

**DISSENTING STATEMENT OF  
COMMISSIONER MIGNON L. CLYBURN**

*Re: Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule, Notice of Proposed Rulemaking, MB Docket No. 17-318*

“Television, like newspapers and like radio, works best when it speaks with many voices, and as these companies swallow one another up, there is the frightening possibility of it all speaking with one voice.”<sup>1</sup> Those sage words, delivered by broadcast journalist Linda Ellerbee in 2000, still ring true.

In any other month, a proposal giving massive media companies the chance to have an even greater share of the local programming market, would generate substantial attention and wide-spread public concern. While admittedly, this is not your typical month at the FCC, the reality is that such a proposal is before us for consideration, and it *is* a big deal with substantial implications for the future of localism, diversity, and competition.

Broadcasters are intricately woven in the fabric of our local communities. They cover local officials and when at their best, hold them accountable. While cable news or online platforms are more likely to paint broad strokes, local broadcasters distinguish themselves through their ability to fill in the fine lines. Local broadcasters go to great lengths to stay on the air during a natural or man-made crisis, providing on-the-ground coverage when news breaks, including the delivery of emergency information that no doubt, has saved countless lives.

In 2004, Congress passed and President George W. Bush signed into law, a provision that no single broadcaster, through its combination of local stations owned, collectively should be able to reach more than 39% of U.S. television households. While I cannot say for certain that the sentiments expressed by the late-William Safire, reflected the legislative mood of the day, it is striking that fourteen years ago he was motivated to write through a New York Times Op-Ed: “The effect of the media’s march to amalgamation on Americans’ freedom of voice is too worrisome to be left to three unelected commissioners.” Soon after, Congress, through Section 629(1) of the Appropriations Act of 2004, specifically “exempted the 39% cap on national audience reach from review.”<sup>2</sup>

This was evidently the prevailing view because in 2004, NAB President Edward Fritts said, “We’re pleased the national television ownership cap issue appears to be resolved by the passage of this legislation.”<sup>3</sup> Press accounts at the time, including a January 2004 story in *Broadcasting & Cable* affirmed, that one of the new features of the law was that “Only Congress (not the FCC) can change the [39%] limit.”<sup>4</sup>

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<sup>1</sup> The Freedom Forum Online, *Ellerbee critiques changes in TV news* (June 6, 2000).

<sup>2</sup> Congressional Research Service (CRS): *Legal Challenge to the FCC’s Media Ownership Rules: An Overview of Prometheus Radio v. FCC and Recent Regulatory Developments at Footnote 29* (February 1, 2010).

<sup>3</sup> The Washington Post, *Senate Adopts TV Station Limit; Measure Modifies FCC’s Rule Raising Broadcasters’ Reach* (January 23, 2004).

<sup>4</sup> *Broadcasting & Cable, New Ownership Cap Fits Fox, CBS Perfectly* (January 25, 2004).

Facing a challenge from broadcasters who sought to maintain a 45% national ownership cap, the Third Circuit issued its opinion in June 2004. In the Court's decision, it wrote, "Because the Commission is under a statutory directive to modify the national television ownership cap to 39%, challenges to the Commission's decision to raise the cap to 45% are moot."<sup>5</sup> This decision should have once and for all, put to rest any question that the FCC could independently increase the cap.

But no. The current Administration, in its quest to green light even greater media consolidation, has found a way to rewrite history and ignore the Third Circuit decision. Earlier this year, over my vociferous objection, the FCC majority reinstated the UHF discount, giving their blessing for a single company to reach over 70% of U.S. television households, while claiming to be compliant with the 39% national ownership cap. In 2004, when Congress enacted the cap, the DTV transition was still five years away, but thanks to the transition to digital television, UHF stations are no longer inferior to VHF. This can mean nothing else but that broadcasters, with the blessing of the FCC majority, are using this arbitrary loophole to expand their reach far beyond what Congress ever envisioned.

How did we get to this point? Hearken back to June 2003, when the FCC voted along party lines to increase the national ownership cap from 35 to 45%. The decision was not without significant controversy.

Even the National Rifle Association at the time came out in opposition, arguing that the loosening of the FCC's media ownership rules should be rejected "for the sake of our democracy."<sup>6</sup>

Leading into the Fall of that same year, Congress continued to debate the issue and there were bipartisan House and Senate resolutions introduced that disapproved of the FCC's deregulation of the media ownership rules. There were also multiple Congressional hearings that year. Senator Trent Lott, in describing his opposition to raising the cap, said "that the Nation is in danger of losing the localism and diversity of viewpoints that are offered under the current ownership cap structure if the current cap is raised."<sup>7</sup> Strong words from the former Senate leader and he was not alone.

A deeply fought battle ultimately resulted in a compromise between Congressional leadership and the White House.<sup>8</sup> That November an agreement was reached and a 39% national ownership cap was established that would be put into law just two months later. While many remained unhappy, the purpose was to put this debate to rest—or so they thought.

Fast forward to last month, when Democratic Leader Pelosi along with Reps. Pallone and Doyle wrote in a letter to the Commission that, "[b]y explicitly excluding review of the cap from the Congressionally-mandated quadrennial review of broadcast ownership rules, we made clear

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<sup>5</sup> *Prometheus Radio Project v. FCC*, 373 F.3d at 396 (3d Cir. 2004) (*Prometheus I*).

<sup>6</sup> *The Washington Post*, *Unlikely Alliances Forged in Fight Over Media Rules* (May 20, 2003).

<sup>7</sup> Statement of Senator Trent Lott before the U.S. Senate Committee on Commerce, Science, and Transportation Hearing on Media Ownership (May 13, 2003).

<sup>8</sup> *The Washington Post*, *Compromise Puts TV Ownership Cap at 39%* (November 25, 2003).

that the FCC is not permitted to change or evade that national cap.”<sup>9</sup> I agree. Localism, diversity and competition are bedrock principles of our national media policy, and indeed our democracy. Giving a single broadcaster the means to buy up enough local stations to exceed the 39% cap is inconsistent with the statute and must be rejected.

FCC Chairman Michael Powell once said that the FCC is “constitutionally bound to comply — willingly or not — with Congress’ direction, as expressed by the text of the statute.”<sup>10</sup> Maybe today will be the day the majority will heed those words and join me in opposing today’s proposal because if nothing else is clear when it comes to this item, is that they have absolutely no authority to act upon.

I dissent.

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<sup>9</sup> Letter of Democratic Leader Pelosi and Representatives Pallone and Doyle to FCC Chairman Pai, Commissioner Clyburn, Commissioner O’Rielly, Commissioner Carr and Commissioner Rosenworcel (November 20, 2017). Available at: <https://democrats-energycommerce.house.gov/newsroom/press-releases/congressional-leaders-warn-fcc-against-ignoring-law-on-tv-station-ownership>.

<sup>10</sup> Testimony of FCC Chairman Michael Powell before the U.S. Senate Committee on Commerce, Science, and Transportation (June 4, 2003).