reach that a single television station owner may have.[78] Then, as the *Fox* Court also observed, Congress instructed the agency in Section 202(h) to review each of its ownership rules every two years "in order continue the process of deregulation" begun by the other specific directives in Section 202.[79]

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75 *United Savings Ass'n v. Timbers of Inwood Forest Ass'n*, 484 U.S. 365, 371 (1988).

76 *Fox*, 280 F.3d 1033.

77 The only exception to this pattern is Section 202(g), which clarifies that Section 202 of the Act does not have any impact on the legality of local marketing agreements. 1996 Act, §202(g).

78 1996 Act, §§202(a), (b), (c); *see also id.*, §202(d) (relaxing the waiver policy for the one-to-a-market rule); §202(e) (modifying the definition of broadcast "networks" subject to the dual network rule); §202(f) (eliminating restrictions on broadcast network/cable cross-ownership). Other sections of the statute contain similar deregulatory instructions. Section 302(b)(1), for example, repealed the statute restricting telephone/cable cross-ownership. §302(b)(1).

79 *Fox*, 280 F.3d at 1033.

In addition, it is notable that Section 202(h) is designed as a one-way ratchet that can lead only to further deregulation. This provision instructs the FCC to "repeal or modify" any rule that "it determines to be no longer in the public interest." But it does not, in any circumstance, call upon the agency to adopt *additional* regulations.

* * *

Accordingly, application of each of these "traditional tools" of statutory interpretation strongly supports the D.C. Circuit's original interpretation of the phrase "necessary in the public interest" as it appears in Section 202(h).

IV. THE FCC IS NOT FREE TO REJECT THE CONGRESSIONALLY ESTABLISHED BIENNIAL REVIEW STANDARDS

A. A Higher Standard of Analysis for Rule Retention than for Initial Promulgation

Congress acted logically and reasonably in establishing a more rigorous test for the retention of a rule than for its promulgation. When the Commission adopts a new regulation, it necessarily must rely to a substantial degree on predictive judgments about the impact the rule will have on the marketplace and the public interest. In contrast, after the agency has had real-world operational experience with a rule over a period of time, it ordinarily will have a more concrete basis for evaluating its public interest benefits and detriments. It makes perfect sense, therefore, that Congress would require the FCC to take a harder look at its rules once the agency has had a chance to view the function of the rules in the marketplace.

In its Petition for Rehearing in *Fox*, however, the FCC argued that the Court's interpretation of the phrase "necessary in the public interest" under Section 202(h) "makes little sense" because it would, in effect, hold the Commission to a higher standard in deciding whether to retain a rule than in adopting the rule in the first place.[80] The agency further contended that this interpretation could have the following "odd result," which Congress surely could not have intended: the FCC could adopt a rule under the general public interest standard, then be forced to repeal it under the more stringent biennial review standard, and subsequently re-adopt the same rule.[81]

These arguments are inapposite. Regardless of the precise meaning of "necessary in the public interest," it is already clearly established that Section 202(h) imposes a higher burden for retention of a rule than for its initial adoption. As explained above, Section 202(h) carries with it a "presumption" in favor of repealing or modifying the ownership rules—obligating the FCC, in conducting a biennial review proceeding, to work from the assumption that the current rules must be either eliminated or substantially relaxed.[82] There is no similar "anti-regulatory" presumption that governs the initial enactment of FCC ownership rules.

In addition, the Commission is wildly unrealistic in postulating a scenario in which this difference in legal standards would lead to a mindless succession of rule adoptions, repeals, and re-adoptions. It should go without saying that any responsible agency would keep the biennial review standard in mind when promulgating new rules. Thus, when it adopts a new regulation, the FCC would be well advised to consider whether the rule would have a reasonable prospect of passing muster under the heightened standard that will be applied at the time of the next biennial review. Moreover, after a biennial review order is reversed in court, only the most reckless (and

80 *FCC Rehearing Petition*, at 8.

81 *Id.* at 8-9.

82 *See supra*, Section III.

adventurous) of agencies would even consider re-issuance of the same regulation pursuant to the same rationale.

B. A Requirement that the FCC Take Deregulatory Action in Response to a Finding that a Rule is No Longer "Necessary in the Public Interest"

The first duty imposed under the biennial review mandate is for the FCC to determine whether its rules are "*necessary* in the public interest."[83] But the statute requires more than a simple inquiry—it requires action in the form of repeal or modification of any rule that fails to meet the standard of necessity. This is true notwithstanding the fact that Section 202(h) states only that the FCC must repeal or modify any rule found "no longer in the public interest."

Construing Section 202(h) to allow retention of rules found to be merely consonant with the public interest would rob Congress' command that the FCC determine if a rule is "necessary" of any import. In addition, as discussed above, such a construction of the statute would run afoul of the established requirement that statutes be interpreted so as to attribute meaning to each phrase.[84] It would also result in a tremendous waste of administrative resources, because the Commission would be required to undertake a needless review and determination—something that Congress surely could not have intended. Moreover, construing the statute in such a fashion would require the FCC to utterly disregard the overarching deregulatory purpose of the 1996 Act in general and the explicitly deregulatory drive of Section 202(h) and the biennial review mandate in particular.[85]

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83 1996 Act, § 202(h) (emphasis added).

84 *See supra*, Section III.C.

85 *See supra*, Section III.D. So interpreting the statute would also require the Commission to feign ignorance of the fact that Section 202(h) states that the biennial review mandated thereunder is part of the overall "regulatory reform review" required by the 1996 Act. Allowing retention of a rule found to be no longer necessary would deprive the exercise of any act of "reform" whatsoever.

The review required by Section 202(h) is, as the statute states, "part of [the] regulatory reform review under section 11 of the Communications Act of 1934."[86] In that section, Congress commanded the FCC to undertake the same inquiry required by Section 202(h) and determine whether its regulations are "no longer necessary in the public interest."[87] Section 11 also requires specific action as a result of this inquiry, mandating that "[t]he Commission shall repeal or modify any regulation it determines to be no longer *necessary* in the public interest."[88] The explicit cross-reference to Section 11 makes plain Congress' intent that the two biennial review provisions be interpreted in the same fashion.[89]

But even had Congress failed to mention Section 11 in Section 202(h), the FCC would still not be free to interpret Section 202(h) in a vacuum, but would instead have to consider its meaning in relation to other provisions involving the biennial review process.[90] As the FCC itself recently recognized in the order adopting its new Equal Employment Opportunity rules, established legal precedent requires it to interpret a given statutory provision "as one component of a 'symmetrical and coherent regulatory scheme' and 'fit, if possible, all parts into an

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86 1996 Act, § 202(h).

87 47 U.S.C. § 161.

88 *Id.* (emphasis added).

89 Indeed, the FCC itself has previously recognized that Section 11 and Section 202(h) require the same inquiry. *See Section 257 Report to Congress*, 15 FCC Rcd 15376, 15440 (2000) (stating that Section 202(h) merely extends the Section 11 biennial review process to the Commission's broadcast ownership rules); *The 2000 Biennial Regulatory Review*, 16 FCC Rcd 1207, 1210 (2001) (stating that "Sections 202(11)(a)(1), 11(a)(2), and 202(h) require the Commission to review certain of its rules biennially and determine whether those rules are no longer necessary in the public interest as a result of competition").

90 2 Norman Singer, *Statutes and Statutory Construction* § 51.03, at 201-02 (2001) (hereinafter "*Sutherland Statutory Construction*") (explaining that statutes on the same subject matter are deemed to be *in para materia* and must be interpreted consistently).

harmonious whole.'"[91] The need for uniformity is greatest, and the likelihood that Congress intended inconsistency between two provisions on the same subject matter the least, where, as here, the provisions are passed at the same time.[92] Section 11 is clear on its face—any rule that is not necessary must be repealed or modified. Section 202(h) must be interpreted in the same fashion, and the FCC must (1) attribute meaning to the inquiry mandated under the statute, and (2) reject the "wooden and noncontextual interpretation" that would permit it to retain rules that are merely consonant with, although not necessary in, the public interest, in favor of an interpretation that makes sense of the statutory scheme.[93]

C. Effect of the Rule of "Necessity" on the Commission's Workload and Important Regulatory Objectives

While it is undeniable that the biennial review process imposes significant additional responsibilities on the Commission, this added burden is mainly the result of realities that are already in place and are inescapable: the existence of the biennial review process itself and the availability of judicial review. The sole issue that is open to debate—the meaning of the term "necessary"—has relatively little to do with the *amount of work* that must be completed to carry out the Congressional mandate. Indeed, unless the Commission was struggling to retain rules of marginal public interest utility, it is not clear that a strict rule of necessity generally would have

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91 *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, FCC 02-303, ¶ 27 (rel. Nov. 20, 2002) ("*EEO Order*") (quoting *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)); *see Gustafson*, 513 U.S. at 569; *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389 (1959).

92 *Sutherland Statutory Construction* § 51.03, at 237-39. Indeed, even when statutes are enacted separately but concern the same issue, "[e]xperience indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency." *Id.* § 51.01, at 174.

93 *EEO Order*, at ¶ 27 (citing *Alarm Industry Communications Committee v. FCC*, 131 F.3d 1066, 1068-69 (D.C. Cir. 1997) ("When the purported 'plain meaning' of a statute's word or phrase happens to render the statute senseless, we are encountering ambiguity rather than clarity.")).

any effect on workload.[94] In fact, where rules obviously are of negligible value, the existence of a stricter standard should actually expedite the agency's decision-making process.

<u>CONCLUSION</u>

In sum, Congress has established a rigorous biennial review program that includes a deregulatory presumption, insistence on punctuality and consistency, provision for judicial review, and a requirement that the FCC retain only those rules that are shown to be needed to achieve identified public interest objectives. Adherence to these guiding principles will assist the Commission to fashion a sustainable outcome in this proceeding.

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94 In addition, where there are no material marketplace changes between one biennial review and the next, the Commission may be able to rely, in substantial measure, on its initial analysis (assuming that the initial determination was adequately supported.) Thus, the whole process should become less burdensome as the years go by.

EXHIBIT 2

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The information related to the number of media outlets in Washington, D.C. and Burlington, Vermont/Plattsburgh, New York in the years 1960 and 2002 was gleaned from the following sources:

VIDEO:

- *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)*, Media Bureau Staff Research Paper (September 2002).
- *Broadcasting Cable Yearbook 2002-2003*, Broadcasting and Cable Publications (2002).
- *Television and Cable Factbook 2002*, Warren Communications News (2002).
- *CDBS Public Access*, Federal Communications Commission.
- The Washington Herald, available at <http://www.washherald.com> (visited Dec. 11, 2002).

AUDIO:

- *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)*, Media Bureau Staff Research Paper (September 2002).
- *Broadcasting Cable Yearbook 2002-2003*, Broadcasting and Cable Publications (2002).
- *Television and Cable Factbook 2002*, Warren Communications News (2002).
- *CDBS Public Access*, Federal Communications Commission.

PRINT MEDIA:

- *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)*, Media Bureau Staff Research Paper (September 2002).
- *US Newspaper Lists*, available at <http://www.usnpl.com> (visited Dec. 8, 2002).
- *Newspapers on Microfilm*, available at <http://dclibrary.org> (visited Dec. 8, 2002).
- *Vermont Living*, available at <http://www.vtliving.com/newspapers/> (visited Dec. 8, 2002).
- *Magazine and Wholesale Evolution*, The Periodical Book Association of America, Inc., available at <http://www.pbaa.net/pbaaweb/slide15.htm> (visited Dec. 11, 2002).

EXHIBIT 3

Statement on Media Ownership Rules

Bruce M. Owen

January 2, 2003

Statement on Media Ownership Rules

Bruce M. Owen[1]

On the occasion of the October 29, 2001 FCC Roundtable on Media Ownership Policies, I was invited by the FCC Staff to offer my views on the Commission's existing ownership policies.[2] I have now been asked by Fox, NBC/Telemundo, and Viacom to summarize my recommended approach to ownership policy issues specifically with respect to broadcasting.

I believe that media ownership concentration is best approached using the standard tools of economic analysis intended for such purposes. Analyzing the effects and measuring the extent of ownership concentration is a well-developed field of economic policy analysis, especially in the context of antitrust enforcement. Whether ownership concentration poses harm to competition or to consumers is precisely the question upon which the Commission should focus, and it is exactly the question upon which the antitrust laws and their enforcers do focus.

The modern approach to analysis of ownership concentration is illustrated by the framework set out in the *DOJ/FTC Merger Guidelines*. These *Guidelines*, while certainly not infallible, are widely respected by courts and commentators alike. The *Guidelines* describe methods by which an enforcement agency can assess the impact of a proposed transaction. Also, the *Guidelines* offer the private sector a rational basis to predict the likely reaction of an agency to a proposed merger or acquisition, thus reducing uncertainty and unnecessary transactions costs. In close cases, the *Guidelines* help to focus debate on the key factors affecting consumer welfare rather than on extraneous issues.

Mass media compete in many different product and geographic markets. Some of these markets are ordinary commercial markets for the sale of advertising, the purchase of programming, and (in the cases of multichannel video program distributors, certain internet service providers, and print media) the compilation of content packages and the provision of transmission services for sale to consumers. For ease of reference I will refer to the foregoing as "economic" markets. These markets are addressed in Section I below. The mass media also play an important role in the metaphoric "marketplace of ideas," which I discuss in Section II. I will bring the two types of markets together in Section III.

A very brief summary of my proposed approach to FCC media ownership policy is as follows: The most sensible way to consider the effects of ownership concentration in media economic markets is to use the *Merger Guidelines* approach. But if the Commission adopts this rational policy it will duplicate the work of the Antitrust Division, which would be a waste of public resources. The Commission also has monitored the effects of concentration in the marketplace of ideas. However, as a practical matter, enforcement of the Clayton Act in media economic markets will serve to prevent undue concentration in markets for ideas and information. As a result, there is no longer a rational basis for the Commission to regulate media ownership.

I.
Ownership issues in economic markets

The analytical tools of competition analysis, as used in antitrust enforcement, apply directly to the Commission's concentration concerns in media economic markets such as advertising and programming. The three key questions facing the Commission with respect to each of these markets are: Which sellers offer choices that customers find attractive? Are there enough such sellers to provide effective competition? Are there significant barriers to entry? These are the same issues addressed in the *Merger Guidelines*. Indeed, the antitrust agencies already routinely apply *Guidelines* analysis to proposed media transactions involving radio, television, newspapers, magazine and book publishers, online and other media. A very recent example is the challenge mounted by the Department of Justice to the proposed acquisition by EchoStar of DirecTV.[3]

The analytical approach of the *Guidelines* begins with a focus on consumers. Whether a proposed merger or acquisition is anticompetitive is determined in part by asking what alternatives are, or would be, available to customers in the event that prices increase or service deteriorates. These are fact questions. They must be addressed from the perspective of particular, defined customers who are users of the services of the firms that propose to merge and competing firms. This determination of relevant market(s) cannot be prejudged in today's complex and changing media industries by establishing arbitrary *a priori* boundaries such as the titles of subsections of the Code of Federal Regulations. Similarly, it makes no sense to define either markets or ownership standards *a priori* in terms of particular technologies, such as radio broadcasting, television broadcasting, cable transmission or newspaper publishing, unless such distinctions happen to coincide with accurate depictions of consumer demand characteristics. Neither technology nor CFR categories are based on or bear any useful relationship to customer behavior in media markets, as the Commission's own evidence amply demonstrates.[4]

The Commission's current ownership rules are based entirely on technology and other such *a priori* distinctions. These distinctions today lack any conceptual or empirical link to consumer harm from ownership concentration. In a business with such rapidly changing strategies and technologies, in which consumers have demonstrated their willingness to adopt new media, it makes no more sense to legislate market definitions in quasi-permanent rules than for King Canute to order away the ocean's waves. The Commission should abandon its present rules.

What should replace these rules? If the Commission adopted sound media ownership policies it would necessarily duplicate the work of the antitrust authorities. As the recent EchoStar matter demonstrates, when the Commission applies sound economic principles to the analysis of proposed acquisitions, it ends up with essentially the same result as the Department of Justice both in terms of analysis and in terms of standards (compare the DOJ complaint with the Commission's Hearing Order in the EchoStar matter.)[5] Clearly, such duplicative regulation is inefficient, a waste of the Commission's resources.

II.

The marketplace of ideas and information

> *And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously...to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?* —John Milton, Areopagitica[6] (1664)

The preceding section demonstrated that a rational policy approach to media ownership in economic markets requires the Commission to leave these enforcement issues to the antitrust agencies. I now turn to whether the Commission's traditional concern with competition in the marketplace of ideas and information, sometimes expressed as pursuit of "diversity," provides a sounder basis for the Commission to regulate media ownership.

The Commission does have a stronger basis for attending to the marketplace of ideas than to mass media economic markets. After all, while DOJ has vigorously enforced merger law with respect to media economic markets, it has not, in practice, addressed competition in the marketplace of ideas. Further, it is possible in principle (though as I argue below, unlikely) that a given transaction might raise marketplace of ideas issues despite the absence of threats to competition in the relevant economic markets. Therefore it is useful to develop a rigorous framework that the Commission could use to prevent ownership concentration from restricting competition in the marketplace of ideas.

The place to start is with the slippery concept of "diversity," which has many interpretations, as discussed in the Commission's NPRM at ¶33ff. I will focus on two of these interpretations: content diversity and outlet diversity.

Content diversity is not a reasonable goal for the Commission. If the Commission were to target media content that would be an *unnecessary* infringement on the First Amendment rights of broadcasters. It would also be *impractical.*

Mass media content is an impermissible target of government regulation, according to the Supreme Court's current interpretation of the First Amendment, except in certain narrow categories such as obscenity. Broadcasting is the only medium to which this interpretation does not apply. The inferior First Amendment status of broadcasting derives from a legal analysis in a 1943 Supreme Court opinion by Justice Frankfurter (and later confirmed in *Red Lion*).[7] The factual basis of the legal argument is spectrum scarcity.

The "scarcity doctrine" is and always has been a factual and economic absurdity. Economics is the science of scarcity. It teaches that spectrum is no scarcer than anything else used as an input by broadcasters. Spectrum is no scarcer than the land used to grow the trees that are made into newsprint. Anything that has a non-zero free market price is, by definition, scarce—there isn't enough to satisfy everyone's wants. The point simply is that spectrum is not scarce in any peculiar or special way—it is no more or less fixed in supply than land, iron ore or antenna sites. All these things are scarce, but all can be economized upon by using more of complementary inputs to produce any given output. Antenna height is a substitute for site altitude. Font size and leading is a substitute for newsprint, hence for trees and forests. Transmitter/receiver power and sophistication is a substitute for bandwidth. It was bad economics for Justice Frankfurter to have focused on spectrum scarcity as a special or unique aspect of broadcasting that justifies denying broadcasters equal protection under the First Amendment in 1943 and worse economics today.

Broadcast spectrum in particular is exactly as scarce as the Commission, through its own policies, has made it. Over the years the Commission has repeatedly restricted the frequencies available for broadcasting in order to serve other policy interests, thus limiting the diversity of programming available to viewers and listeners.[8] It is circular logic to hold that the Commission can regulate broadcast content because the Commission has chosen to restrict the spectrum available for broadcasting. Spectrum scarcity has never made sense as a *factual* basis for broadcast regulation. (These arguments are laid out in more detail in my book *The Internet Challenge to Television* (Harvard Univ. Press, 1999) at 57-62 and 79-83.)

Even if there had been spectrum scarcity at the time of *Red Lion*, technological developments have long since eliminated that scarcity. Almost twenty years ago the Supreme Court itself recognized the possibility "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 (1984)) at n. 11. The Commission's own Spectrum Task Force Report recently acknowledged that "[a]dvances in technology create the potential for systems to use spectrum more intensively and to be much more tolerant of interference than in the past," and even more significantly that " [i]n many bands, spectrum access is a more significant problem than physical scarcity of spectrum, in large part due to legacy command-and-control regulation that limits the ability of potential spectrum users to obtain such access."[9] The factual underpinning of the scarcity doctrine is no longer able to bear its weight. *Stare decisis* cannot make nonsense into fact. Therefore, for all these reasons, the inferior First Amendment status of broadcasters is an *unnecessary* burden on freedom of the press.

Further, content diversity is an *impractical* policy target because it cannot be defined or measured, and because there is no analytical linkage between ownership concentration and even abstract concepts of content diversity. In one theoretical model, for example, a monopolist of three channels is predicted to produce more content diversity than three competing broadcasters (See Bruce M. Owen and Steven S. Wildman, *Video Economics*, (Harvard Univ. Press 1993) at 64-100.) In contrast, even "complete" freedom of expression (defined as the availability of universal communication services at zero cost to all speakers and consumers), need not necessarily result in any particular degree of content diversity. Complete freedom in practice might produce no diversity of content. It is the tastes and demands of audiences, not the wishes of broadcasters, that determine the extent of content diversity in a competitive marketplace. I conclude that content diversity is not a sound policy objective for the Commission.

The Commission's traditional concerns with diversity make sense only if diversity is understood as synonymous with what it terms outlet diversity. The difficulty with establishing sound ownership policies and non-arbitrary rules with respect to outlet diversity has been the absence of a rational analytic framework for doing so. Although the "marketplace of ideas" is but a metaphor, I believe that outlet diversity issues can usefully be approached by taking the competition metaphor quite literally.

The goals of freedom of expression and an informed public are best served by ensuring that the media have incentives to respond to consumers' demand for ideas and by eliminating artificial or unnecessary barriers to the transmission of new ideas. Equivalently, the Commission should seek to minimize the price (and thereby maximize the output) of the communication and compilation services provided by media outlets. This can be achieved by pursuing economic competition and minimizing barriers to entry among communication media.

Just as competition, backstopped by antitrust policy, works to ensure that the interests of consumers are served in economic markets, competition is the best protection for consumer access to ideas and information. Media, competing against each other for audience "eyeballs" and consumer and advertiser dollars, will be led "as if by an invisible hand" to serve the public interest in promoting First Amendment values. None of the economic models of broadcast competition supports the notion that the government can reliably improve on competitive market outcomes.

If the Commission does undertake to promote the free flow of ideas through competition, it cannot do better at present than to utilize the rigorous analytical framework reflected in the *Merger Guidelines*. That framework is aimed at preserving competition by preventing even incipient threats to consumer welfare from ownership concentration. The Commission itself can apply *Guidelines* principles to the analysis of competition in the marketplace of ideas. As with economic markets, the keys are to identify the outlets for ideas to which a particular group of consumers can readily turn in the event its current supplier(s) raise price, lower quality or otherwise prove unsatisfactory, and to assess ease of entry by new outlets. Building on these facts, the Commission could determine whether a proposed merger or acquisition would unduly reduce competition. Of course, as with any analysis of competition, it is necessary to take account of the particular facts and circumstances in the market.

Market definition is the first step in the competitive analysis. What alternatives do consumers have if they are faced with increased prices or reduced quality in the media used to convey ideas? As with economic markets, which alternative outlets should "count" is largely a fact question derived from analysis of consumer demand and entry conditions. It cannot be prejudged based on the technology or format of a given medium, especially in light of the dynamism of today's media markets and technologies, for the reasons given in the preceding section.

A key distinction between most economic markets and the marketplace of ideas, however, lies in the measurement of market shares. The Commission would commit a serious error if it attributed shares in the marketplace of ideas according to the current revenue or audience shares of individual outlets. The measurement of market shares must always reflect the underlying theory according to which increased concentration may bring harm to consumers. Thus, in economic markets, competing firms' shares of revenues in the relevant market often have great significance in understanding the likely effect of a proposed merger on customers. This is so because revenue market shares influence pricing incentives.

In the marketplace of ideas, however, what matters is the number of alternative information outlets available to consumers, not the current popularity, much less the technology of transmission, of the ideas communicated by each outlet. Each source of ideas available to a given consumer is equally significant from a First Amendment perspective. The rational way to measure the "share" of each source of ideas available to a given set of consumers, therefore, is to give each source equal weight. It is availability and not usage of alternatives that should count, because it makes no sense to view the Commission's role as regulating the popularity, as opposed to the availability to consumers, of ideas and information. It is unpopular new ideas that may be of the greatest importance to the future. Such unpopular ideas are the essence of diversity in the marketplace of ideas. To discount media that are available to all but that garner small audiences because consumers prefer other content would understate the level of diversity from the perspective of any coherent public policy theory of the *purpose* of promoting diversity. It would be remarkable indeed for the Commission to adopt an ownership concentration metric that implies, as a social ideal, that all ideas should be equally popular.

Moreover, unlike economic markets, the usage of particular media, technologies or channels has no incentive effect on media owners when it comes to possible suppression of ideas. The *Guidelines* (at §1.41 and n. 15) specifically contemplate the possibility that, in circumstances where current revenue market shares are misleading indicators of competitive significance, equal shares should be imputed to each competitor.

There are few politically or socially significant ideas that can be expressed only through a particular medium. While the effectiveness of each medium may vary from one idea to another, the key is that ideas, once released to the public, can no longer be suppressed or controlled by government or commercial interests. The truth of this assertion is reinforced by the great importance of interpersonal communication with friends, family and co-workers, and the role of opinion leaders in the diffusion and acceptance of ideas. It makes no sense to say that a particular media outlet that has a large audience controls access to that audience, unless members of that audience are inaccessible to other media. As the evidence in this proceeding shows, audiences are accessible to many media and many media are accessible to audiences. In short, the audience of a media outlet is unrelated to that outlet's significance in the marketplace of ideas. Every outlet available to the community has equal potential as a source of ideas.

The preceding important point can be made in a somewhat different way. Imagine that there are fifty independent media outlets serving a given community. Each outlet chooses the ideas and information that it will convey, based on a desire to maximize profit given advertiser and subscriber demands. Some outlets will have larger audiences and revenues than others, based on competitive interactions. The outlets with the largest audiences will not necessarily be the most profitable, because some niche outlets serving up relatively unpopular ideas to minority tastes may face less intense competition than those outlets seeking mass audiences. (By "unpopular" I mean simply that the idea or outlet attracts small audiences.) However the competitive process works itself out, the accessibility of the community to new and therefore by definition initially unpopular ideas clearly is a function of how many outlets there are, not on how many outlets currently have large audiences. Indeed, new ideas are far more likely to be aired at first by the media with *smaller* audiences. Once a new idea is available to the community, either directly through each consumer's access to an unpopular outlet or indirectly through interpersonal communication, its diffusion cannot be prevented whether or not the idea is adopted by more popular media.

It is reasonable to ask whether "ideas" may not be too broad a definition of the relevant market. Ideas or information about what? It is clear upon reflection that any taxonomy of ideas and information would be arbitrary from a competition perspective.

By *arbitrary* I mean that there is no principled basis for a taxonomy of ideas in this context. Even if there were, there is nothing to prevent a new idea from arising in one category and yet having important or even revolutionary implications for other categories. The Commission wisely does not attempt to define its policies with respect to particular categories of ideas—with one exception. The exception is the Commission's longstanding preoccupation with local content.

In its most basic historical decisions regarding the allocation of broadcast spectrum, the Commission expressly sacrificed consumer breadth of choice in order to promote local ownership and "therefore" local content. It turns out, of course, that local ownership, while it *permits* local content, does not often *result* in local content.

The Commission's preoccupation with localism is difficult to explain or to justify. Why should the government seek to promote local content as opposed to, and especially at the expense of, any other category of ideas? One can readily imagine categories of ideas more central to the political, social, educational, aesthetic or spiritual lives of Americans. Further, to fasten on any category of ideas readily runs afoul of First Amendment values. In short, a focus on local content or local outlets appears to lack a coherent policy basis.

The same is true, of course, of the Commission's sometime preoccupation with news and public affairs, as distinct from entertainment programming. This makes even less sense than localism. First, broadcast news *is* entertainment—it has to be, at least in part, in order to attract audiences that can be sold to advertisers. One need look no further than this to understand what "stories" are "newsworthy." Second, surely some of the most effective of media vehicles for the communication of ideas are classified as entertainment. One could reasonably argue that a given consumer is more likely to be exposed to a controversial new idea by a talk radio show or an Internet newsgroup than by either network or local television news.

I conclude that independently-owned outlets for, or sources of, ideas and information generally should each be counted equally as separate sellers in the marketplace of ideas, with respect to the consumers whom they can reach (or the consumers who can reach them), without regard to the classification or popularity of their current content. If the Commission wishes to continue to emphasize local content (notwithstanding the apparent lack of a rational basis for doing so), then the sellers in the relevant market include all independently-owned outlets for or sources of local ideas and information, again without regard to the classification or popularity of their current content.

III.

Competition in economic markets will protect competition in the marketplace of ideas

As a practical matter competition in "economic" media markets, backed by effective DOJ enforcement of the Clayton Act, likely will be sufficient to ensure competition in the marketplace of ideas. There are three reasons for this. First, markets for ideas are much broader than corresponding economic markets. DOJ, for example, has traditionally focused on extremely narrow advertising markets, stopping threats to economic competition long before consolidation poses a threat to competition in the marketplace of ideas. Second, relevant markets for ideas are less concentrated than narrowly-defined economic markets served by given outlets because of the way that shares are measured. Third, entry in the marketplace of ideas is far easier than in economic markets because ideas (especially unpopular ones!) can be introduced at much smaller scales of operation.

For these reasons it is not correct to view the Commission's responsibility to protect First Amendment values as requiring a lower tolerance for concentration than that required by antitrust principles. Indeed, the analysis suggests that the Commission could safely (from a marketplace of ideas perspective) adopt a more tolerant standard, especially if it was concerned about impeding technological progress or handicapping licensees in their competition with non-licensees, and thereby harming consumers.

Merger enforcement in the media has tended to focus on rather narrow advertising markets. DOJ in recent years has chosen to exclude television and newspaper advertising as alternatives to radio when considering advertising market definition in radio station mergers. It has similarly rejected television and radio advertising as alternatives for newspaper advertisers when considering newspaper mergers. In the EchoStar matter, both DOJ and the Commission identified relevant markets for MVPD services, excluding broadcast television and other media as substitutes for the services provided to consumers by DirecTV and EchoStar. My point is not to endorse these market definitions as being factually accurate, but simply to observe that relevant antitrust markets in the media have traditionally been defined narrowly by the antitrust enforcement agencies, excluding from consideration outlets that surely are important competing sources of ideas and information.

The significance of the preceding point lies in the fact that relevant markets for ideas are likely much broader than corresponding economic markets as defined by the antitrust agencies. The hypothetical monopolist paradigm used to define relevant economic markets based on consumer response to a "small" price increase cannot be applied easily to the marketplace of ideas because it is difficult to identify the relevant prices. Even if the paradigm could be applied, the hypothetical monopolist test is too demanding in the context of ideas. What really matters with ideas from a political perspective is whether they can be suppressed. But given the importance of interpersonal communication, it is extremely difficult to suppress ideas—they can "leak out" even through small or economically minor media outlets. That most consumers form opinions based on information derived from mass media through the intermediation of others, rather than directly, has been a central tenet of mass media research for more than half a century.[10]

A relevant question, therefore, is whether alternative sources are or would be available if the media identified as being "in the market" were to suppress an idea or class of ideas. This test would inevitably produce a broader market than the traditional economic market. While DOJ might exclude, say, newspaper advertising from the relevant economic market in its analysis of a local radio station merger, it would make no sense to say a hypothetical monopolist of all radio stations could succeed in depriving consumers of some idea or information.[11] All outlets, regardless of their technology, would have to be included in the hypothetical monopoly in order to suppress an idea. As noted above, each outlet that can reach a given audience has the capacity to make any given idea available to that audience, regardless of the outlet's popularity.

Even if the foregoing argument is rejected, markets for ideas are much less concentrated than corresponding relevant economic markets because of the way that their respective concentration should be measured. Firms with large revenue shares count heavily toward concentration in economic markets. In markets for ideas, each firm is just one more source, and should count equally. The smallest level of concentration that could exist among a given number of firms is, by definition, the level associated with an equal market share for each firm.

Finally, entry often is easier into the marketplace of ideas than into the associated economic markets. In many advertising and other economic media markets the minimum scale at which an outlet is viable is not trivially small. Even the weakest low power TV or AM radio station needs a transmitter and an antenna. But politically, socially or otherwise significant information can enter the marketplace of ideas through a single web site, newsgroup or chat room and be disseminated extremely widely among the community.

It follows from the preceding argument that antitrust merger enforcement in economic markets for advertising and other media services will tend to stop ownership concentration long before it becomes a threat to competition in the broader marketplace of ideas. Moreover, even if the Commission believed, erroneously, that the popularity of a given medium should be given weight in assessing competition in the marketplace of ideas, antitrust enforcement already accomplishes this. Outlets with large advertising or revenue market shares are very likely to be the most popular media. If the Commission sought to weight media by their popularity, it would once again end up duplicating the work of antitrust enforcers.

IV.
Conclusion

If the Commission sought to adopt ownership rules in order to protect advertisers or program vendors from the market power consequences of excessive media ownership concentration, it could not do better than to adopt the conceptual framework of modern industrial organization economics. This framework is imbedded in the *DOJ/FTC Merger Guidelines*, and it is already employed by the antitrust agencies in their scrutiny of media mergers. Thus, if the Commission adopted the most rational available basis for its media ownership rules, it would simply duplicate the work already performed by DOJ. This obviously would be wasteful of public and private resources.

The Commission has a better claim to adopt ownership rules in order to protect consumers from the threat of ideas being suppressed through the exercise of power in the marketplace of ideas. The *Guidelines* framework also can be applied effectively to this problem. It becomes apparent when that is done that concentration among the sources of or outlets for ideas and information available to a given audience will necessarily be less than concentration in the corresponding markets for advertising or programming. Therefore, merger review of relevant economic markets conducted by the antitrust agencies will ensure even greater competition in the marketplace of ideas. Given this relationship, the Commission lacks a basis to adopt ownership rules on either economic or diversity grounds.

Bruce M. Owen

January 2, 2003

Endnotes

1 My curriculum vitae is appended.

2 http://www.fcc.gov/ownership/roundtable.html; http://www.fcc.gov/realaudio/tr102901.pdf (Transcript of FCC Roundtable on Media Ownership Policies - 10/29/01).

3 *United States, et al. v. EchoStar Communications*, et al., Case Number 1:02CV02138 DDC *Complaint* filed October 31, 2002. http://www.usdoj.gov/atr/cases/f200400/200409.htm

4 http://www.fcc.gov/ownership/studies.html (FCC studies in this proceeding)

5 *In the Matter of Application of EchoStar Communications Corporation,* (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee) HEARING DESIGNATION ORDER, CS Docket No. 01-348 FCC 02-284 Released: October 18, 2002. http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-284A1.pdf

6 John Milton, *Areopagitica: A Speech For The Liberty Of Unlicensed Printing To The Parliament Of England* (1664)) http://www.uoregon.edu/~rbear/areopagitica.html

7 *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943) http://caselaw.lp.findlaw.com/cgi-bin/219. *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367 (1969) http://laws.findlaw.com/us/395/367.html.

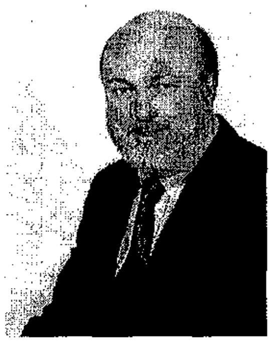
8 The Commission restricted diversity, ostensibly to serve the cause of localism, in *Amendment of Section 3.606 of the Commission's Rules and Regulations; Amendment of the Commission's Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service; Utilization of Frequencies in the Band 470 to 890 MCS for Television Broadcasting, Sixth Report and Order,*

Docket No. 8736, 41 F.C.C. 148, 1 RR 91:559 (1952). The Commission later declined to "deintermix" VHF and UHF frequency assignments in local TV markets, perpetuating artificial scarcity at the local and national level. Similarly, the Commission delayed the use of digital broadcasting methods, thus denying viewers the benefits of increased competition and diversity through digital compression technology. Through its distant signal importation and anti-siphoning rules, the Commission delayed for years the increased competition and diversity now provided by cable networks.

9 FCC Spectrum Task Force Report, ET Docket No. 02- 135, November 2002 at 7. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-228542A1.pdf

10 A summary of Katz and Lazarsfeld's famous two-step mass media diffusion process may be found at http://www.cultsock.ndirect.co.uk/MUHome/cshtml/media/kl.html

11 I do not mean to suggest that the DOJ staff is correct, as a technical matter, in excluding newspaper advertising from the relevant market for radio mergers, for there is much evidence to the contrary.



CURRICULUM VITÆ

Bruce M. Owen

OFFICE ADDRESS	Economists Incorporated 1200 New Hampshire Avenue, N.W, Suite 400, Washington, D.C.20036 Direct line and voice mail: 202 833-5224 FAX 202 296-7138 • e-mail: owen.b@ei.com bmowen@stanford.edu
BACKGROUND	Born 1943, Worcester, Massachusetts • Attended public schools in Millbury, Massachusetts • Married 1965 to the former Josetta Knopf • Two children: Peter 1969 and Bradford 1974.
EDUCATION	B.A.Williams College 1965. Ph.D.Stanford University 1970.
PRESENT POSITION (1 MARCH 2003)	Gordon Cain senior fellow, Stanford Institute for Economic Policy Research and, by courtesy, professor of economics, Stanford University 2003-; special consultant, Economists Incorporated 2003-.
PREVIOUS EXPERIENCE	President and co-founder, Economists Incorporated 1981-2002 • Visiting professor of economics, Stanford in Washington, 1989-2002 • Chief economist, Antitrust Division, United States Department of Justice 1979-1981 • Associate professor of business and law, Duke University 1978-1980, adjunct professor of public policy, Duke University 1981-88 • Assistant professor of economics Stanford University 1973-1978 • Chief economist, White House Office of Telecommunications Policy 1971-1972.
CURRENT MEMBERSHIPS AND AFFILIATIONS	American Economic Association • Econometric Society • American Law and Economics Association • National Economists Club • American Bar Association (Associate).

FELLOWSHIPS

Merit Scholar 1961-65; Woodrow Wilson Fellow 1966; National Defense Education Act Title IV Fellow 1966-69 Brookings Institution Economic Policy Fellow 1970-1971; Hoover Institution National Fellow 1974-1975; Aspen Institute for Humanistic Studies Fellow and chairman, Task Force on the Future of the Postal Service 1978-79

RECENT PROFESSIONAL ACTIVITIES

Editorial Board, referee, Journal of Media Economics, 1990-present • Invited lecture, Pontificia Universidad Católica de Chile, Santiago, 1999 • Invited lecture, American Enterprise Institute, Washington, 1999 • Referee, National Academy of Sciences-National Research Council, 1999 • Invited lectures, Fordham Univ.Business School, Yale Univ.School of Management, 2000 • Referee, Journal of Industrial Economics, 2001-02 • Referee, Review of Economics and Statistics, 2001 • Invited paper, AEI-Brookings Jt.Center Conference on Broadband, October 2001 • Panelist, Conference on Digital TV, American Enterprise Institute, October 2001 • Panelist, FCC Roundtable on Media Ownership Policies, October 2001 • Invited panelist, antitrust in the sports industry, Antitrust Division, USDOJ 2002 • Seminar on economic analysis of law, Stanford in Washington, 1989-2002.

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Consulting (partial)

AARP
ABC
ACF Industries
Aerojet Technologies
Airline Reporting Corp
Alcoa
Alliant Technologies
Alpo
American Airlines
Amer.Horse Show Assoc.
America Online
Arbitron
ARCO
Asbury Park Press
ASCAP
AT&T
AT&T Cable
AT&T Wireless
Atlas Copco
Baker International
BASF
Bayer
Bellcore
Bertelsmann
Broadcast Music Inc.
Boots Pharmaceuticals
Bowater
Brinks
Bristol Myers Squibb
British Oxygen Corp
British Steel
Brown & Williamson
Brunswick Corp
Buckeye Pipeline
Burlington Industries
Cablevision
Cadbury Schweppes
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Clear Communications
CNN
Coca Cola
Coca Cola Enterprises
Colgate Palmolive
Comcast
Consolidated Edison
Continental Airlines
Control Data Corp
Coopers & Lybrand
Coors
Cox Broadcasting
Deloitte Touche
DeVry
Disney
Dresser Industries
Eaton
Educational Testing Service
Eli Lilly
Emhart
Englehard
Ernst & Young
ESPN
Ex-Cello Corp
Exxon Chemical
Federal Express

Fox
Freedom Communications
Gannett
Gatx
General Motors
General Signal
Gemstar
Georgia Pacific
Goodyear
Gray Line
Group W
Grumman
Guardian Industries
Hachette
Hallmark
Hanna
Hillenbran
Hill-Rom
Hiram Walker
Honeywell
Hughes Communications
IBM
Ingersoll Rand
Int'l Hockey League
Iowa Beef
Itel
Johns Mansville
J.Ray McDermott
J.R.Simplot
Jenny Craig
Kansas Power & Light
Kendall
Kikkoman
Knight Ridder
Lawyers Title
Liberty Media
LTV
Lubrizol Corp.
MCA
MCI
Merck
Minebea
MPAA
MTV
National AssocBroadcasters
National Basketball Assoc.
National Football League
National Hockey League
National Cable TelecomAssoc
NBC
NEPA
News Corp.
New Skies
New York Power Authority
New York Times
Nintendo
Newspaper Assocof Amer.
North American Phillips
Northwest Airlines
Optel
Optus
Orion
Owens Corning
Pacific Telesis
Pan Am
Panamsat
Paramount

PBS
Peat Marwick
PECO
Pfizer
Proctor & Gamble
Purolator
Quaker Oats
QVC
Reliance Electric
RIAA
SBC
Sea Land
Sealy
Simmons
SKF
Spanish Int'l Network
Sprint
Square D
Tarmac
Telstra
Texas Utilities
Times Mirror
Todd Shipyards
TRW
Turner Broadcasting
TV Guide
TWA
Union Carbide
United Airlines
Universal Leaf
US Brands
US Brewers' Assoc.
Viacom
Washington Post
Western Fuels
Westinghouse
Worldcom
Yale Materials Handling Corp.

Law Firms:

Akin Gump Strauss Hauer & Feld
Arendt Fox Kintner Plotkin & Kahn
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Carrington Coleman Sloman & Blumenthal
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Collier Shannon & Rill
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Crowell & Moring
Davis Graham & Stubbs
Davis Polk & Wardwell
Dickstein Shapiro Morin & Oshinsky
Dow, Lohnes & Albertson
Dykema Gossett
Elworthy
Fenwick & West
Foley & Lardner
Fried Frank Harris Shriver & Jacobson
Hale & Dorr
Hogan & Hartson
Hopkins & Sutter
Hughes Hubbard & Reed
Jenner & Block
Jones Day Reavis & Pogue
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King & Spalding
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Mayer Brown & Platt
Milbank Tweed Hadley & McCloy
Mintz Levin Cohn, Ferris, Glovsky and Popeo
Morrison & Foerster
Mudge Rose Guthrie Alexander & Ferdon
Nixon Hargraves Devans & Doyle
O'Melveny & Myers
Paul Weiss Rifkind Wharton and Garrison
Pillsbury Madison & Sutro
Piper & Marbury
Proskauer Rose
Reid & Priest
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Steptoe & Johnson
Squire Sanders & Dempsey
Sutherland Asbill & Brennan
Thompson Hine & Flory
Vinson & Elkins
Wachtell Lipton Rosen & Katz
Weil Gotshal & Manges
Wiley Rein & Fielding
Williams & Connelly
Willkie Farr & Gallagher
Wilmer Cutler & Pickering
Winthrop Stimson Putnam & Roberts

Government entities

Antitrust Division, USDOJ
CalifAttorney General
CalifPub.Util.Commission
City of San Diego
Federal Communications Commission
Federal Trade Commission
Government of Argentina
Government of Jamaica
Government of Mexico
Government of Peru
Sacramento Cable Commission
USAID
World Bank