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May 14, 2003

TO: Marlene H. Dortch, Secretary
Office of Secretary
Federal Communications Commissions

FROM: Betty Jo Toccoli

RE: Ex Parte Presentation in:
2002 Biennial Regulatory Review of Broadcast Ownership Rules
MB Dkt. No. 02-277; FCC 02-249
- and –
NPRM as to Cross-Ownership of Broadcast Stations and Newspapers
NM Dkt. No. 01-235; FCC 01-262

CSBA Means Business for Small Business.

Dear Madame Secretary:

We have submitted ex parte written presentations to the five Commissioners of the Federal Communications Commission in connection with the above referenced proceedings, and we include herewith four copies of these presentations for Commission records. Thank you very much for filing these presentations.

Please do not hesitate to contact me at (310) 642-0836 if you have any questions or require additional information.

Sincerely,

Betty Jo Toccoli
President

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FIRST CLASS MAIL

The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 12th Street, S.W.
Room 8-B201
Washington, D.C. 20554

CSBA Means Business for Small Business.

Re: *Ex Parte* Presentation in a Non-Restricted Proceeding Initial Regulatory Flexibility Analysis for 2002 Biennial Review: Review of FCC Broadcast Ownership Rules (MB Dkt. No. 02-277)

Dear Mr. Chairman:

We submit this comment letter regarding the Commission's third biennial review of its broadcast ownership rules pursuant to section 202 of the Telecommunications Act of 1996. A notice of proposed rulemaking on the matter is set forth at 67 Fed. Reg. 65751 (Oct. 28, 2002). A related notice of proposed rulemaking, as to the newspaper-broadcast cross-ownership rule and related waiver policies, is set forth at 66 Fed. Reg. 50991 (Oct. 5, 2001). In particular, we direct our comments to the analyses prepared in these documents pursuant to the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996.

Specifically, both of these notices of proposed rulemaking contain analyses denominated "Initial Regulatory Flexibility Analyses" (or "IRFA"). 67 Fed. Reg. at 65773; 66 Fed. Reg. at 50999. However, for the reasons set forth in the April 9, 2003, letter in this rulemaking docket from the Honorable Thomas M. Sullivan, Chief Counsel for Advocacy for the U.S. Small Business Administration, the IRFA and any subsequent regulatory flexibility analyses based thereon are defective.

Primarily, as Chief Counsel Sullivan explains, the IRFA is not adequate because it is not based on a notice of proposed rulemaking that proposes any specific rules. Indeed, the IRFA explains that, "The ownership

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rules in their current form ... may need revision to ensure that they accurately reflect current media marketplace conditions. The goal of this proceeding is to solicit comment on the modification of the subject policies and rules." 67 Fed. Reg. at 65773. Nowhere, however, does the Notice of Proposed Rulemaking explain at any place what changes to these joint ownership policies and rules the Commission is actually proposing. The Administrative Procedure Act also requires an agency to specify the proposals it is making. *See, e.g., Small Refiner Lead Phase-Down Task Force v. U.S. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("the EPA must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.").

The purpose of the Regulatory Flexibility Act is to ensure that small businesses not only learn that there may be regulatory changes that may affect them, but that an agency set forth its proposals in a sufficiently concrete way that the proposing agency, the SBA Office of Advocacy, and the affected small entities in the regulated community can ascertain whether the proposed rule has a "significant impact on a substantial number of small entities," 5 U.S.C. § 605(b); and, if so, through a notice and comment based process, the proposing agency can thereupon identify the projected adverse impacts of the proposed rules on small entities and then seek to ascertain whether agency objectives can reasonably achieved with less impact on small businesses. 5 U.S.C. §§ 603-604.

The RFA regime is detailed, and it needs to be based on an agency proposal that contains a sufficient quantum of detail to allow the analyses the RFA requires to be undertaken. None of the detailed analyses required under the RFA can be conducted if no concrete agency proposal exists to subject to that Act's substantive analytical requirements. Indeed, on this docket, it is not surprising that the Commission, in its IRFA, was not able to identify any particular adverse impacts on small businesses from the proposed rulemaking as it stands. *See* 67 Fed. Reg. at 75773. However, such minimal and vague analyses are not sufficient to comply with the RFA, and they do not amount to reasoned decision-making more generally.

More specifically, the Commission's uninformative conclusion about whether its amorphous proposal has any impact on small entities does not mean that, if, for instance, the Commission modifies or repeals its broadcast-newspaper cross-ownership rule, then such a modification or repeal would not have a significant economic impact on many of 8,000-plus small daily newspaper publishers in this country, *see* 67 Fed. Reg. at 65775 that might confront the entry of large TV and media conglomerates into their respective

local newspaper markets.[1] *See, e.g., Southern Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1436 (M.D. Fla. 1998) (invalidating final regulatory flexibility analysis that was based on an agency's inadequate consideration of the impacts of a proposed rule).

As Chief Counsel Sullivan explained in his April 9, 2003, letter, "This style of rulemaking is very costly to the telecommunications industry. By issuing an NPRM that lacks specific proposals, the FCC creates uncertainty in the industry, resulting in thousands of comments that, at best, can only speculate as to what action the FCC may take and the potential impacts." Further, it is far from the first time that the FCC has pursued this flawed and illegal regulatory approach. Small businesses should not have to learn what the Commission is planning to propose (or the deals it may be brokering between the mega-media conglomerates) from stories in *The New York Times* (*see, e.g.,* "Give-and-Take F.C.C. Aims to Redraw Media Map," *The New York Times (Sunday ed.)* (May 11, 2003), Section 3, at 1, or *The Washington Post* (*see, e.g.,* "A New Era for Media Firms?: Public, Private Interests Clash as Revision of Ownership Rules Nears," *The Washington Post*, (May 13, 2003), at E1.

Accordingly, as did the SBA Chief Counsel for Advocacy, we would request that the Commission issue a Further Notice of Proposed Rulemaking containing the specifics of any amendments to the cross-ownership rules and policies the Commission might actually decide to entertain. The specifics contained in such a further notice could then be used to develop a supplemental IRFA upon which a reasoned Regulatory Flexibility Act proceeding could be based.

In conclusion, Congress strengthened the RFA in 1996 (including by providing judicial review provisions) out of concern that agencies were doing no more than paying "lip service" to its important requirements. "Many small business owners believe that agencies have given lip service at best to RFA, and small entities have [therefore] been denied legal recourse to enforce the Act's requirements." *See* 142 Cong. Rec. S3242, S3245 (daily ed., Mar. 29, 1996) (Small Business Regulation Enforcement and Fairness Act-Joint Managers' Statement of Legislative History and Congressional Intent. The Commission has a duty to the many thousands of small entities subject to its web of cross-ownership regimes to conduct a full and fair regulatory flexibility analysis, and it ignores these statutory requirements at the peril of having

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[1] We also do not understand why the Commission's decision to change the composition of local media markets might not have adverse economic impacts on small newspapers that publish less frequently than daily.

enforcement of its rule stayed. *See Northwest Mining Ass'n v. Babbitt*, 5 F. Supp.2d 9, 15 (D.D.C. 1998); *Southern Offshore Fishing Ass'n v. Daley*, 55 F. Supp.2d 1336 (M.D. Fla. 1999) (both enjoining agency rulemaking proceedings due to violations of, among other laws, the RFA).

We sincerely hope that this important rulemaking can proceed in an informed and constructive way and that the important purposes of the Administrative Procedure Act and the Regulatory Flexibility Act can be served.

Respectfully submitted,

President