December 9, 2007

Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: Docket 06-121
Docket 02-277
Docket 01-235
Docket 01-317
Docket 00-244

Notice of Oral *Ex Parte* Presentation

Dear Ms. Dortch:

On December 7, 2007, the following individuals met with Commissioner Copps, his Senior Legal Advisor, Rick Chessen and his Legal Advisor, Bruce Gottlieb:

Andrew Jay Schwartzman, Media Access Project
Derek Turner, Free Press
Ben Scott, Free Press
Angela Campbell, Institute for Public Representation
Mark Cooper, Consumer Federation of America
Christopher Murray, Consumers Union
Gene Kimmelman, Consumers Union

The principal topic of discussion was the material and positions set forth in the attached letter which was sent to Chairman Dingell and Ranking Member Barton on December 4, 2007. In addition, Mr. Schwartzman stressed the importance of clarifying whether under the Chairman's ownership proposal the meaning of terms such as one property per market and determining programming quantity would be tested on a market wide or station by station basis. In addition, Professor Campbell discussed the dangers arising from ambiguities in the Chairman's proposal with respect to transactions which would on their face transgress the guideposts set forth therein.

Respectfully submitted,

/s/

Andrew Jay Schwartzman

cc. Commissioner Copps
Rick Chessen
Bruce Gottlieb

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December 4, 2007

The Honorable John Dingell
Chairman, Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Joe Barton
Ranking Member, Committee on Energy & Commerce
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairman Dingell & Ranking Member Barton:

We offer this letter for the official record of the hearing on "Oversight of the Federal Communications Commission: Media Ownership" conducted by the Subcommittee on Telecommunications and the Internet. This is the outline of a response to Chairman Kevin Martin's latest proposal to relax media ownership rules by three of the largest groups representing consumers on media policy issues.

Despite Chairman Martin's apparent effort to propose a compromise modification of the newspaper-broadcast cross-ownership ban, fundamental flaws in the Commission's data gathering, administrative procedures and ambiguities in the plan make it impossible for us to see how this proposal could serve the public interest goals of promoting diversity, competition and meaningful local and minority programming opportunities. Unless Chairman Martin remedies procedural flaws, eliminates dangerous and vague exceptions, and thoroughly expands meaningful minority ownership and local programming needs, his plan will not serve the public interest or meet minimum legal fairness requirements for FCC rules.

On November 13, 2007, Chairman Kevin Martin offered the public a proposal to relax the newspaper-broadcast cross-ownership rule. He did so outside the normal channels of agency procedure, publicizing the proposal instead through a press release and an OpEd in the *New York Times*.[1] The proposal and the time table for public comment were not conducted using standard Commission process, nor were they published in the Federal Register or put out on Public Notice. The Chairman declared that he would permit 30 days for public comment, which would be due on December 11th. Immediately thereafter, the "sunshine rules" would apply in advance of a December 18th vote and the public would have no further opportunity to comment or to reply to the comments of other stakeholders.

We believe this process is fundamentally inadequate and runs at cross-purposes with the public interest as a simple matter of proper review and consideration. The process used to put the proposal out can in no way replace a proper opportunity to comment on an actual proposed rule. Indeed, the act of the Chairman putting out a proposed rule in an OpEd rather than in a Notice of Proposed Rulemaking smacks of abuse of administrative process, which has typified this proceeding for the past five years. The process fouls committed by this agency on everything from data collection to research agendas to peer review are legion. We applaud

[1] Kevin J. Martin, "The Daily Show," New York Times, Nov. 13, 2007, Available at http://www.nytimes.com/2007/11/13/opinion/13martin.html; Federal Communications Commission, "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule," News Release, Nov. 13, 2007, Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278113A1.pdf.

your leadership in launching an Oversight & Investigations Subcommittee inquiry into these questionable practices and trust that oversight will begin to correct these problems. It is our view that a December 18th vote on media ownership rules—as proposed by the Chairman—is not in the public interest.

Beyond our procedural concerns, the Chairman's proposal to allow case-by-case review of newspaper –TV mergers in all media markets suffers from a number of critical infirmities. The benefits he claims for it in his OpEd are not demonstrated in the record. The assertions that cross-owned combinations produce more news and that they benefit the financial viability of the newspaper business are simply not borne out by the facts and in no way justify reducing the diversity of viewpoint in our community. Our analysis shows that long-term cross ownership situations do not increase the amount of news in the market as a whole, or even by the individual station, and the stations tend to slant the news they produce. We note that both broadcast stations and newspapers (to the extent the Commission even has jurisdiction over these entities) continue to be very profitable businesses that do not deserve a bail out at the expense of the public interest. Further, there has never been any explanation for how the checks and balances provided by independent voices in different local media will be replaced in consolidated markets. The idea that the Internet is a suitable substitute for local news and original reporting doesn't pass even the lowest evidentiary bar. These are the central issues in setting the limits on cross ownership. Chairman Martin's proposal does not meet any of these public interest tests.

It is notable that the new proposal appears to permit media concentration only in the largest markets. However, this facial difference from the proposal of the previous FCC (which would have swept away ownership limits in all but the smallest markets) does not appear to hold up under scrutiny. Those mergers that are not permitted presumptively would be subject to a four part test. The criteria it proposes to use to ensure that mergers do not harm the public interest are vague and unspecified, and therefore unlikely to afford protection from harm. Of greatest concern, perhaps, is the fact that this new four part test could possibly be met almost entirely with unilateral assertions from merging companies ("Yes, we will do more news after consolidation." "Yes, we are having financial difficulties."). Effectively, this new waiver standard could permit waivers in most markets in the country.

Finally, we look in vain for any mention of minority ownership in this proposed rule, despite the fact that both the Congress and the Courts have repeatedly asked the Commission to address the issue. The agency's record on the issue of minority broadcast ownership can best be described as one of willful neglect. People of color own just 3 percent, and women just 5 percent of all TV stations, even though those groups make up 35 percent and 51 percent of the U.S. population, respectively. Sadly, those striking numbers had to be compiled by Free Press because the commission has never conducted an accurate census of minority owners. The FCC has clear statutory and moral obligations to address the woefully inadequate levels of minority and women-owned broadcast outlets before it moves forward with any further changes in its media ownership rules.

For this proposal to be worthy of consideration by the public and the Congress, the FCC should first correct its process problems and complete the record with regard to localism and minority ownership. From there, if the Chairman is determined to press forward quickly, it is imperative that strong limits on media mergers are preserved with very narrow exceptions based on important public policy goals that would prevent the most dangerous consolidation that could harm our democracy. Among those provisions that would be a starting place for consideration, the Commission should maintain the top four-firm exclusion concept as a hard line and impose a high standard with regard to other mergers, eliminating the loose waiver process. To the extent that a newspaper-TV combination will add news production to a TV station that has not produced local news during the period of its license (as opposed to merely adding news to an outlet that already does news), it should raise

the merits for its consideration. The Commission should study the impact of top market mergers on minority owners and the quantity/quality of local news to determine the economic impact at the market level.

To prevent excessive concentration, the FCC should adopt a ten voice test – which is consistent with the DOJ/FTC *Merger Guidelines* for the threshold where a market is defined as unconcentrated (more than 10 voices). The voice count should be based on a measure of market concentration that reflects all types of media outlets, their audiences and their relative contribution to the overall media market place. Only by adopting such an approach to counting of voices will the FCC ensure that its market analysis reflects the reality of media markets and achieves the public policy goal of promoting "the widest possible dissemination of information from diverse and antagonistic sources." Within this conceptual frame, the Commission should adhere strictly to the thresholds of impermissible concentration in the *Merger Guidelines.*

The current Martin plan will not serve the public interest or meet minimum legal fairness requirements for FCC rules. We therefore call on Congress to make sure that the FCC addresses all of these concerns before promulgating new media ownership rules.

Sincerely,

Gene Kimmelman
Vice President for Federal and
International Policy
Consumers Union

Mark Cooper
Research Director
Consumer Federation of America

Ben Scott
Policy Director
Free Press

cc: House Energy and Commerce Committee members
Federal Communications Commissioners