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-Public Affairs consultant and author, 1996-

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1990s: a leading figure in the Political Communication field in the American Political Science Assoc.; served on section's Executive Committee, and served as editor of section's Political Communication Report.

Research & Writing:
Books & Book Chapter:

-Dean Alger, MEGAMEDIA: How Giant Corporations Dominate Mass Media, Distort Competition, and Endanger Democracy (Rowman & Littlefield Pubs., fall 1998)

-Marion Just, Ann Crigler, Dean Alger, Timothy Cook, Montague Kern & Darrell West, CROSSTALK: Citizens, Candidates and Media in a Presidential Campaign (U. of Chicago Press, 1996). [Major study out of the Kennedy School.]

-Dean E. Alger, The Media and Politics, 2nd ed. (Harcourt Brace College Pub., 1996)

-Dean E. Alger, "The Media, the Right to Privacy, and Judicial Policy-Making: Rethinking Conceptual Foundations," in Robert Spitzer, Media and Public Policy (Praeger Pub., 1993).

Many journal and major conference professional papers; one example:
-Dean Alger, "Megamedia, the State of Journalism, and Democracy," Harvard International Journal of Press/Politics, Vol.3, No.1 (Winter 1998)

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In the matter of:

LOCAL BROADCAST OWNERSHIP:
AN EN BANC HEARING
February 12, 1999

COMMENTS OF DR. DEAN ALGER

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(I beg forgiveness if the following seems a bit meandering in structure and in how the nine questions posed for the En Banc panel are tackled. But time and resources were short (I don't have the resources of CBS, Inc. or NAB), and the substance for considering various of the key questions is interrelated; also, there is too much compartmentalizing in FCC documents and some functionally related elements are not being properly considered.)

I. FUNDAMENTAL PERSPECTIVE ON THE ROLE AND PURPOSE(S) OF FREE OVER-THE-AIR BROADCASTING IN AMERICAN SOCIETY

<u>The First Amendment and the Media's Role</u> I am encouraged that the Commission asks hearing participants to assess "the role and public purpose of the free over-the-air broadcasting system in our society," and the "significance of a locally licensed service and how localism will fare in the future," etc. Especially with the pressures on FCC from organizations with big financial stakes and with its need to specify rules and the bases of them in narrow legal fashion, I have been concerned that the Commission has at times failed to keep fundamental principles at the fore and "lost sight of the forest for the trees."

In Chapter 2 and in the final two chapters in my recent book, MEGAMEDIA[1], on the issue of the patterns of concentration of media ownership and the implications for competition and democracy, I sought to provide a solid foundation in judicial opinion and democratic and media theory and research for considering such fundamental principles for our broadcasting system. With limited space and time for testimony, I refer the Commission and others to that more extensive treatment.

Here, let me briefly note fundamental principles. With all due respect, I must take issue with Commissioner Furchtgott-Roth's reading of the First Amendment in his Statement in the matter of the 1998 Biennial Regulatory Review. He notes the "Congress shall make no law" phrase and declares that since it is "entirely in the negative... this provision is by its terms a limitation on -- not an expansion of -- governmental power." This reading of the surface of the First Amendment misses the ultimate point of that keystone of the Bill of Rights and of the democratic process.

The press provision is the only one that gives a category of private, economic organizations special privileges in the Constitution. But those special privileges are a *means* to an end. What is the end itself? The answer is: So the press can make a primary contribution to the democratic process. That is the ultimate *reason* for the centrality of the press provision; and correspondingly, it reposes *responsibilities* on the news media. That has been centrally recognized in the history of American law and principle; even the 1996 Telecommunications Act, which is otherwise derelict in recognizing genuinely public purposes (see below), refers to "the *public trust*" placed in electronic media, carrying forward the language from the original Communications Act of 1934. The Code of Ethics of the Society of Professional Journalists also strongly registers this:

"The primary purpose of gathering and distributing news and opinion is to serve the general welfare by informing the people and enabling them to make judgments on the issues of the time" - which is "a public trust."[2]

Thus, the free press provision in the First Amendment was *not* placed there to be purely a negative element - or to, in effect, facilitate Megamedia corporations in building ever greater business empires. Rather, it included an underlying *affirmative responsibility* for the press to maximally serve the public's need for information and varying opinions which enable the democratic process to be fully realized. The noted New York Times reporter R.W. "Johnny" Apple said it well in a talk at Harvard:

> It is my conviction that the Founding Fathers... had a reason for giving journalists special privileges in the Constitution. The reason was that we were supposed to find out what was going on, here and abroad, and report it, so that the public could understand and make an informed judgment. It was *not* put in the Constitution so that publishers could make billions of dollars or so that journalists could make lots of money.[3]

The affirmative responsibility for the news media is especially compelling in the case of broadcast stations that use the "public airwaves," particularly in the case of the prime mass medium of television, and given the "main source" reality of local TV as a news source; while about 40 million Americans attend to network TV news shows, about 80 million watch local TV news. It is the source of news with nearly universal access for Americans. TV is also a uniquely powerful medium of mass communication, as I have analyzed, drawing on social science theory and empirical research, in chapters 3 and 4 in my previous book The Media and Politics, 2nd ed. (Harcourt Brace College Publishing, 1996). It is also crucial to consistently keep in mind that the *main mass media effectively constitute the primary realm of the public arena in the American* *democracy*. The control and performance of those media outlets are then, of profound concern for the future of this republic.

It is encouraging that the Commission has prominently cited the landmark language in Justice Black's Supreme Court decision in the Associated Press case: "The First Amendment rests on the assumption that the *widest posssible dissemination* of information from *diverse and antagonistic sources* is *essential to the welfare of the public.*" In using the word "antagonistic" he meant that information and opinion must come from *fundamentally different and opposing sources*, not just different individuals presenting the news, if we are to fully realize the "marketplace of ideas" that all major democratic theorists see as a foundation of the democratic process. Specific implications of this principle for the structure of local broadcasting ownership are discussed below in "Comments on Local TV Ownership Rules and Related Questions."

Prof. Owen Fiss, in his important book <u>The Irony of Free Speech</u>,[4] has authoritatively discussed the Constitutional and conceptual bases of how the ultimate purpose of the First Amendment involves an *affirmative* role for public authority in fostering democratic communications from genuinely diverse sources, widely disseminated to the public. I leave the balance of that point to the distinguised Prof. Fiss.

Before addressing specific local TV broadcast ownership issues, I'd like to add a couple of additional elements of background and perspective. Please bear with me, I believe these additional perspectives need to be considered.

<u>Public Opinion on Media: Another Matter for Basic Perspective on the Broadcast System (and Media in General)</u> The Dean of the Columbia

University Law School, Benno Schmidt (who later became Yale's President), pointed out a few years ago that the First Amendment protections for free press and speech are not automatically operative. Rather, they "depend on the spirit of tolerance in our society and the extent to which society as a whole understands the role of the press." Then he went on to note: "Most important is the current social and political climate which is unfriendly to the press, viewing it as an uncaring, unresponsive big business."[5]

Indeed, the public's opinion of the media - news operations especially, but media in general, as well - has declined dramatically and has increasingly focused on the impact of control by media chains and conglomerates. Polling by the Pew Research Center found: "The public's assessment of press performance has grown increasingly negative in recent years. A majority (56%) now say news stories... are often inaccurate, up more than 20 percentage points since 1985."[6]

It is important to note that the mid-1980s are precisely what I have identified in the book MEGAMEDIA as the beginning of the Megamedia era. The conjunction in time is *not* coincidental. A July 1998 opinion poll for Newsweek found that 76% of the American people thought media corporations, in "the competition for ratings and profits," had "gone too far in the direction of entertainment and away from traditional reporting" in their news operations; and the same percentage specifically cited pressure for such fare from "media owners and news executives" as being worse than in earlier years.[7] A major study that I co-directed out of Harvard's Shorenstein Center, using in-depth interviews and focus groups with citizens in four areas of the nation, found: "This theme, that the mass media pander to the audience, recurred... throughout the campaign. People linked the media's taste for scandal and sensationalism to commercial motives that got in the way of useful information." This response was volunteered by our citizen subjects; we didn't ask about that, rather, our study was focused on the media in election campaigns.[8]

Richard Clurman, respected former senior editor at Time magazine and then news executive at Time, Inc., concluded a few years ago that for the public, "it was becoming harder and harder to think of the news media as different from any other business in free enterprise America."[9] The public opinion data confirm that. Again, as Law School Dean Schmidt noted, the First Amendment cornerstone of our democratic process requires public support for it to work. But if the public support dissipates upon seeing more media concentration, Megamedia corporate obsession with profits, and little commitment to their First Amendment responsibilities, then at some point we are in a very dangerous situation for the American democracy. Unduly alarmist? Consider the findings of a 1996 Harris Poll conducted for the Center for Media and Public Affairs: 70% of the public "would allow courts to impose fines for 'inaccurate or biased reporting'," among other "drastic measures.[10] As I have documented in detail in MEGAMEDIA, chain, media group, and conglomerate ownership of mass media has increasing' degraded the news process and product (see below for evidence on that) and is leading us in precisely that dangerous direction. I cannot understand how even more loosening of ownership limits, leading to even more concentration of media control, national corporate profit obsession, and loss of commitment to local community will lead to anything but a further major step in this dangerous deterioration in our democratic society and its bedrock principles and practice. Former editor of the Chicago Tribune, James

Squires, frankly noted the core problem: "Corporate America has been in the driver's seat as the press enters the new world of information. And it is this 'corporate takeover' of journalism... that has weakened the press as an institution of democracy and destroyed its brand-name credibility."[11]

The famous financier George Soros - who experienced a closed state-socialist society growing up in Hungary - has put the basic point in broader perspective: "Although I have made a fortune in the financial markets, I now fear that the untrammeled intensification of laissez-faire capitalism and the spread of market values into all areas of life is endangering our open and democratic society."[12] The dramatically increasing concentration of media ownership and the attendant lessening and degradation of the news and lessening of diverse "voices," as well as other media offerings, is the ultimate exemplification of that concern. The media are Constitutionally recognized to be in a critically unique category of economic activity. They cannot be treated the same as any other business area; there must extra caution used in structuring control of media businesses.

<u>An Absence of Public Interest Provisions in the Telecom Act</u>

Unfortunately, the Telecom Act itself illustrates the "untrammeled intensification of laissez-faire capitalism" and spread of raw market values into the heart of public policy. For example, while businesses and the consumers are repeatedly referred to, revealingly, *the word "citizen" makes not a single appearance in the Act*. In fact, while numerous provisions clearly benefit big media and telephone corporations, there is precious little that directly speaks to the general public good (see Chapter 4 in <u>MEGAMEDIA</u> for further details); substituted for the latter is the near-religious belief that what Soros aptly calls "market fundamentalism"[13] will somehow result in public good as a fringe benefit - despite the record that I have documented in MEGAMEDIA. Regarding the process producing the Telecom Act, Senator McCain himself noted: "It was clear to me all along that it was the... special interests that were driving this train."[14] (Sadly, his own market fundamentalism has blurred his vision regarding other realities here; and I lament his misconceived threats against FCC.) This Telecom Act action also illustrates another matter for basic perspective: the public's involvement - or effective lack thereof - in this policy process. A note on that is added at the end of these comments.

II. COMMENTS ON EN BANC QUESTIONS & RELATED LOCAL OWNERSHIP RULES

Introductory Case, Key Issue & Part Answer to En Banc Question #2

In the dockets under consideration here, the core of the questions relates to whether a further loosening of ownership restrictions, with the consequent further increase in ownership concentration nationally and locally, will have a beneficial or a deleterious impact on economic competition and on genuine diversity of sources of news and sorts of opinion. Not only the predictable comments of the NAB, but various suggestions in Commission documents suggest increased ownership concentration, from allowing "duopolies," etc., will result in increased efficiencies and that owners of multiple broadcast properties are somehow more likely to be able and inclined to provide more public service through their TV stations.

For introduction, it is important to register a stunning piece of empirical evidence regarding broadcasters' discharge of their responsibilities. While watching the Telecom bill during its consideration in Congress, I didn't seem to hear much of it in the news media, especially on TV news shows - precisely where it should have been most prominently covered. So, for MEGAMEDIA, I searched the Vanderbilt TV News Archive for all stories in the three major network news shows on the Telecom bill. That and other research yielded shocking results.

From the May 1995 primary congressional introduction of the Telecom Act through its passage in early February 1996 - nine months - the total coverage all three major networks gave to the Act amounted to only nineteen and a half minutes of material primarily on the Act. The 11-14 million viewers of GE-controlled NBC News received a total of three minutes, fifty seconds on the Telecom Act over those nine months. And those totals actually exaggerate the coverage, as a sizable amount of that minimal coverage was about the side issue of the V-chip and/or the Internet "decency" concerns. Almost nothing was heard from the network news shows on the proposed easing of ownership restrictions and their implications. This was abject failure of First Amendment responsibilities - with bias for their parent corporations' financial special interests. And remember, those three network corporations also own at least 35 local TV stations, mostly in large markets; such an orientation was likey to be carried out through those local stations.

But the tale gets worse. My own viewing in Minnesota and North Dakota, along with research by political scientists Snider and Page, led to the conclusion that local TV news shows were at least as derelict in reporting on this important policy issue, which involved their financial interest. But even more appallingly, while this absence of reporting was going on, the National Association of Broadcasters and many local stations - especially group owners, as far as I can tell - sponsored and aired millions of dollars worth of what they called "Public Service Announcements" which misleadingly characterized proposals to auction the digital spectrum as a "TV tax," etc. These PSAs were actually just self-serving propaganda. And, while those propaganda pieces were airing and while they were *not* covering provisions in the Telecom Act, the *stations allowed no alternative perspectives to be aired.* This was an ultimate betrayal of the First Amendment and of the stations' public trust. And now they, especially the group and conglomerate owners, want to be given control over even greater swaths of these main mass media - which are also main realms of the public arena. Still further Yale political scientist Martin Gilens looked at news coverage of the Telecom bill and found that *newspapers from corporations with substantial TV station ownership* were decidedly *less likely* than those without such TV ownership to mention that the Telecom Act would mean each media corporation could own more TV stations and would likely lead to more concentrated media ownership. Thus, we see again that group and conglomerate ownership, notably including cross-media ownership, led to a loss of adequate coverage of that momentous bill and did so in a way that benefited the group owner.[15]

Political scientist E.E. Schattschneider pointed out that a key to understanding the nature of the governing process was to look at the "*scope of conflict*" on an issue.[16] That is, if the involvement of people and groups is limited to well-connected insiders with special interests, then the range of policy options is likely to be narrow - and to serve the special interests; whereas, if the scope of conflict is broad, with the public well informed and involved, then the range of options and the whole dynamic of policy-making is quite different. Relatedly, other researchers have noted that *defining the issues* is often half the battle in the policy process. In the case of the Telecom bill, the group and conglomerate media corporations controlling that main media source of public information, TV news, and even various newspaper companies with TV stations, kept the scope of conflict narrow by refusing to adequately cover the bill and its implications. And the TV owners used the power of their medium to define the issue on dispensation of the digital spectrum by using the biased PSAs and refusing to give alternative perspectives air time. This should serve as a strong cautionary note on the notion that increased chain and conglomerate ownership would be likely to lead to better public affairs material for the public and on the need to more strongly and clearly hold such media groups accountable in general.

Responses to Issues/Questions for Panelists at the En Banc Hearing

<u>On Question 1 (Further Thoughts)</u> Earlier I suggested some fundamental principles and logic related to question 1 on the role and purpose of the free over-the-air broadcasting system, the significance of locally licensed service and how localism will fare in the future, etc. Some more specific comments follow.

First and foremost, considering the purposes of the broadcast system, along with how to evaluate any genuine "substitutes" provided by cable TV and other TV outlets, democratic theory and judicial opinion make clear that the most important element of the prime mass media communications system in the American democracy, TV, is provision of ample news and public affairs coverage and an ample exchange of ideas and opinions of a truly diverse nature. And for local TV - and radio - local and state news and opinion are the central and most important concern.

On Question 3 - & Notes Related to Questions 4, 5, 6, 7 & 8

Question 3 asks about the status of competition and diversity in local mass media, how the emergence of cable and new video outlets affect competition with local broadcast TV and radio, etc. There are a number of points of evidence and logic that need to be considered here.

a. In assessing whether cable TV, DBS and other means of delivery constitute a genuinely broadened competitive environment, as noted, the first question to ask is whether they supply full coverage of news and public affairs and opinion on them, especially on state and local public affairs. This should include broadcast of key public affairs events like major candidates' debates and presidential and gubernatorial state of the union/state messages. Media contributions to the marketplace of ideas for democracy is the Commission's most profoundly important responsibility.

Now, consider the case in the major metro area of the Twin Cities. First, I simply looked at last week's Star Trib "TV Week" listings for Monday evening. On each of the four long-time VHF stations (local ABC, CBS, and NBC stations), there was the 6:00 news and midwest-schedule late news at 10:00; and former independent channel 9, now a UPN-affiliate, has an hour-l g news show at 9:00, as well as a half hour at ten. But I looked across the hours for ch. 23 (affiliated with Time Warner's WB network): no news show; I looked at ch. 29 (Fox): no news show; I looked at ch. 41 (Paxson): no news show - and the latter is *owned* by big group owner Paxson, but such ownership has not resulted in regular news. This illustrates how, in reality, UHF, which gets it best exposure via cable, acts like the typical cable channel, shouldering no responsibility for contributing to the democratic process - even when it is owned by a group owner. What I *do* see in the 10:00 late news slot on the WB affiliate is an hour of the *Jerry Springer sleaze-a-thon* (an exploitation of people of lower demographcs). In this case, no news is *bad* news - for the media's responsibilities to the American democracy. And on cable, as a rule, there simply is no independent, digging local and state news show at all. The good news is that various areas have one or two government and public affairs cable channels that, some or much of the time, air state and local legislative sessions, forums, etc. - although they tend to be out in the hinterlands of cable on channel 47 or the like, and few people even know of their existence. Those are nice additions, but they are not substitutes for or competitors of genuine local news operations. Cable TV is NOT a substitute for broadcast TV and should not be counted as a set of full competitive "voices."

It is important to note that FCC, in its Notices of Rule Making when addressing the competition in local markets and the notion of "total independent voices" and the like, frequently muddles together channels that provide various entertainment options with channels/outlets that provide genuine, full scale local news and public affairs. This is frequently enough muddled together that I sometimes wonder if the Commission fully understands the functions of full news operations and coverage of public affairs events. This is also why the great majority of radio stations cannot be considered a full additional source or voice, as most stations carry little meaningful news and public affairs material. In fact, the typical radio station "news break" is not only inadequate; in previous assessments and college courses I have characterized such news breaks as worse than nothing at times (especially when they just repeat in headline fashion the propaganda line from a presidential or gubernatorial administration or other official that was intended for a lead - but that is very inaccurate). A very few radio shows in major markets, including public radio, do provide a significant additional source of news and views, but they are few. And a thorough study by political scientists Davis and Owen documents how the much discussed talk radio may give various people a feeling of having a place to vent their spleen, but is mostly governed by intensely commercial and entertainment criteria and fails badly at being consistent contributors to meaningful democratic information and dialogue.

Regarding the broadcasting of major candidates' debates and other crucial elements of the governing process and the democratic need for the public to be exposed to such events, UHF stations and 90% of cable and satellite channels are, in reality, working overtime to *entice people away* from such key forums of democracy by airing sensationalist entertainment fare. As Henry Geller has noted, "cable TV is a First Amendment horror story."[17] Now, in Minnesota this last election, *all* the VHF stations aired candidate debates; and on one notable occasion, three of the four, along with public TV, simulcasted/"roadblocked" a gubernatorial debate. This bit of high responsibility is increasingly rare even on traditional main VHF stations (I'm proud that the Minnesota Compact election reform I worke. in helped organize that noble effort). But no such responsibility was or is evident on UHF stations or on over 90% of cable stations. Correspondingly, how can the Commission consider cable stations in the "total independent voices" calculus, especially for the core concern of *local* electronic media outputs?!

More basically, given the record of group and conglomerate megamedia corporations in news and public affairs information and opinion, ownership of multiple media outlets means, at a minimum, that Justice Black's fundamental and oppositional diversity has a strong tendency to be attentuated; inevitably, in many cases it will be severely lessened. This is especially the case when there are a few enormous "Megamedia" conglomerates that control numerous media properties in most or all the main mass media - as is documented in MEGAMEDIA. Thus, when General Electric's CEO John Welch pokes his finger in the chest of an NBC News President and says "You work for GE!," and also says NBC and its TV news operation is "no different from toasters, light bulbs or jet engines," then as Larry Grossman says, such an industrial-media conglomerate (with its 12 local TV stations in large markets) "will do whatever is necessary to achieve high profitability, with little regard for journalistic standards, integrity, or taste."[18] With a rare few exceptions (apparently like A.H. Belo), this is increasingly the orientation of media groups and conglomerates, from Gannett, with its 90+ newspapers, 21 TV stations and so on, to the Tribune Co., with its 20 TV stations, newspapers, etc. (Group owners' state of mind is also starkly evident in demands on profit margins, and in how, with certain past actions and the current environment, local TV station owners increasingly treat their "broadcast properties" like "commodity trading." It is also evident in the loss of a sense of stewardship for the stations' responsibilities to this democratic society. All of this is detailed in "b" below.)

The examples just noted from GE-NBC, Gannett and so on suggest another point that needs to be dealt with, even though the Commission has preemptorily dismissed it: national concentration issues and impacts cannot be separated from local media concentration and performance issues. This is the case both in terms of specific concentration and diversity of voices and offerings in and for local areas, and in terms of overall dominance of communication in the prime public arena of the main mass media. In specific concentration terms, consider the case of Chicago. CBS, Inc., after gobbling up the Infinity Broadcasting and American Radio System chains, controls no fewer than 8 AM and FM stations and it owns one of the prime VHF TV stations in Chicago - and has proudly held its waiver of the radio-TV cross-media ownership rule for something like 2 years now. But add to that the fact that the Tribune Co. owns another of the prime VHF TV stations, along with WGN radio, largest in the Chicago area, and the dominant newspaper in the region; and Chancellor-Capstar owns 6 radio stations. Thus, just three Megamedia corporations control all of the following: 2 prime VHF TV stations, 15 radio stations (with the majority of ad revenue), and the dominant newspaper in that third-ranked media market and metro area of over 6 million people. Any sensible analysis has to conclude that this is very bad news for economic competition and genuine diversity of sources in our democracy.

The extensive cross-media ownership, along with other properties of media conglomerates, presents further problems for fair, level-playing-field economic competition and diverse offerings and "voices." A couple of examples will help clarify the point. The Disney-ABC media conglomerate gained control over three radio stations in the Los Angeles media market. Two of those stations had previously been competing talk show format stations. But under the Disney-ABC corporate umbrella those two stations now "complement" each other. Thus, local radio competition and a diversity of both voices and functions was lost or lessened under group ownership of multiple stations in the same market. Another example comes from my home area of Minneapolis-St. Paul. In the Twin Cities by September 1997, the Chancellor-Capstar two section media group owned seven radio stations with about 30% of total listenership - and fully 37% of 18-34 year olds; and Disney-ABC controlled five stations. These aggregations resulted in multiple station format shifts throughout 1997, confusing and disserving many in the area. Especially notable was the loss of what had been a genuinely alternative voice in the media mix: "Rev 105" radio; it was replaced by a standard rock station, which the conglomerate felt would make them more money. Further, a station that I and many of my friends and colleagues relied on as a leading music station and entertainment option, "smooth jazz 104," suddenly disappeared; here one day, gone the next without a word to the community - another victim of conglomerate use of broadcast properties like a Monopoly game. By the way, one other thing happened at about the time Rev 105 was lost: national chain owner of supposedly alternative weekly newspapers, Stern Publishing, bought out both of the fine alternative weekly newspapers in the Twin Cities, the Twin Cities Reader and City Pages, and then promptly closed down the Reader. Still another alternative voice was lost.

There are two further troubling dimensions to the impact of big chain and conglomerate control of media, especially with extensive cross-media ownership. The Commission notes that promotion and protection of real competition is a key goal of the FCC. I appreciate the effort Commission staff made in section III of the Further Notice of Proposed Rule Making to systematically detail a framework for competition analysis. But I have concerns that some factors are not adequately taken into account therein, in significant part due to excessive narrowness in considering market forces, including a narrow focus on local market areas.

With the "Megamedia" conglomerates of today come massive holdings in network TV, local TV stations, cable channels, Internet sites, movie and TV production, newspapers, magazines, book publishers, recording companies, etc., as well as theme parks and huge franchise merchandise chains in the case of Disney-ABC; or much of the same, along with huge cable distribution systems, pro sports teams, etc. in the case of Time Warner-Turner. First, these multiple cross-media properties afford an extraordinary capacity for cross-promotion and cross-subsidization. (Media moguls like to call this "synergy," but there is little evidence of the new creative production that was the chief rationale for synergy; mostly it has been used to overwhelm economic competition.) For example, an ABC radio executive said: "What synergy has done for us, particularly here in Los Angeles, with the fact that there's KABC-TV, Disneyland, Los Angeles magazine, the Disney movies, and three radio stations, is, it's a great opportunity to cross-promote each vehicle and help each other."[19] It tilts the playing field for smallish L.A. area companies to compete with the enormous financial and personnel resources of Disney-ABC and such extensive cross-promotion and -subsidization. Further, in the cable TV realm, with largest MSOs TCI and Time Warner also owning or having sizable stakes in many cable channels and production companies, a number of insidious "exclusive programming deals" have been engaged in, as noted in the National Journal.[20] And other preferential treatment actions have come to light such as Time Warner keeping "Space Jam" "in the family." In general, with Disney-ABC, Time Warner-Turner, News Corp.-Fox, and Viacom controlling such a large swath of movie and TV production houses, there is a constant potential for independent or smaller TV stations, radio stations or cable operators to be severely disadvantaged in obtaining progamming. And as Los Angeles attorney Rita Haeusler has noted: "The vertical integration of all these media companies is leaving creators' without negotiating power"[21] - which certainly has implications for the diversity of creative sources in our culture. Indeed, the level of cross-subsidization appears to be extensive enough that the antitrust concept of "predatory cross-subsidization" is operative for these media and industrial-media conglomerates, at least at various times, and in great potential. And given their orientations and intense empire-building, as documented in MEGAMEDIA, it would seem naive to think they will not make ample and probably increasing use of those capacities - in the absence of close antitrust monitoring and other regulation.

Now, let's step back and think about the basic concept of competition in the marketplace. As law professor Michael Meyerson has noted, drawing on the introduction to the Act, the major changes in the Act were "based on the premise that technological changes will permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers being made available to the American consumer."[22] What has actually happened is a tremendously increased concentration ownership, with far fewer genuinely independent options and fewer companies "going head-to-head." But further and crucially, consider the essence of how the capitalist marketplace is supposed to work, which is the prime rationale for the idea that such a market is most effective and efficient. The idea is that in a given particular market, a number of companies compete on the basis of price and quality of the product or service comprising that particular market; that is how the "market mechanism" sends a specific signal to the competing companies - and those that might want to get in. But media chain and especially industrial-media conglomerates can shift resources from other media operations or even from a totally different industrial area (think of GE or Viacom) and thus can affect the particular market in artificial ways, ways that do not relate to price and quality of the specific product or service; the conglomerates can even lower prices to drive out of business a smaller competitor (although that, if clear & obvious, is an egregious form of restraint of trade and could bring one of those rare antitrust cases).

Further, with chain and conglomerate owners like CBS and Chancellor-Capstar controlling as much as eight radio stations in a market, many of them the largest ones, they have each captured 25-35% of the radio ad revenue in the market. Such big groups, using their array of stations (with formats selected for maximum appeal for advertising revenue, not viewpoint diversity), can offer advertisers package deals that overwhelm the competition. In a case like CBS, where they control most of the largest stations in New York, Chicago and elsewhere, they could even threaten a shut out of advertisers in prime radio territory; certainly with such sheer market power, they have some artificial control over prices. As CBS's Mel Karmazian told Barron's magazine: "It used to be that [stations] competed, that media buyers would play [them] off against each other. Now we have the [CBS stations'] ad sales managers talk to each other every morning. That adds up to higher prices and better [profit] margins."[23] That also adds up to evidence that Megamedia distort level playing-field competition. In summary, media groups and especially conglomerates severely tip the "level playing-field" of market economics.

(The good news is that this radio advertising conglomerate crunch was getting so egregious that the Department of Justice began looking into it.)

It seems to me that invigorated antitrust efforts are badly needed. It is important to note that the Celler-Kefauver Act of 1950, augmenting the key Section 7 of the Clayton Antitrust Act, indicated the need to make efforts to "arrest a trend toward concentration in its incipience."[24] The mass media are clearly the most critically important area to deal with in concentration concerns, and equally clearly, the situation is now well beyond incipient! Thus, as the more full exposition in MEGAMEDIA documents, there is a great need to have more serious efforts at antitrust enforcement and better coordination between the Justice Department's Antitrust Division, FTC, and FCC in the critical area of mass media. Because general antitrust laws are handled by Justice and FTC, but mass media raise unique concerns and have unique elements, and because the instrument of antitrust enforcement, especially as hesitatingly practiced at present, is a blunt one, FCC's expertise and efforts beyond antitrust are needed. Thus, the answer to En Banc Question #5, **"Are the antirust laws by themselves sufficient to protect broadcast diversity and competition themselves?," is: no.**

More generally, with the enormous number of media holdings across most or all prime media, the few Dominant Dozen megamedia corporations have the capacity to dominate, or at least significantly influence, the public arena of American democracy and its public agenda. This is exactly what was done to a stunning degree regarding the crucial issue of the Telecom Act, as noted. In general, as one reporter observed at the time of a certain mega-merger: "Time Warner's move to remain no.1 in the face of Disney's expansion also means it will be hard for American households to avoid one of the industry's giants when they seek news or entertainment."[25]

In the 1930s, President Roosevelt denounced the "economic royalists" of concentrated economic power and expressed concern that they were using their vast power to undermine American democracy. But today, it is not just industrial and banking giants; conglomerate giants now control the central nervous system and public arena of our American democracy: the media. This is far more dangeous. In the first third of the century, the public arena of media was quite diverse and 80% of the principal media of the time, newspapers and magazines, were *independently* owned (although the radio networks were already showing the concentration problem by the 1930s). Correspondingly, there was a vigorous national debate about the concentration of business ownership and its consequences. But today, chains and conglomerates overwhelmingly dominate media and the public arena. As their actions in the case of the Telecom bill demonstrate, there is much less likelihood that America will have such a wide, vigorous national debate about such matters today. In my judgment, this is the single greatest danger to the American democracy for today and the new millenium.

The realm of entertainment offerings also demonstrates what the media moguls are increasingly doing with their media properties. Opinion polling shows increasing public disgust with the excesses of violence and increasingly raw sex on TV, cable TV being an especially great offender. The public's feelings are justified: Content analyses of TV shows have increasingly shown, in the words of a 1996 study, that "psychologically harmful violence is pervasive on broadcast and cable TV programs;" indeed, "the average child will witness 8,000 made-for-TV murders before finishing elementary school."[26] This is the fare, along with the cheapening of the news, that the Megamedia era has increasingly brought us.

As NAB claims and FCC speculates, common ownership of TV stations might enable some lesser stations to have more resources to buy "better" quality or a bit more variety of entertainment programming in some cases. But as I read through Broadcasting & Cable magazine's recent special report on the "Top 25 Television Groups" and their program "shopping lists and syndication strategies,"[27] I find it hard to generate much enthusiasm for the augmentation of media contributions to our civilization when these media group execs talk almost exclusively about filling various day parts with standard talk shows like "Sally Jesse Raphael," game shows like "Wheel of Fortune" or "Let's Make a Deal," recycled older or newer network sit-coms and sit-drams like "Touched By an Angel" or "Eight is Enough." How does such fare meaningfully enhance competition and substantive diversity?!

Dr. Alger's favorite entertainment and cultural area, music, is one where the addition of cable TV *has* significantly enhanced programmatic offerings, with MTV, VH-1 and occasional material on other channels. The same goes for sports. But those, especially the latter, *will* easily be taken care of in standard marketplace fashion. For the core of First Amendment responsibilities, news and public affairs information and opinion, I see little evidence common ownership will provide fundamentally opposing sources and orientations; in fact, the evidence is considerable that orientations and practices of media groups tend to lead to a worsening of the public affairs offerings. The following adds to that evidence.

b. In considering further easing ownership restrictions to allow duopolies, more radio-TV cross-ownership, etc., FCC, as well as NAB and the big broadcasting groups repeatedly refer to increased efficiencies resulting from economies of scale which supposedly can result in more and better news and "could permit the production of new, diverse, and locally produced programming."

There are, however, three factors that cast doubt on those notions. First is a fact/pattern that is startlingly absent from any of the FCC documents ("Further Notice...," "Second Further Notice..." etc.). It is odd to hear so much about strengthening the weakened economic status of broadcast stations by allowing media groups to increase broadcast station owership, especially TV stations, when the record shows profit margins for most TV stations, especially VHF ones, at a level that would make executives of the average industrial company in America drool uncontrollably. Thus, for TV stations in any of the medium or larger markets, the profit margins are anywhere from 20% up to 55%; and it is group, chain and conglomerate ownership that, from distant corporate headquarters, puts the greatest pressure to produce the highest profit margins. A Gannett executive recently testified that their profit margins were around 35%; Capital Cities squeezed no less than 55% from their stations, and newer owner Disney has done its best to keep up those basic levels. A specific example from my home area illustrates the point. In later 1995 or early 1996, Westinghouse-CBS (now just "CBS") bought Twin Cities CBS affiliate, WCCO. Through the 1960s, 1970s and much of the 1980s, WCCO had one of the two or three best local TV news operations in the nation. From internal testimony, I know that while WCCO earned a 27% profit margin in 1996, under control by CBS, Inc., the national executives are now demanding 40% profit margins. Now where is the extra profit margin going to come from? The primary local station programming is news and public affairs; clearly they would be squeezed further (as WCCO's leading correspondent has noted) and that money sent back to headquarters to improve the national corporate bottom line and impress Wall Street so the stock will fly high. (The Wall Street obsession in these increasingly publicly traded media corporations is the other indirect deleterious element in the intensified degradation of the news and public affairs offerings in broadcast stations, as I have documented in <u>MEGAMEDIA</u> in chapters 5 and 6.) But the primary public trust responsibility suffers. Gannett, for further example, has a long record of squeezing its media properties for high profits - and reducing the capacities of its news operations to do their First Amendment jobs. This casts doubt on the notion that still more group/chain ownership will result in better programming, especially in public affairs.

Indeed, in the book I have drawn on a number of studies from scholars, watchdog groups and even journalists themselves, and the trend in the nature of news offerings is increasingly dismal. On network news shows and so-called "news magazine" shows, and on local TV news shows, sensationalism, scandal, crime and mayhem, celebrity-chasing, and the like are the steadily increasing fare, under group and conglomerate ownership especially. For example, the Rocky Mountain Media Watch analyzed one hundred local TV stations around America on the same evening. They found an average story length of only 47 seconds, and, combining crime, disasters, and like stories into an aptly entitled "mayhem index," they found that for 33 of the stations, news shows were over half mayhem, and the average for medium and large-market news shows (most of which are group owned) was 46%.[28] (See chapter 6 for the full data.) And on network news shows, General Electric-controlled NBC

News was the worst of the three in the declining coverage of foreign affairs - at a time when it is more crucial than ever for Americans to better understand the rest of the world.: *In summary, the Megamedia moguls are building huge empires and making themselves very rich, while they are impoverishing the dialogue of democracy.*

If there is a specific case where a TV station, presumably in a small market, is truly failing and where a group owner can save it and add a real news operation that did not exist before, then I might agree that a rare waiver could be justified. But given all that is noted here and in the book, I would strongly support the Media Access Project's insistence that a clear condition of granting the waiver is a requirement that the broadcaster "make specific, enforceable promises as to the public interest program benefits that will redound from" the waiver - and periodic reports must document that such substantial net gain in genuine public service programming has, in fact, been provided. Such programming could *not* include the obscenely bogus claims a number of broadcasters made in the aftermath of passage of the Childrens' Television Act...!

A second factor that casts further doubt on the notion that additional group ownership would benefit local broadcasting's service to the community is as follows. Looking at the history of American media, we see a number of notable media owners who had a strong sense of *stewardship* for "their" network, TV station, newspaper or magazine, from Bill Paley of CBS to David Sarnof of NBC to the Sultzburgers and Grahams of the New York Times and the Washington Post. Group ownership in TV, as in newspapers and other media, however, typically means the loss of a strong sense of stewardship for the station's substantive performance, especially on news and public affairs, and an increasing loss of a primary orientation to and understanding of the local community, in the case of local media. For Paley and CBS its news division was "the jewel in the crown" and was central to the self-image of the company. When Lawrence Tisch grabbed control of CBS, news was just another division to cut to maximize his profits. The same was the case when General Electric gained control of NBC. As Leonard Goldensohn said, upon ending his time as head of the ABC network with its sale to Capital Cities: "I fear that one of the most insidious byproducts of the current merger mania may be the loss of a sense of stewardship.... Our business is more than a business. It is a public trust."[29]

Public policy should be doing all possible to encourage such stewardship; but, reflecting also on **En Banc panel Question 4** on the FCC's role and goals in regulating broadcast ownership, currently, policy encourages the treatment of prime media as mere commodities. Indeed, as Martin Pompadur of Television Station Partners acknowledged: "It's commodity trading to us. We don't know the community. We're short term players"[30] And that raises a point about past FCC rules - or rather the abandonment of them. In a revealing action that was a direct precursor to the Telecom Act, in the 1980s, the Commission cancelled the requirement that an owner who buys a broadcast station must hold it for at least three years before reselling. As Patricia Auderheide has detailed:

> Three years after the dropping of the... trafficking rule... half the broadcast stations in the country had been sold, many of them repeatedly, and for escalating, even dazzling prices. In the purchasing fury, *groups and chains were favored over smaller purchasers.*

Thus, regarding **En Banc panel Question #6** on the impact of consolidation on small business, the answer is that it has indeed had a negative such impact. And Aufderheide went on to point out:

> A new generation of station managers came to the fore, whose eyes were focused not merely on the bottom line but on the next sale. Group and chain broadcast holdings fueled a syndication market that both mass produced and tailored for individual markets headline news services, providing the simulacrum of local news and public affairs programming...[31]

But a *headline* service *simulating* genuine, community-based, digging local news is not what the First Amendment is about or what the FCC should be working to facilitate. Thus, **regarding En Banc Question # 7** on whether FCC's local ownership rules promote or undermine First Amendment values, the answer is: they undermine those values.

And that abandonment of the trafficking rule was in profound contradiction with the rationale underlying the routine granting of license renewal and the refusal to consider seriously any comparative license challenges. That is, the *expectation* of and essentially automatic renewal was instituted to encourage sustained ownership that would really invest in the station and be involved in the community, including ascertaining what needs the community had. Instead, the abandonment of the three year holding rule, and the even greater encouragement of group buyouts included in the Telecom Act, has led to group owners simply treating these public trusts as commodity trading items, with little regard for public service to the respective communities. In light of the skyrocketing prices of broadcast stations, a direct result of the general Megamedia trend and the Telecom Act's opening of the buyout floodgates, the likely result of allowing duopolies is that there will be more group ownership with less community and public service commitment. For example, two stations in Portland and Bangor, Maine, sold for $112 million in 1997 - and they were bought by Gannett from the local Maine Radio and Television Co.

Further regarding En Banc panel Question 6: Those resultant skyrocketing prices and Megamedia machinations also mean, as several analysts and magazine pieces have recently pointed out, that minorities have a much tougher time getting into the game. Indeed, especially with the resultant Megamedia buying frenzy after passage of the Telecom Act, minority ownership of broadcast stations has declined, becoming even more "few and far between," as Broadcasting & Cable put it in October..[32] And regarding small business in general, listen to the chairman of sizable but not quite Megamedia-magnitude Renaissance Communications - in the aftermath of the Telecom Act: "I'm a buyer who can't buy. Every time I try to buy, a bigger gorilla gets in the way." Then in July 1997, Renaissance itself was bought out by Megamedia corporation, The Tribune Co.[33] Further, as Broadcasting & Cable points out: "With large competitors controlling as many as eight stations in a market, minority owners say they are losing a greater share of ad revenue and popular syndicated programming as well."[34]

Further and related to the issue of group buying of an additional station if the duopoly rule is eased, note that there is an increasing tendency for network affiliates to bump their network's programs because they feel they can make more money from showing syndicated shows during which they can sell most or all of the ad spots. Clearly, on average this tendency will be greater with group owners than with individual owners since the groups can offer better bids for more enticing syndicated shows. At first glance that might seem like a step in the direction of more diverse programming. But further thought shows that the substitute programming will generally be, as detailed above, standard, often recycled entertainment fare; and the most frequent shows preempted have significant public affairs or cultural material. This then, is actually a loss of important material in our media mix

The third factor that casts doubt on the claimed additional public service and meaningfully better programming from easing the duopoly, cross-media and other rules, is the huge debt levels incurred from buyouts by group owners. As Ken Auletta has reported: "Run by bottom-line managers, and often burdened by the debt incurred to meet the steep purchase price, stations were constantly trying to better last year's numbers."[35] And, the debt problem has gotten worse as broadcast stations have dramatically risen in cost/market value.[36]

One other note on the impact of group ownership: There is increasing evidence that radio group ownership is having an impact on local community broadcasting that is the opposite of what the Commission has long said is in the public interest, namely local programming that serves the particular community. Group owners are increasingly substituting national and syndicated programming for genuinely local material, CBS's radio empire and Karmazian's part-owned Westwood One national radio syndication/distribution operation being a prime example.[37]

All that further suggests an answer to En Banc question #7, "do the FCC's local television ownership rules promote or undermine First Amendment values? With the abandonment of public affairs programming log-keeping, ascertainment rules, and the like, along with the great increase in ownership concentration and the impacts of those develoments discussed above, the answer is: the current law and rules undermine First Amendment values.

An additional note on the notion of cable TV constituting competition for broadcast stations: FCC documents refer repeatedly to the sizable total cable coverage of about two-thirds of the public. But besides the unreasonable programmatic comparisons for core First Amendment concerns, this simple count is inaccurate. 67% of the public does get *basic* cable, but a smaller percentage gets extended basic, and a much smaller percentage gets premium channels. Broadcasting & Cable's spring '98 listing documents a wide range of "pay-to-basic" ratios in the top 25 cable MSOs, with many in the 40-70% range of basic cable subscription.

In summary, maybe is it time to step back and ask ourselves, for a civilized society, what can and should these powerful and pervasive means of mass communication be used for, and how can we facilitate more meaningful and constructive use of them? Is our society about more than just business empire-building and crass money-making?

A Final Matter for Perspective: Who is Represented in the Policy Process?
An esteemed colleague, Prof. Darrell West of Brown University along with co-author Prof. Burdett Loomis of the University of Kansas, recently published an important book entitled The Sound of Money: How Political Interests Get What They Want.[38] Their excellent scholarship demonstrates how increasingly skewed is the policy process, in Congress and elsewhere, by the huge resources of corporations, trade associations and other special interest groups, and how the gap between them and the general public in the ability to exert influence in governmental processes has widened

further with use of various contemporary means of communication, computing and other technology.

In the Commission's Further Notice of Proposed Rulemaking on regulations governing television broadcasting, etc. and in its Second Further Notice on that docket, we see evidence of precisely this pattern - and a very unfortunate and undemocratic pattern of conclusions. That is, looking through the List of Commenting Parties one sees they are nearly all business or trade organizations that have a big financial stake in these rules; but other elements in our society, including the general citizenry, are only in rare evidence. Correspondingly, it is severely inaccurate and very misleading for the Commission to repeatedly say "most commenters thought..." or "commenters were generally saying...." Those summations seem to suggest this was the majority of opinion in general; but nothing could be further from the truth. The list of commenters - especially in light of what professors West and Loomis report - actually demonstrates how severely skewed is the pattern of voices heard by the Commission. In simple terms, this is overwhelmingly an insider, special interests' game - and they and their financial interests overwhelm the policy process, while the public's interests are lost. I am appreciative of the opportunity to have my voice heard. I'm also thankful that such organizations as the Consumers' Union, the Media Access Project and a couple of others have striven to add a more general public interest voice, one not carrying special financial stakes; but they are the rare exception.

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WILLIAM F. BAKER
President and Chief Executive Officer

William F. Baker is President and Chief Executive Officer of Thirteen/WNET, public television's flagship station, major program producer and multimedia producer, serving the New York metropolitan area and the nation. Under Dr. Baker's leadership, Thirteen has increased its local programming efforts, created the national nightly CHARLIE ROSE discussion program, and instituted an educational program development and multi-media learning center.

He joined Thirteen in May 1987, after serving a dual role as President of Westinghouse Television, Inc. (from 1979) and Chairman of Group W Satellite Communications (from 1981). Beginning his broadcasting career while still a student, Dr. Baker has held a variety of programming and general management positions in radio and television in Cleveland, Baltimore, Los Angeles and New York.

His usual range of avocations include amateur radio, horology, astronomy, electronics, sailing, and polar exploration. In 1983, he carried the Explorers Club flag to the top of the world, becoming one of the first ten people in history to visit both the North and South Poles. He returned to the South Pole in December, 1988 to tape a documentary about Antarctica, and he revisited in 1992 and 1996.

Dr. Baker was honored with the 1987 Trustees Emmy Award of the National Academy of Television Arts and Sciences, which is given in recognition of outstanding contribution to the advancement of television. He has received two duPont Columbia Journalism Awards and numerous other awards for his work as a producer, including four Emmy Awards. On July 4, 1992, he hosted the worldwide telecast of the Tall Ships parade, which achieved the largest audience in the station's history

President of the New York Chapter of the National Academy of Television Arts and Sciences, Dr. Baker also serves on the boards of The British Academy of Film and Television Arts East Coast, Leitch Technology Corporation and College of St. Elizabeth.

Dr. Baker received his B.A., M.A. and Ph.D. degrees from Case Western Reserve University, and he is the recipient of honorary degrees from St. John's University and the College of St. Elizabeth.

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Statement by William F. Baker
President and CEO, Thirteen/WNET

Mr. Chairman and Commissioners:

Thank you for inviting me to offer my views as you consider the ways in which proposed changes to ownership patterns for broadcast outlets will affect our society and the public's free access to news and information.

This is an issue of profound importance. Indeed, it goes right to the heart of our way of life. Democracy, by definition, depends on the free and uninhibited expression of a range of ideas, opinions and voices. Since most Americans still get most of their news and information via free, over-the-air broadcast transmission, it is imperative to the health and welfare of the American people that we maintain an unfettered marketplace of ideas in that medium. Accordingly, when conditions conspire to interfere with or impede such expression, our democratic system is notably weakened.

Since its earliest days, American broadcasting has had to balance its dependence on the profit motive with its obligations to the public interest standard to which the Congress continues to adhere. These two forces have been locked in a dynamic tug-of-war that has driven the development of radio and television, and thrust it into the center of American life. In my 30 plus years in broadcasting, I have had the privilege of heading up a major commercial television group and presiding over one of America's foremost public television stations. Through that professional experience, and in researching the book "Down the Tube," I have come to respect a healthy mix of marketplace incentives and regulation in the public interest. But today, I fear that you are about to let private interests tip the scales too far in their favor.

All around us we see evidence that when corporate balance sheets come to dominate a media concern, the shareholders garner profits at the expense of viewers looking for substance.

A recent survey commissioned by the Benton Foundation and the Project on Media Ownership discovered that 80% of those polled were in favor of more educational programming for children and more local programming.

Yet, as we all know, it took Congress and the FCC to mandate that broadcasters provide just three hours of educational programming for children per week. Unregulated, programmers found no incentive to provide families with even a meager ration of educational fare.

As for local programming, broadcasters supporting the modification and/or elimination of local cross-ownership and duopoly rules prepose that the cost savings they will enjoy from operating co-located facilities in a single market will allow them to compete more effectively. But at what cost?

Two apparently competing news programs emanating from a single newsroom at two different stations certainly do not reflect the vigorous marketplace of ideas from the diverse and antagonistic sources that the Supreme Court deemed essential to the public welfare.

Moreover, there is no assurance that a single owner of multiple outlets counter-programming itself will actually provide more meaningful service to viewers outside the mainstream demographic sectors -- especially in cases where a corporate owner's ties to the community are minimal and local management's measure of success is the short-term bottom line.

Consolidation in radio has not resulted in any increase in diversity that I can discern. Nothing I have seen in radio has convinced me in the slightest that multiple television ownership within a local market would result in a process of diversification of programs and viewpoints. In fact, any such claim is highly speculative.

Moreover, with the general easing of ownership limitations and the lifting of the three-year anti-trafficking rule, the Commission has allowed radio stations to be turned into little more than commodities whose skyrocketing market values must, of necessity, restrict the possibility of ownership to a select few. Recently, the Veronis, Suhler & Associates annual analysis reported that the aggregate value of radio station sales in 1995 was 1.2 billion dollars. Today, the trade and general press are predicting a single transaction of some 21 to 23 billion dollars, which would create a single owner of approximately 900 radio stations.

Arguing that consolidation will not harm the marketplace of ideas, industry leaders insist that stations will serve the public no matter who owns them. But can we seriously suggest that Fox Broadcasting's service is not influenced by the views of Rupert Murdoch? Is there anyone among us who would assert that the combined CBS/Westinghouse view of serving the public interest is the same as the distinct and competing views of those companies when they were run by those old adversaries Bill Paley and Don McGannon respectively?

As an industry veteran who has been the head of a multi-group conglomerate, take it from me: ownership matters.

Yes, the economy has changed, and broadcasters must endure increased competition from cable and other new media. That does not justify every scheme for reducing competition within the medium. We must remember that broadcasters have a special position in our society. As trustees of a prized national resource, they hold an obligation to look beyond the bottom line.

Were commercial broadcasters in financial peril, perhaps their arguments would be more convincing and my comments would take a different tone. But the fact is, broadcasting remains a highly lucrative business. According to the Television Bureau of Advertising, advertising revenues for the first three quarters of 1998 totaled nearly 25 billion dollars, a 7.8% increase above the same period a year before. Operating income has also shown a significant uptrend in recent years. And the rule changes being sought are designed to increase those profit margins.

Unfortunately, it is local diversity that would be sacrificed for such profit. In my hometown of Cleveland, Ohio, where only two of the 20 assigned stations were not locally owned when I was living there, those owners were active leaders in the community. Today, there is only one such owner. Moreover, 14 o´ .ne stations are owned by only three large companies with minimal local ties.

As we make the transition to digital, the Commission should take a moment to step back and see how things unfold for broadcasters. Digital multicasting capabilities, as we all know, will essentially allow broadcasters to have multiple channels in a single market. That fact alone should call into question the necessity of modifying fundamental rules at this juncture.

This is not to say that I am categorically opposed to all rule changes. Although I personally have no objection to the Commission's proposal to ease its prohibited overlap rule, for example, I believe that wholesale relaxation of the rules on TV duopoly and the radio-television cross-ownership could open a Pandora's Box of problems that may become evident only after time. Do not open that box without the most extensive deliberation. Once ground held on behalf of the public trust is surrendered in the name of corporate profits, it may prove impossible to reclaim. The arguments on grandfathering LMA's and one-to-a-market waivers are clear examples.

Before you act, I urge you to put these issues on the public docket and air them fully. In "Down the Tube," we have discussed the many unintended consequences of past FCC deregulation. Be sure that the decisions you make today will not become infamous chapters in a book yet to be written.

Whatever has been said by influential members of Congress – however the definition of the "public interest" may change over time – Congress has not removed that standard from the Communications Act and this Commission must define its substance. Today, the developing history of American broadcasting has its spotlight on each of you. Consider well what you do, and what you undo.

Thank you.

OWEN M. FISS

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- Spec. Asst. to Asst. Atty. Gen., Civil Rights Div., Dept. of Justice, 1966–68
- Professor, University of Chicago Law School, 1968–74
- Visiting Professor, Stanford Law School, 1973
- Professor, Yale Law School, 1976–82; Bickel Professor, 1982–92; Sterling Professor since 1992.

Selected Publications

- Injunctions, 1972, 2nd ed. (with D. Rendleman), 1984
- The Civil Rights Injunction, 1978
- The Structure of Procedure (with R. Cover), 1979
- Procedure (with R. Cover and J. Resnik), 1988
- The Federal Procedural System (with R. Cover and J. Resnik), 1988, 1989, 1990
- Troubled Beginnings of the Modern State, 1993
- Liberalism Divided, 1996
- The Irony of Free Speech, 1996

Biography

ALAN FRANK
VICE PRESIDENT & GENERAL MANAGER, WDIV-TV

Alan Frank has been vice president and general manager of WDIV-TV, Channel 4 since April, 1988.

During his tenure as WDIV's vice president and general manager, Frank has helped the station become the market's leader in news and programming. He has earned the distinct reputation for producing and airing innovative local programs and upholding excellence in journalism.

Under his leadership, WDIV has been the number one NBC affiliate among the top 10 markets and is considered one of the top NBC stations in the country. Frank is the current chair of the NBC Affiliate Board of Directors, an association of all NBC stations across the country.

Frank has also helped establish WDIV's strong involvement in the community with the live broadcasts of Detroit's two premiere events, *"The Michigan Thanksgiving Parade"* and the *"International Freedom Festival Fireworks"* display. He has also initiated campaigns such as *"Walk on the Wild Side."* a community project with the Detroit Zoo which encouraged the public to enjoy southeast Michigan's rich environment. *Walk on the Wild Side* was recognized as an outstanding community affairs campaign, honored with a Silver Angel Award and by the Michigan Association of Broadcasters. It is credited with making 1997 the greatest year the Detroit Zoo has ever enjoyed.

Frank joined WDIV in 1979 as program manager. He was promoted to director of programming and audience development in 1981. He was named vice president of programming and audience development in 1984 and became vice president of programming and production for Post-Newsweek Stations, Inc., WDIV's parent company, in 1986.

Go for it! 4

While supervising the national programming development efforts for WDIV and Post-Newsweek, Frank worked on developing nationally syndicated programs.

In 1992, while running WDIV, Frank negotiated the purchase of PASS Sports, Michigan's cable sports system. He made it into a 24-hour basic cable service then sold the programming rights to Fox Sports in 1997.

Prior to joining WDIV, Frank held a number of television management positions at several stations owned by Group W. He was program manager at WJZ-TV in Baltimore from 1975 to 1978 and at WBZ-TV in Boston from 1974 to 1975. Frank was executive producer at KPIX-TV in San Francisco from 1972 to 1974 and production manager for the "David Frost Revue" in New York City from 1971 to 1972.

Dedicated to community service, Frank is the past chairman of the Board of Trustees of Sparky Anderson's CATCH (Caring Athletes Team for Children's and Henry Ford Hospitals.) In 1992, he was inducted into the CATCH Hall of Fame. Frank also serves on the board of directors of the Henry Ford Health System, Detroit's Children's Hospital, the Detroit Zoological Society, the Parade Company, Camp Make a Dream, the Metropolitan Detroit Convention & Visitors Bureau and Roeper School. Frank is also on the advisory board of United Way for Southeastern Michigan. In 1990, Frank was named Honorary Chair of National Volunteer Week and in 1992 and 1993, he served as General Chairman of the International Freedom Festival.

A native of Pittsburgh, Frank holds a master's degree in television and radio from Syracuse University and a bachelor's degree in journalism from Duquesne University. He served as a first lieutenant in the U.S. Army in Vietnam.

Frank resides in Oakland County with his wife and three children.

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9805

**WRITTEN TESTIMONY OF ALAN FRANK
FOR THE FCC EN BANC HEARING ON
TELEVISION DUOPOLIES AND LMAs
ON FEBRUARY 12, 1999**

I am Alan Frank, President and General Manager of WDIV(TV), the Post-Newsweek station in Detroit, and Chairman of the NBC Television Affiliates Association. I am here in place of Bill Ryan, who is President and Chief Executive Officer of Post-Newsweek Stations, and who could not be here because of a longstanding unbreakable commitment. Bill made great efforts over the past month to accommodate the shifting dates for this hearing. He wanted to be here because he is deeply committed to the principles at stake in this hearing.

Through wholly-owned subsidiaries, Post-Newsweek is the licensee of KPRC-TV, Houston, KSAT-TV, San Antonio, WDIV(TV), Detroit, WKMG-TV, Orlando, WJXT(TV), Jacksonville, and WPLG(TV), Miami.

I

The controlling principle for broadcast ownership issues is localism. Although it has been at the core of the Communications Act since 1934, localism remains the soundest available guide for current broadcast regulatory issues. Consistent with this statutory mandate, our country's television service is universal, free, and locally and nationally diverse and competitive. It is the localism principle, faithfully administered by the Commission, that explains why our local broadcast system is the envy of the world. Proposals to water down the duopoly rule and to permit LMAs indiscriminately run counter to the localism principle.

From a consumer's perspective, localism is local news and weather emergency information, coverage of candidates for the communities they represent, and station support of local charities and civic activities. (This is a generalization that fails utterly to give adequate tribute to the array of day-in, day-out special contributions that just our station in Detroit, for instance, makes to the communities we serve). From a programming perspective, it is the balance of network and locally produced or selected programming – a mix that local stations tailor to the audiences in their communities. From a statutory/regulatory perspective, it is Section 309 of the Act, the table of channel allotments, and propagation, interference and other technical rules that provide the structure for local television service throughout the United States.

Localism has driven the policy decisions of Congress and the Commission for 65 years. The table of DTV channels, the FCC's recent defense of the Grade B standard, the preservation of the 35% cap, the FCC's refusal thus far to eliminate the rule that preserves for local affiliates the right to preempt network programming that they prefer not to carry, and Congress' insistence on reasonable DTV cable carriage rules are all examples of the continued applicability of the localism principle.

II

We believe that the localism principle requires a meaningful duopoly rule so as to assure a diverse and competitive local marketplace. It is healthy to have different entities owning and controlling different broadcast outlets in a market. It leads to economic, programming, and viewpoint competition and diversity.

It stands to reason that generally it is preferable from the point of view of competition and diversity to have five stations in a market being operated by five different licensees, rather than to have two of them (or two sets of two of them) being co-owned under a duopoly or co-managed and controlled under an LMA. These stations are operated under licenses assigned by the Commission in the public interest. In assigning these licenses, it is right and proper for the Commission to enact rules that promote diversity and competition by limiting common ownership and control in the local market. Therefore, we support the duopoly principle.

However, like others, we believe the existing Grade B standard for the duopoly rule is unrealistic and overbroad. Generally, a Grade A/DMA standard would be reasonable, and we support a rule modification to this effect. Both the Grade A and DMA standards effectively measure the areas in which local stations compete against each other, although their service to the public reaches beyond. The distinction between UHF and VHF is becoming outmoded and will largely expire in the digital world. Accordingly, it should not be a basis for exceptions to the duopoly rule. Exceptions might, however, be permitted for failing stations – UHF or VHF.

III

Most LMAs are simply a way of evading the duopoly rule. Seven years ago, the Commission decided in the radio environment that if one station duplicates more than 15% of the programming of another station, it should be treated for purposes of the duopoly rule as being co-owned. The Commission treated LMAs as equivalent to ownership, and therefore subject to the duopoly rule, "as a means of preventing circumvention of the ownership rules through local time brokerage arrangements." Revision of Radio Rules and Policies, FCC 92-97, 7 FCC Rcd. 2755, 2761 (1992). The Commission was "particularly concerned" that these arrangements "could undermine [its] continuing interest in broadcast competition and diversity." Id. at 2788. That made eminent sense in the radio context. And for the same reasons it makes equally good sense in the television context. As with the duopoly rule, we agree that exceptional circumstances (for example, severe financial hardship) may justify waivers.

We can also appreciate the appropriateness of grandfathering existing LMAs but within limits. If an LMA is a sham, it should not be entitled to any grandfathering. Otherwise, grandfathering should be determined based on whether the LMA was entered into before or after November 5, 1996, for the Commission on that date gave clear notice that stations which entered LMAs prospectively did so at their own risk. Therefore, stations that entered into LMAs after that date should be given only a short period, certainly no more than a year, to come into compliance with the rules. As to LMAs entered into before November 5, 1996, they should be grandfathered for the duration of their term or for three to five years, whichever is less. Those that entered into LMAs of excessive length, like 15 or 20 years, should not be rewarded for overreaching. Stations that entered into LMAs prior to November 5, 1996, should have known that these arrangements would one day be treated as equivalent to ownership and therefore subject to the duopoly rule. The rule for radio LMAs was already in effect and it was clear even then that there was no difference in principle between television and radio LMAs. In light of this history, these grandfathering proposals seem reasonable and even generous.

IV

We now turn to the specific questions that the Commission has asked the Second Panel to address.

1. **What is the status of competition and diversity in the mass media at the local level? How does the emergence of cable and new video outlets affect your views on this issue? To what extent do these other media and new outlets compete with broadcast TV and radio?**

By and large, competition and diversity are healthy in the mass media video market at the local level. By diversity, we mean diversity of viewpoint, diversity of service, diversity of management style, and diversity of ownership. It may be that there should be more minority and female ownership, although I note that Mrs. Graham is the single majority shareholder of The Washington Post Company, our parent company. On both a local and national basis, cable and new video outlets compete with local television stations for advertising dollars, viewers, programming talent and other resources. Cable and new video outlets add to national and, in some respects, regional program diversity, but they provide very little in the way of local service and, therefore, contribute only marginally to local program and viewpoint diversity.

I would add that two of the greatest threats to local competition and diversity in television are the growing power of the networks at the expense of local affiliates and the trend toward consolidation at the local and national levels, radio concentration being the prime harbinger of what would happen if the national cap and duopoly rules were diluted. For in the local radio marketplace and nationally, competition and diversity are in a very unhealthy state.

2. **What are the benefits of common ownership? How do these benefits serve the viewer or listener?**

Common ownership may result in economies which lead to competitive advantages for one set of competitors over its rivals. These economies may benefit the two stations that are commonly owned. But they may also result in competitive harm to others whose service to the public will be adversely affected thereby. Whatever benefits are achieved by the commonly owned or commonly controlled stations will usually be outweighed by the negative impact on other competitors and by the diminution of diversity and the elimination of competition between the co-owned or commonly controlled stations.

3. How does ownership consolidation affect the FCC's traditional goals of promoting diversity and competition in broadcasting.

For the most part and making exceptions for failing station situations, ownership consolidation hurts the FCC goals of enhanced diversity and competition in the local television market.

4. Based on your experience, is there a connection between ownership and the political and social viewpoint presented over the airwaves, either in news and public affairs programming or entertainment programming? It would be helpful to give specific examples to support your view.

It stands to reason that stations that are independently owned and operated will tend to approach programming and other competitive decisions differently from those that are under common control or ownership. This does not necessarily mean that the program content of two independently-owned and operated stations will be more different from each other than if they were co-owned or subject to an LMA. In some cases, the programming may be more similar and therefore more competitive, for example when independent stations compete head to head in local news rather than, if they were co-owned or involved in an LMA, they scheduled entirely different programming in the same time slot. Reasonable duopoly and LMA rules mean that program-related decisions will be made independently, without regard to their impact on the co-owned or LMA-ed station.

5. Has broadcast industry consolidation had an impact on the ability of small businesses, including businesses owned by minorities and women, to enter into and compete in broadcasting?

We do not know of any adverse impact in television, and we do not have sufficient information to comment on this issue for radio. Our position on the duopoly and LMA issues for television is not dependent on such considerations.

6. In light of your diversity and competition goals, how would you draft a TV duopoly rule for the FCC?

We think the duopoly rule generally should prohibit stations to be co-owned where there is a Grade A overlap or they are in the same DMA. We would make an exception for failing station situations and would waive the rule in other special situations but would make no special allowance for UHF stations.

7. Assuming LMAs become attributable under the FCC's ownership rules and that some would violate your proposed duopoly rule, would you grandfather these existing LMAs? For how long and under what circumstances, e.g., would you allow them to be renewed or transferred?

If an LMA is a sham, it should not be entitled to any grandfathering. Otherwise, the grandfathering should be determined based on whether the LMA was entered into before or after November 5, 1996, for the Commission on that date gave clear notice that stations which entered LMAs prospectively did so at their own risk. Therefore, LMAs entered into after that date should be given only a short period, no more than a year, to come into compliance with the rules. As for LMAs entered into before November 5, 1996, they should be grandfathered for the duration of their term or for three to five years, whichever is less. Those that entered into LMAs of excessive length, like 15 or 20 years, should not be rewarded for overreaching. Because the rule for radio LMAs had been in effect for years and it was clear even then that there was no difference in principle between television and radio LMAs, television stations entering into LMAs prior to November 5, 1996, are not entitled to wholly unrestricted grandfather rights.

8. In light of your diversity and competition goals, how would you draft a TV-radio cross-ownership rule for the FCC?

Post-Newsweek takes no position on this rule. But I would make the personal observation that these cross-ownerships can lead to undesirable conduct. For example, in Detroit our television station approached the all-news radio station owned by CBS (which also owns a television station and other radio stations in Detroit) with a proposal that it carry our emergency weather coverage and that we cross-promote each other's service in this regard. The radio station initially expressed enthusiasm for this proposal but ultimately rejected it because its co-owned television station exercised veto power over the radio station's programming decisions.

9. Assuming some of the conditional waivers of the TV-radio cross-ownership rule granted since passage of the 1996 Telecom Act would violate your proposed revised rule, how would you treat these conditional waivers? Would you require waiver holders to come into compliance with the new rule? How soon?

We take no position on the TV-radio cross-ownership waiver policy, as we take no position on the rule itself.

10. How would relaxation of local ownership rules affect advertising and program distribution (e.g., syndication) pattern and practices?

It seems reasonable that if the local ownership rules were compromised, there would be fewer stations competing for advertising and programming and therefore the prices local retailers pay for commercial time might increase and the prices program syndicators could extract from a market might decrease (resulting in lower rewards and incentives to the program community and, in turn, lower quality programming). These harms are not theoretical. Syndicated programmers themselves have publicly expressed great concern with the negative impact LMAs have had on them. Duopolies and LMAs tend to strangle diversity of programming from these sources.

11. **How should digital television be factored into our thoughts? Would duopolies provide more resources and economies to assist conversion to digital or would they reduce broadcasters' incentives and interest in making the conversion?**

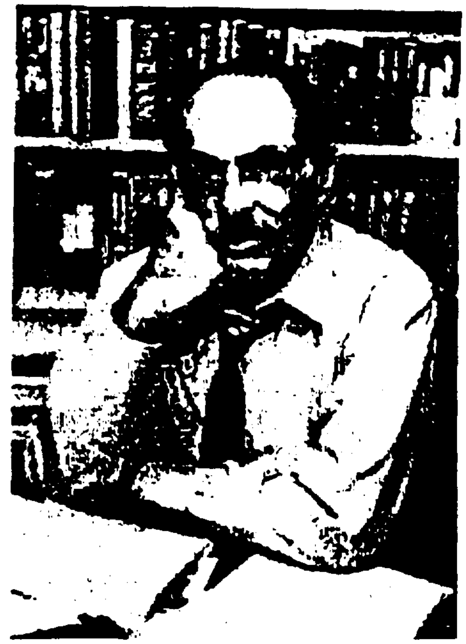
We don't believe that the advent of digital should affect the public policy analysis at all. Undue concentration would have comparable effects on diversity and competition in the digital world just as it does in the analog world. Conceivably, because of the burdens of the digital conversion, the failing station exception might be justified more frequently, but the principle would be the same. The Commission can much more effectively support the transition to digital by adopting reasonable DTV carriage rules and playing an effective role in cable compatibility issues than by abandoning the principle of local competition and diversity. Of course, the Telecommunications Act of 1996 provided that the duopoly rule should not apply to situations where existing DTV licensees bid for new DTV stations to be operated on spectrum turned back to the Commission when the digital transmission has been completed. That is not the same as one existing DTV station buying another existing DTV station in the same community.

* * * * *

Post-Newsweek appreciates the opportunity to appear today. We know that broadcasting must continue to change. That is why, for example, we are exploring new services that digital technology may make possible. But we believe the best strategies will be those that build on and enhance localism, not ones that turn their back on the localized service that our system has been designed to foster, that good broadcasters in fact provide and that the public continues to rely on and benefit from. Accordingly, the Commission should retain a reasonable duopoly standard and adopt an LMA policy that is consistent with this standard.

Lawrence K. Grossman

Lawrence K. Grossman's career in print and electronic communications spans almost five decades. From 1984 to 1988 Grossman was president of NBC News. Prior to that he was president of PBS (the Public Broadcasting Service). He's also held positions in charge of advertising and promotion at NBC, and in advertising and promotion at CBS and *Look* magazine. For ten years, Grossman headed his own media and advertising agency. A prolific writer on media and political issues, he is author of the widely raised, The *Electronic Republic: Reshaping Democracy in the* [illegible]*formation Age*, published by Viking and Penguin Books. He writes a regular column, "In the Public Interest," for the *Columbia Journalism Review* and has contributed numerous articles on media and politics to newspapers, magazines and journals.



Grossman held the Frank Stanton Chair on the First Amendment at the Kennedy School of Government at Harvard and was a senior fellow at the Gannett Center for Media Studies at Columbia University's Graduate School of Journalism.

Mr. Grossman serves on various not-for-profit boards including: Connecticut Public Broadcasting, where he is chairman of the board's Strategic Planning Committee; the International Longevity Center, USA; the International Council on Global Public Health Progress, Paris, and the American Heart Association Research Council, New York City. He and his wife Alberta, an adjunct professor at Borough of Manhattan Community College of City University of New York, reside in Westport, CT and New York City.

Lawrence K. Grossman

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February 12, 1999

Statement of Lawrence K. Grossman

***En Banc* Hearing Before the Federal Communications Commission**

On Local Television Ownership Rules

Thank you for your invitation to appear on this morning's first panel. The material I received from Mr. Stewart, Chief of the Mass Media Bureau, advised us to offer you "A General Perspective -- Views from Academia and Wall Street," since the panel's members consist of "legal scholars, economists, political scientists, and Wall Street observers."

In the interest of full disclosure, I should warn you that I am none of the above and have none of those credentials. Far from being a legal scholar, I am in fact a law school drop-out. Nor do I qualify as an academic, an economist, or a professional Wall Street observer. A decade ago, over the objection of some resident Harvard academics, I did occupy the Frank Stanton First Amendment Chair at the Kennedy School of Government. In the early 1990s I spent time as a Senior Fellow at Columbia University. And more recently I wrote a book, "The Electronic Republic, Reshaping Democracy in the Information Age," now in paperback. But my only advanced academic degree was not earned but honorary.

I have, however, spent most of my working life in television, starting in advertising at CBS in the 1950s; then in the 1960s as vice president of advertising for

NBC; in the 1970s running my own advertising and production company; then from 1976 to '84 serving as president of PBS, and from 1984 to '88 as president of NBC News. Currently, I serve on the board of Connecticut Public Broadcasting and other not-for-profit organizations, and for my sins, I serve as chairman of Connecticut's Strategic Planning Committee, preparing for the digital era.

So my role here this morning is to offer you my own general perspective, based merely on my own long and diverse professional TV experience. And let me say right up front that in my view you would be making a serious mistake and acting against the public interest if you decide at this time to modify the "duopoly rule" and allow a single company to own more than one TV station in a market; or if you let companies own radio stations in markets where they also own TV stations; or if you allow one company to own both the newspaper and one or more TV stations in town, or if you decide to expand TV local marketing agreements. All of these changes, I suggest, will only weaken local TV service.

The ongoing changes in the mass media have not yet made it necessary to relax your TV station ownership rules. There might conceivably be a need in the smallest markets to waive a station ownership restriction from time to time in order to help a small station survive. But that has little to do with changes in television technology, and there is absolutely no need now to change the entire broadcasting industry by weakening TV ownership rule. Some day, perhaps, there may be such a need, in this unpredictable, fast-changing electronic media environment. But I doubt it. If anything, new digital technologies such as datacasting, Internet access through the TV screen, and the prospect of multiplexing TV stations appear to give broadcasters even more opportunities to make money not less.

Reducing diversity of station ownership is certainly not advisable as long as your underlying, bedrock policy continues to be to encourage diversity of programming, news sources, and viewpoints. As the Supreme Court has said, the First Amendment itself "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...." The basic policy preference should still be for the widest possible diversity of local ownership of TV stations in every market.

Obviously, diversity of TV station ownership by itself offers no guarantee of producing a diversity of viewpoints. Nor does it guarantee the existence of the diverse and antagonistic sources of information that, according to the Supreme Court, undergird the First Amendment and are essential to the public welfare. Television today suffers from what economists call "an excess of sameness" despite your local ownership rules that are designed to promote diversity of content. But a policy that will diminish diversity of TV station ownership will inevitably guarantee that fewer differing viewpoints will be made available on the air waves. Such a policy will guarantee the diminution of diverse sources of local news. And it will guarantee the homogenizing of antagonistic sources of ideas.

Before easing local TV ownership rules, I urge you to conduct a careful study of the effect on local service that easing radio's local ownership rules has produced. In radio, what was once basically a locally owned media business has become virtually a national oligopoly. I have no doubt that a careful study will show that radio now offers less local service than in the past, in part because easing radio's ownership rules has brought about a predominance of distant absentee corporate owners, more interested in financial results than broadcasting service. The result has been a sharp decline in local radio news gathering and local radio news reporting. Diminishing attention is being paid to coverage of local issues on commercial radio. And radio has experienced a corresponding rise in regimented, formulaic talk and music formats, imposed by outside owners, with little regard for individual community needs and interests.

And it is important to note that this deterioration in radio's local service has not been caused by economic hardship. Radio is now the most profitable of all the mass media, the darling of Wall Street, in part because its programming and operating costs are so cheap. The economies of scale that companies achieve by buying and operating scores of radio stations are most often used not to benefit the public, but to increase corporate profits and cash flow, and to repay the debts incurred from radio station purchases. The typical first step of a company that buys radio and television stations is to slash the newly acquired stations' operating costs to improve the company's profit margins. And the biggest cost centers invariably targeted for budge cuts tend to be local news reporting and local news gathering.

I write an occasional column for the Columbia Journalism Review called "In the Public Interest." Last fall, I wrote about the decline of radio reporting. Every radio news director I interviewed deplored the deterioration of local coverage and the homogenization of radio news. They blame it all on the companies' rush to acquire stations. As one said, "What's happening to radio news throughout the country is not a pretty picture." In the words of another, "radio today gives the appearance of having a multiplicity of news voices. But in reality what is coming out of those many thousands of radio channels is the product of a very few media owners." And a third complained that radio's multi-station owners are turning the stations under their control into "a commodity rather than a service, abandoning any pretense of serious news digging or reporting."

So before you lower the barriers to multiple television station ownership in a single market, I suggest you carefully study what exactly have been the unintended consequences during the past three years of easing radio's ownership restrictions. You should also study what has happened in TV markets where public-spirited, quality local broadcasters have sold their TV stations to larger distant companies, a trend that will accelerate rapidly if you relax local ownership rules in television. Study, for example, Seattle, once admirably served by King Broadcasting; Portland, Maine, once well served by Maine Broadcasting; and Sacramento, once well served by Sacramento Broadcasting. From all the accounts I have heard and read, new absentee multi-station owners have cut local TV news reporting and news gathering costs and diminished local TV community service in those markets rather than improved it. Large group ownership has made it increasingly difficult for the remaining local TV broadcasters to acquire programming and compete effectively.

Some have also urged you to lift restrictions on common ownership of a TV station and newspaper in the same market, even though almost every TV market in the country now is served by only a single daily local newspaper. By definition, if that were done, coverage of controversial local issues involving education, the environment, government fiscal policy, welfare, law enforcement, or medical services would see a significant reduction in the presentation of diverse viewpoints the Supreme court called for. Common sense also suggests that in any market where a newspaper and one or more television stations are owned in common, the newspaper will tend to be a lot less critical of the television station's poor performance and inadequate service to its community than if the two were independently owned.

Finally, as you know, digital technology will enable a single TV station in a market to expand into four or five TV stations, thereby compounding the local multiple ownership problem. If you change the duopoly rule now, broadcasters who own more than one TV station in a market eventually will have the capacity to convert their analog stations into eight or ten or more digital TV stations in the same market. It is way premature to set that in motion now.

Today, with television stations fetching record-breaking prices and TV station cash flow margins running at 50 to 60 percent of income, there is no compelling economic reason to lessen restrictions on local ownership and, in effect, reduce the number of information gatekeepers in each market. In the famous words of the great jurist Learned Hand, "The dissemination of news from as many different sources as possible" is "one of the most vital of all general interests....The right conclusions are more likely to be gathered out of a multitude of tongues than through any kind of authoritative selection. To many this is, and always will be folly," Judge Hand said, "but we have staked upon it our all." The Federal Communications Commission should do no less.

Thank you.

Chancellor
MEDIA CORPORATION

Jeffrey A. Marcus
Biography

Jeffrey A. Marcus (52) is President and Chief Executive Officer of Chancellor Media Corporation (Chancellor). Chancellor is the nation's largest radio broadcasting company, operating 474 stations in approximately 106 markets across the country that reach a weekly listener base of over 66 million people. Prior to assuming his current position at Chancellor, Mr. Marcus was Chairman, President, and Chief Executive Officer of Marcus Cable Company, the nation's largest privately held cable company, serving over 1.2 million customers.

Mr. Marcus founded Marcus Cable in 1990 with 15,000 customers. Through a series of acquisitions, the company grew to serve over 1.2 million customers, and in April 1998, Microsoft co-founder Paul G. Allen purchased all the limited partnership interests of Marcus Cable in a transaction valued at $2.775 billion.

Over the course of his 31 year media career, Mr. Marcus has also co-founded Communications Equity Associates, a media brokerage company (1976), and Marcus Communications, Inc. (Marcus), a cable television company (1982). In 1987, he merged Marcus into publicly held Western Tele-Communications, a microwave transmission/cable company, and he became Chairman and Chief Executive Officer of the merged and renamed company, WestMarc Communications, Inc. (WestMarc). He stepped down from his position at WestMarc in 1988, having built the company to serve over 550,000 customers.

Mr. Marcus, his wife Nancy and their two children live in Dallas, Texas. Mr. Marcus serves on the boards of The Dallas Museum of Art, The Dallas Institute of Humanities and Culture, Southern Methodist University Edwin L. Cox School of Business, St. Mark's School of Texas, and Southwestern Medical Foundation. He is also a member of the State of Texas Governor's Business Council, as well as the Southern Methodist University Willis M. Tate Lecture Series Board. Mr. Marcus also serves on the boards of Brinker International, Inc. (chairing its Executive Committee), and Chancellor Media (including its Executive and Nominating Committees), and CEI Argentina. Mr. Marcus formerly served on the boards of the National Cable Television Association (serving as Treasurer and including its Executive and Public Affairs Committees), C-Span (including its Executive Committee), Cable Telecommunications Association (CATA), the Cable Television Advertising Bureau (CAB), Cable in the Classroom (including its Executive Committee) and Cable Labs.

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Before the
Federal Communications Commission
Washington, D.C. 20554

En Banc Hearing on Broadcast Ownership Regulation

Testimony of
Jeffrey A. Marcus
President and Chief Executive Officer
Chancellor Media Corporation

National Association of
NAB®
BROADCASTERS

February 12, 1999

Testimony of Jeffrey A. Marcus
President and Chief Executive Officer
Chancellor Media Corporation

It is both ironic and apt that I am here today representing the National Association of Broadcasters. It is ironic because until last summer I had spent my entire career, 31 years, in the cable industry, building cable systems which competed with broadcasters. It is apt because the subject of this hearing is media competition. There can be no better informed witness on this subject than someone who has helped build the most successful and relentless competitor the broadcast industry has ever faced, one which has completely transformed the competitive media landscape.

The pace of change in media competition is nothing short of breathtaking. When Congress passed the Telecommunications Act three years ago, Senator Inouye said "[t]oday's local marketplace is characterized by an abundance of media outlets that were not present or contemplated when the [duopoly] rule was last revised." Since then, the Senator's perception has been confirmed over and over. A then-nascent satellite industry has become a major provider of video. The internet has exploded, and the ability to deliver audio and video signals over computers is growing ever-greater. The cable industry is changing to digital technology that will dwarf today's channel capacity. And telephone companies and cable operators are merging or entering into alliances that will accelerate the spread of digital networks.

To negotiate these developments successfully will require extraordinary agility and flexibility, the resources and the ability to conceive and implement creative strategic initiatives and alliances, and, in most cases, to scrap them and start over again. It is in the context of this volatile, tumultuous and demanding environment that we must examine the two venerable regulations, the television duopoly and one-to-a-market rules, which are the subject of this hearing.

These two rules are glacial remnants of a regulatory Ice Age. They stem from an almost forgotten time when a few TV and radio stations were the electronic media. They are the product of regulatory fears that have no place in today's market.

Eight years ago, the Commission's own Office of Plans and Policy studied the emerging media market and found that the irreversible growth of multichannel competitors to broadcasting would lead – without a change in the regulatory environment – to "a reduction in the quantity and quality of broadcast service." The OPP concluded:

> "Many of the FCC's broadcasting rules were adopted when there were far fewer channels per market . . .. Much of the FCC's broadcast regulation was motivated by a desire to limit economic market power and concentration of control over program content . . .. These concerns appear misplaced, or at best of greatly diminished importance, in a world where broadcast stations and networks face dozens of cable channels and program networks."

Again, what has happened since 1991 only confirms OPP's predictions.

In addition to the revolution in the media marketplace, the record before you shows that the duopoly and one-to-a-market rules are counterproductive, and destroy – not advance – your goals of competition and diversity. The duopoly rule has prevented dozens of stations from being launched, and condemned others to broadcasting with second-class signals and even worse programming. We know this because we can see the results of the Commission's limited but highly successful nine-year experiment with two-station operations under local marketing agreements or LMAs.

Of the approximately 70 television LMAs on the air a year ago, nearly two-thirds involved failing or struggling stations. Nearly all the others put new stations on the air. Nearly two-thirds of the LMAs provided outlets for the emerging WB and UPN networks, with the remaining one-third either independents or Fox affiliates. Over half the LMAs were carrying new local news programs (and local sports and public affairs). Nearly half resulted in a substantial upgrade in technical facilities.

The efforts of LIN Television, soon to be a subsidiary of Chancellor Media, are typical of these LMA pioneers. Through an LMA, LIN saved a failing station in Battle Creek, Michigan, restoring the only local news programming for the cities of Battle Creek and Kalamazoo, and preserving a local outlet which even today would not be viable on a stand-alone basis. In Norfolk, Virginia, a LIN LMA enabled the transformation of a minimum facility home-shopping channel to a full-service WB affiliate and then, last fall, by agreeing to carry the first 10 p.m. newscast in the market, landed the Fox affiliation. In Austin, Texas, and New Haven, Connecticut, LIN LMAs launched stations which had been unable to obtain adequate financing (in one legendary instance, for more than 40 years), providing outlets for the WB network and providing additional local news and sports programming.

Because LMAs have allowed stations to share costs between two facilities, viewers have benefitted from the launch of new broadcast networks, the creation of new outlets for syndicated programming and the addition of countless hours of local news programming. These same stations have provided additional competition for both advertising dollars and syndicated programming, benefitting both advertisers and programmers.

Perhaps most important, LMAs show how changing the duopoly rule can strengthen broadcasting as a competitor to multi-channel providers such as cable and satellite. When I ran a cable company, it seemed to me that cable had two main advantages over broadcasting: (1) dual revenue streams; and (2) the ability to spread programming and other costs over multiple channels. Now that I'm in broadcasting, I see how hard it is to overcome these barriers. And while I'm proud of our free over-the-air system, I don't understand why the FCC should restrict free broadcasters' ability to compete with pay competitors who do not face these restrictions.

The one-to-a-market rule has no better justification. Even when it was adopted, the Commission could not point to any actual problems that the rule would remedy. The many grandfathered radio-TV combinations, and the waivers that the FCC has granted since 1996 – like LMAs – allow us to look into what a world without the rule would be. And the answer is that no reduction in service or diversity has been caused by radio-TV cross-ownership. Instead, radio and TV stations have strengthened their service to the public by realizing efficiencies from joint operations.

Moreover, as the Commission recognized in the *Second Further Notice* in this proceeding, if radio and television stations do not compete, there is little justification for a cross-ownership rule. And on that issue, the government has hardly been consistent. The Department of Justice has insisted that radio is a separate market from television and other media. While the FCC has sometimes reached a different conclusion, in recent months you have raised questions about certain transactions based on stations' share of the radio advertising market only. Surely, the Commission cannot have it both ways – restricting radio ownership by looking at the radio market only, but barring cross-ownership based on an entirely different view of the market.

Further, economic studies in the record show that, if the rule were repealed, and every possible radio-TV combination would occur in all of the top 50 markets, they would all still be competitive under the standards used by the Department of Justice. Each of the top 25 markets would have no fewer than 20 independent *broadcast* voices remaining after all possible combinations, and that does not even take into consideration the multitude of other competing media voices that would still be available to viewers, listeners, and advertisers.

Certainly, there is no evidence – nor could there be – that the one-to-a-market rule in operation results in greater competition or diversity of programming in any market.

The Commission should, therefore, head the advice the OPP gave it years ago and get rid of rules that reflect only a bygone era of media competition. The FCC should repeal the one-to-a-market rule, and permit ownership of radio and TV stations up to the limits set for each service. It should reform the TV duopoly rule to permit common ownership of two TV stations where at least one is a UHF station, or where the combination has no likelihood of diminishing competition. However, if you should not take this course, the investments broadcasters made to improve service to the public should not be jeopardized, and the existing LMAs and one-to-a-market waivers should be grandfathered.

Thank you for your attention. I will be happy to answer any questions.

2/5/99

MICHAEL J. McCARTHY

Executive Vice President/General Counsel

Michael J. McCarthy joined Belo as the Company's first in-house general counsel in 1985.

A native of Davenport, Iowa, McCarthy graduated from Notre Dame University in 1966. Two years later, he earned a master's degree from the London School of Economics and in 1973, he received a J.D. degree with honors from George Washington University Law School.

McCarthy began his career in 1968 as an economist/speechwriter for members of Congress at the Congressional Research Service in the Library of Congress in Washington, D. C.. In 1972 and 1973, McCarthy worked as a speechwriter for Clay T. Whitehead, an assistant to President Nixon and the Director of the Office of Telecommunications Policy in the Executive Office of the President of the United States. In 1973, McCarthy became an associate of Dow, Lohnes & Albertson in Washington, D.C., where he specialized in FCC/media, general corporate and regulatory/legislative law. McCarthy later became a partner at the firm.

In October 1985, McCarthy became Belo's first vice president, general counsel and secretary. He was promoted to senior vice president/general counsel and secretary in January 1986, and assumed his current title of executive vice president/general counsel in July 1998. Since joining Belo, McCarthy has served on the Company's five-member Management Committee.

McCarthy is a member of the National Association of Broadcasters Board of Directors, and is active with The National Center for State Courts in Williamsburg, Virginia, serving on its Corporate Counsel Committee, as well as the Legal Affairs Committee of the Newspaper Association of America and the DFW General Counsels Group.

In civic affairs, McCarthy serves on the advisory board of Bishop Lynch High School. McCarthy is a former director of the North Texas Commission, Catholic Charities of Dallas, and a former trustee of the Dallas Bar Foundation. McCarthy is also a published novelist.

McCarthy and his wife, Monica, have two children.

DOB: October 21, 1944.

Opening Remarks of Michael J. McCarthy
Executive Vice President & General Counsel
A. H. Belo Corporation

at

FCC <u>En Banc</u> Hearing on Local Television Ownership Rules
Washington, DC
February 12, 1999

Thank you, Chairman Kennard, and Commissioners:

Belo has been in the media business for 157 years. We are the owner of seventeen television stations, reaching 14.3% of the nation's households. We also own six daily newspapers, with The Dallas Morning News as our flagship paper. Additionally, we operate LMAs in four of our television markets. We believe we add considerable public interest value and editorial diversity in the markets where these LMAs operate. And while I would be pleased to answer questions about these LMAs, I'd like to confine my remarks to the Commission's duopoly rule.

While the television business today faces an extremely challenging competitive climate, Belo sees unprecedented opportunities to develop new businesses as extensions of our traditional local TV franchises. We are doing this by focusing on our major strength, the distinctive hallmark of the structure of American television regulation: we are licensed to serve local communities. Our TV stations are the only free, local video services in our markets. We are the key suppliers of quality local news and information to viewers. To thrive in the burgeoning multichannel universe, our stations have to strengthen and extend their local news and information franchises, to find more outlets and provide repurposed and, in most cases, differentiated franchise news programming. It's the only way we will retain and expand our viewer and advertiser bases. Right now, we are doing this by programming cable news channels in our TV station markets and operating four LMA stations. We have two twenty-four hour regional cable news networks, one in the Northwest and one in Texas; these networks provide informational programming different from that broadcast over our stations in those areas. Three of our four LMA stations have their own local news and all four have locally-originated programs. But our ability to program additional local outlets, like other television stations, is strictly circumscribed now by the FCC, with the prospect that we may not be able to do anything more at all.

As we weigh these limited options, meanwhile our video competitors keep forming ever larger, more threatening business combinations and alliances. Cable companies continue clustering their systems. Time-Warner now is the only cable provider in Austin, Houston and San Antonio, Texas, having exchanged cable systems in other markets with TCI in a new joint venture. And Time-Warner and TCI/ATT, which already provide a myriad of news and information services into U.S. homes, now propose to provide American households with local telephone businesses and high speed Internet access. The RBOCs keep buying each other, adding cable and Internet programming services to their wired homes. Public utility companies are also beginning to provide programming into U.S. homes over their utility wires. And the satellite business is merging into fewer companies and proposing, through signal compression, more channels.

Comparable business alliance opportunities are unavailable to local TV stations. While new video outlets -- on cable, satellite, Internet, and telcos -- are exploding onto the competitive horizon, TV stations have to exist under a regime of scarcity-based ownership regulation. The phrase "an abundance of media outlets" is today an understatement. At the very least, thousands of web sites with video streaming come onto cyberspace every day.

Please remember that local television stations are the only ones serving one-third of this country with free, local over-the-air news and information. We need the same liberal regulatory considerations afforded cable television and telephone companies to expand our own business and programming bases. From a public policy standpoint, it makes eminent sense for the Commission to remove any duopoly restrictions, at least in the larger television markets. There's no risk that this would result in a lack of editorial diversity in these larger markets. The top twenty-five television markets must average close to fifteen or sixteen full service television stations; the cable television systems alone propose a 500-channel universe in these markets, let alone 500 satellite channels, the ever-expanding Internet, and forty to fifty radio stations. And those are just the video and audio outlets. I won't even mention the print providers of editorial information in our large markets; there are few barriers to entry on the print side of the business. The Department of Justice has all of the legal and administrative machinery it needs to monitor the competitive conditions.

In sum, Mr. Chairman and Commissioners, a significant loosening of the duopoly/LMA restrictions, starting with the larger television markets for a trial period, is very much overdue. We're not asking for special consideration; we merely want regulatory parity.

Thank you.

CURRICULUM VITÆ

Kent W Mikkelsen

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Home	3012 Fayette Road Kensington, MD 20895 (301) 946-8901

Background	Born: September 20, 1954 Married, 3 children
Education	Ph.D., Economics, Yale University, 1984 M.Phil., Economics, Yale University, 1981 M.A., Economics, Yale University, 1980 B.A., Economics, Brigham Young University, 1978, *summa cum laude*
Fellowships, Honors, and Awards	College Valedictorian, Brigham Young University, 1978 H. B. Earhart Fellow, 1978-1979 University Fellow, Yale University, 1978-1980 Richard Bernhard Fellow, 1980-1981 Research Scholar, International Rice Research Institute, 1981
Fields of Concentration	Industrial Organization, Economic Development
Professional Experience	*Present Position*: Vice President, Economists Incorporated

Professional Experience (cont.)

1984-1986: Economist, Economic Analysis Group, Antitrust Division, U.S. Department of Justice

1983-1984: Visiting Assistant Professor, University of Michigan

1982: Acting Instructor, Yale University

1981-1982: Teaching Fellow, Yale University

1979-1983: Research Fellow, Yale University

Testimony

Expert witness for Government in *United States* v. *Calmar Inc. and Realex Corp.*, United States District Court, District of New Jersey, Civil Action No. 84-5271.

Expert affidavit filed for Plaintiff in *Product Movers, Inc.* v. *Valassis Inserts, Inc.*, United States District Court, Southern District of New York, 88 Civ. 5214 (MGC).

Expert witness for Defendant in *Sunbelt Television, Inc.* v. *Jones Intercable, Inc.*, United States District Court, Central District of California, Case No. CV-91-3506 WDK (Kx).

Expert witness for Defendant in *Stag-Parkway, Inc.* v. *The Dometic Corporation*, United States District Court, Northern District of Georgia, Case No. 1-91-CV-2579-JOF.

Expert witness for Plaintiff in *Thomas L. Hopkins (State of Virginia) v. Smithfield Foods, Inc.*, Virginia Circuit Court, Isle of Wight County, No. 96-125.

Expert witness for Defendant in *Elpizo Limited Partnership* v. *Marriott International, Inc. and Host Marriott Corporation* v. *Maryland Hospitality, Inc.*, Court of Common Pleas for Philadelphia County, Pennsylvania, October Term, 1994, No. 607.

Selected Television-Related Matters

An Economic Analysis of the Prime Time Access Rule, March 1995. Submitted by ABC, CBS and NBC in Federal Communications Commission MM Docket No. 94-123. *(Co-author)*

An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules, May 1995. Submitted by ABC, CBS, NBC and Westinghouse in Federal Communications Commission MM Docket No. 91-221. *(Co-author)*

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Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules, July 1998. Submitted by Newspaper Association of America in Federal Communications Commission MM Docket No. 98-35. *(Co-author)*

Panel Member, Panel Discussion on the FCC Ownership Rules, The Media Institute, December 9, 1998.

Remarks for FCC En Banc Hearing on Local Television Ownership Rules

Kent W Mikkelsen

February 12, 1999

I am pleased to have an opportunity to present an economist's perspective on the station ownership issues before the Commission.

Among economists, there is a general presumption that in a free market, the self-interested actions of individuals and firms will lead to socially desirable amounts and types of goods and services being produced as efficiently as possible.

Exceptions to this general presumption can occur due to what economists call "market failure." Market failure can occur, for instance, when too much or too little of some product is produced because economic actors do not fully internalize the costs or the benefits of their actions. Of particular interest today is another type of market failure referred to as problems of monopoly or market power. In many cases, firms could increase their profits by combining to reduce or eliminate competition among themselves. The participating firms get higher profits, but society suffers through higher prices and inferior products and services. For this reason, the antitrust laws were designed to discourage or prevent firms from significantly reducing competition. These laws are justified by this potential market failure.

Economic theory teaches that competition can be threatened if economic activity in a market is concentrated into the hands of a small number of firms. Generally speaking, the larger the number of firms in the market, and the more similar the firms are in size, the greater is the likelihood that competition will prevail (other things being constant). Thus, there is a clear theoretical link between the structure of ownership in the market and the presence of competition.

The U.S. Department of Justice and the Federal Trade Commission, the two main federal antitrust agencies, have developed a standard methodology they use to identify changes in ownership structure that can potentially reduce competition. Their "Horizontal Merger Guidelines" are also widely used elsewhere in analyzing competition issues. At the risk of oversimplification, I would like to very briefly describe the analytical process.

> The first step is to determine all the products and services in which the merging parties compete.

Next, one determines who else competes. That is, one determines what other products and services are close substitutes in use and are available in the relevant geographic area.

Having identified the relevant products and competing providers, the next step is to assesses the concentration of ownership among the providers. Concentration is usually measured using an index based on the market shares attributable to each separate owner in the market, using actual sales shares or shares based on potential sales.

The measured concentration level is then compared with external standards. While there are other factors that are also considered, the federal agencies that routinely analyze mergers have identified as a minimum threshold the concentration level that would exist in a market with 5-6 equal sized firms, or some larger number of unequal sized firms, depending on the degree of inequality.

Based on the results of this analysis, an antitrust agency would decide whether a proposed merger was likely to result in a significant decrease in competition. If so, the agency would likely oppose or seek modification of the proposed merger

Please note that the antitrust agencies do not attempt to "maximize" the number of competitors. Against the possibility that competition would not be preserved if two firms merged, competition policy recognizes that mergers and joint ownership can yield benefits to consumers in the form of improved product offerings and lower costs. It is also recognized that economic freedom should not be curtailed unless there are clear, compelling benefits to be gained. For these reasons, only mergers that are judged likely to have a significant impact on competition would be opposed.

Competition analysis is best done on a case-by-case basis. Relaxing that rule for a few minutes, I would like to state some general conclusions that I believe would be verified in case-by-case analyses of individual markets where mergers (joint-ownership) might be proposed if the Commission were to relax certain of its ownership rules.

1. Suppose that the "TV duopoly" rule were relaxed. Assuming that TV stations do not compete significantly with other media and so form a separate market, there are many areas of the country in which little or no joint ownership of TV stations could be permitted without significantly reducing competition. For instance, there are about 90 DMAs in which there are 4 or fewer commercial TV stations. Assuming that the DMA is the relevant geographic area in which to analyze competition, moving

from 4 to 3 or from 3 to 2 independent owners of healthy competitive stations may well be likely to reduce competition.

By the same token, there are many DMAs in which joint ownership of TV stations would presumably have no significant effect on competition. In markets with 8 or more commercial stations, of which there are over 40, some joint ownership could probably be permitted without raising competitive concerns.

2. To take another case, suppose that TV stations and radio stations are considered to be in the same market, a proposition for which there is considerable evidence. In this case, there could be some competitive rationale for limiting cross-ownership of TV stations and radio stations, but there is no justification for an arbitrary cap on the number of cross-owned stations. In an analysis I and colleagues submitted to the Commission about 2 years ago, for instance, we found that permitting TV stations to be jointly owned with radio station groups as large as are permitted by the 1996 Act would result in few if any markets with high levels of concentration in the largest 50 DMAs, even after we constructed the mergers to maximize concentration.[1]

In individual cases, joint ownership could be beneficial despite producing concentration levels that would appear troubling. If joint ownership or operation is necessary to bring stations on the air that would otherwise not be broadcasting or would be insignificant as a competitive force, joint ownership is probably not anticompetitive. Joint ownership or operation can also enable stations to offer superior services that would not be economical for either station to offer by itself. Such gains may outweigh competitive concerns.

I think it is safe to say that the TV duopoly and radio-TV cross-ownership restrictions now in place are not needed to preserve competition. One must also say that competition could be harmed if there were no limit on joint ownership of stations. Antitrust analysis is designed to provide such a limit. I believe the Commission should relax these restrictions and substitute an antitrust analysis in cooperation with the Department of Justice.

Competition and diversity are offered as the two bases for the Commission's ownership rules. I find it instructive to contrast the two.

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[1] Economists Incorporated, "Television-Radio Cross Ownership, Concentration and Voices in the Top 50 DMAs," February 7, 1997.

First, the justification for a competition policy is "market failure." I do not know of a corresponding rationale that demonstrates that the amount of diversity produced by economic agents in the market is too small.

Second, unlike with competition, there is no sound theoretical basis for linking deconcentrated station ownership to the types of diversity the Commission is concerned about. It is presumed that, with a given number of stations, content diversity will be greatest if all stations are separately owned. It is equally plausible to believe that, if one party owned several stations, it would purposely diversify the offerings on its stations so as to increase the overall audience it would attract.

The link between ownership diversity and viewpoint diversity is equally tenuous. Station owners don't typically enforce their viewpoint on their stations. If we assume profit-maximizing behavior, diversity in the audience seems to dictate that there is diversity of viewpoints expressed on each station, as well as diversity across stations. Furthermore, station managers and news directors also affect what is aired, not just owners.

Counting "voices" seems to imply that persons or groups without a broadcast station don't have a voice. Looking around Washington D.C. or most any other community, one sees commercial and non-commercial groups with viewpoints they want to express. These groups find many ways of persuasively expressing their views without owning a broadcast station.

Suppose it could be demonstrated that deconcentrated ownership resulted in increased diversity. There is a temptation to take what I will call an "absolutist" approach to diversity. That is, if diversity is good, then a policy that leads to more diversity must be preferred to a policy that yields less diversity. Such an absolutist approach is not the basis for sound decision-making. To illustrate with an example, most people would agree that safety is a desirable goal. Nevertheless, we do not adopt policies that "maximize" the amount of safety. Mandating speed limits of 25 mph everywhere, or imposing restrictive licensing that would sharply reduce the number of cars on the road, would both likely increase traffic safety. We choose not to adopt these policies, however, because the cost in inefficiency and loss of personal freedom is judged to be too high. Similar balancing is needed in the pursuit of diversity or any other social goal.

In conclusion, competition in broadcasting can be preserved using antitrust standards without the need for one-size-fits-all restrictions like the duopoly and one-to-a-market rules. If, in selected markets, ownership concentration were allowed to rise to somewhat higher levels consistent with competition standards, I see no reason to think that the associated amount of diversity provided by broadcast stations and other sources would be insufficient. No separate ownership standard based on diversity is warranted.

Professional Experience (cont.)

1984-1986: Economist, Economic Analysis Group, Antitrust Division, U.S. Department of Justice

1983-1984: Visiting Assistant Professor, University of Michigan

1982: Acting Instructor, Yale University

1981-1982: Teaching Fellow, Yale University

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Expert witness for Defendant in *Stag-Parkway, Inc.* v. *The Dometic Corporation*, United States District Court, Northern District of Georgia, Case No. 1-91-CV-2579-JOF.

Expert witness for Plaintiff in *Thomas L. Hopkins (State of Virginia) v. Smithfield Foods, Inc.*, Virginia Circuit Court, Isle of Wight County, No. 96-125.

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Panel Member, Panel Discussion on the FCC Ownership Rules, The Media Institute, December 9, 1998.

Bio for Victor B. Miller IV:

Victor B. Miller IV: Mr. Miller is Bear Stearns & Company's Television and Radio Broadcasting Analyst. He has served in this role since May 1996. Before this, Mr. Miller worked for the Chase Manhattan Bank's Media and Telecommunications Group from 1987 until 1996. Mr. Miller has an MBA from Columbia University and a B.S.B.A. from Georgetown University. He is married to Whitney Lynne Stevens and they have one child, Victor.

Opening Statement – Federal Communications Commission En Banc Hearing – February 12

Victor B. Miller IV – Managing Director – Bear, Stearns & Co., Inc. – Equity Analyst - Broadcasting

Opening

Good morning. I appreciate the invitation and the opportunity to share some of Wall Street's perspectives of the local television business with the Commission today. I have been actively following the broadcast business for ten years. Before becoming an equity analyst, I worked in the Media and Telecommunications Group at a commercial bank and worked extensively with television broadcasters.

When it was issued in December 1996, I read the Notice of Proposed Rulemakings with great interest, because the Commission has considerable influence over the direction and economic health of the broadcast industry. In those pages, a series of thought-provoking issues were raised addressing local ownership rules including duopoly, local marketing agreements and cross-ownership rules that are perhaps even more relevant today than when they were first written.

In my view, two central questions emerged from the NPRM. First, what is the real world relationship between ownership concentration and programming diversity in local broadcast television? Second, how does the Commission ensure that that local, free over-the-air television remains vibrant in an increasingly competitive, multi-channel world?

With these two questions in mind, I would like to discuss the current operating and financing environment facing local television broadcasters and review with you some of the conclusions we reached in recent research pieces and notes we have written.

Facts that Illustrate the Local Television Broadcaster's Operating Environment.

To provide you with a sense of the operating environment confronting local television broadcasters, I would like to state some basic statistics to set the stage.

- In 1980, there were three broadcast networks, now there are seven.
- In 1980, there were 734 commercial television stations on the air. Now there are 1,197.
- In 1980, there were 10 major pay and basic cable networks. Now there are over 60.
- In 1980, the average home had 10 viewing options available to it. In 1998, that number increased to over 50.
- In 1980, the "big three" traditional networks captured 90% of the viewing audience. Year-to-date, the "big three" networks capture only 44% of viewing.
- In 1980, the average U.S. adult was exposed to 22 hours of cable TV fare. In 1998, the average U.S. adult was exposed to 554 hours. During that same time, cable's percentage of television viewing has increased from 2% to 39%.
- In 1980, cable networks earned $53 million in advertising revenues. In 1998, cable networks garnered $8.3 billion in advertising revenues.

Clearly, the video distribution business has become progressively more competitive during the last 20 years from both a broadcast and cable perspective. However, the main beneficiary of these changes has been the viewer; there are 60% more TV stations on the air in local markets and 400% more viewing options on a national level. There is no shortage of distinct points of view.

Operating Challenges Facing the Local Broadcasters.

In May 1998, we wrote an industry piece entitled "Seizing Control of Their Destiny", in which we identified five operating challenges confronting the television business.

The first challenge is fragmenting viewership. As cable penetration rises and new cable and broadcast networks enter the fray, local broadcasters' share of viewership is declining. Declining viewership impacts local broadcasters' revenue and expense lines simultaneously, impacting station profitability. While pressure on advertising rates impedes revenue growth, station's spending on news and national "marquee" programming has been increasing as stations struggle to differentiate themselves from video competition.

The second challenge for local station operators is battling the cable networks. Cable networks enjoy several advantages relative to local TV broadcasters. For instance, cable networks participate in a dual advertising-subscription revenue stream. Also, cable networks rely on the economics of national reach, while local television stations rely on individual markets. Additionally, while large entertainment and broadcast companies are able to "amortize" expensive programming over several broadcast and cable "windows" (i.e. channels), local stations enjoy no such opportunity. Lastly, with the inability to control both content and distribution assets, local broadcasters have no presence in the cable network business; the broadcast networks control 17 of the top 20 rated cable networks in the U.S. It is becoming progressively more difficult for a single-channel local market broadcaster to compete for advertising, programming, viewers and talent against these larger multi-channel operators.

The third challenge for the local stations is the network-affiliate relationship, which seems unusually strained. Networks, while trying to improve returns on their substantial investments in programming, would like to "repurpose" programming, while local broadcasters wish to protect valuable "brand" franchises. In the next affiliation renewal cycle, we believe that the networks, in search of profitability, will seek to substantially reduce, if not eliminate $400 to $600 million in network compensation payments they currently pay to affiliates.

The fourth challenge is a decline of national advertising in the broadcast television business. Competition for national advertising is intense as cable networks, new broadcast networks, a consolidating radio business, a consolidating outdoor business, the internet players and traditional media all compete vigorously for ad dollars. Since 1980, local television stations' share of national advertising has fallen by nearly 6%.

The fifth challenge is digital television. While questions concerning the viability of the transmission standard, the rate of consumer adoption and digital must-carry abound, the average television operator is faced with spending millions to convert stations to digital technology with no expectation that they will earn any incremental return on their investment.

The facts and challenges we just raised provide strong evidence that the local free over the air broadcast television is becoming a progressively more difficult business. The environment is even more difficult for unaffiliated stations, newer entrants and undeveloped properties.

Financial Challenges Facing the Local Broadcasters.

Now I would like to turn to the financial markets from both a company and investor perspective. Faced with a difficult operating environment, many broadcasters have had to decide whether to get bigger or get out. Since 1990, we believe that 90 licensees have elected to exit the local television business. We believe most elected to leave the business because they could not reach critical scale. For those that have decidód to consolidate the business, access to capital is crucial.

In the aforementioned industry piece, we identified four factors on which we believed television broadcasters needed to concentrate; distribution, delivery, diversity and a dual-media presence. We suggested that companies that were committed to the television broadcast business should a) have a broad distribution base, b) have the ability to deliver large audiences and/or attractive demographics, c) have geographic, affiliation and revenue diversity among its properties and d) have a multi-media presence in its markets, if possible.

It comes as no surprise that many of the factors I have cited require scale, which means industry consolidators must have acquisition capacity, which in turn means they must have debt capacity, a valuable stock currency or both. However, consolidators of television have actually paid a price to get larger; relative to other media, such as cable, radio and outdoor, television companies, on average, are more levered and television broadcast equities have not kept pace with other media. In fact, since the passage of the Telecommunications Act of 1996, the S&P 500, our Bear Stearns' cable stock index and our radio stock index outpaced our TV stock index by 18%, 102% and 207% respectively. In fact, while cable and radio company's stocks have recovered most of their retreat from October 1998's market correction, television stocks, on average, are still off 52-week highs by over 33%.

As a course of my job as an equity analyst, I meet with and talk to hundreds of portfolio managers and analysts at mutual funds who actively purchase broadcast stocks and who each influence the investment of billions of dollars. In general, I believe that these portfolio managers and analysts are "agnostics"; they are willing to own the securities of any company (broadcast or not) that exhibits predictable and sustainable cash flow and avoid those that do not. Specifically, we believe that forced divestitures of television

LMAs or radio properties will lead to a sell-off in the stocks of companies affected. Conversely, the elimination of the "one-to-a-market" rule, permanently "grandfathering LMAs" or permitting some rational form of duopoly would remove risks that confront the industry and increase the flow of capital into the industry, thus increasing broadcaster's access to the capital markets.

The Commitment to Local Free-Over-the-Air TV.

Ultimately, a strong network and local station business is essential for the survival of free over the air television and democracy. On a local level, television is one of the most important links to a particular community. Let's not lose cite of the fact that the CBS network, for example, spends $3 billion in programming and that local television stations in the top 50 markets spend over $1 billion producing local news.

Mr. Chairman, in a recent interview with Charlie Rose you said that "more and more product is migrating to cable and the subscription services. And so we're challenged, as policy makers, to assess whether this is a threat to free, over-the-air television, as we have known it, and that's going to be one of the great policy questions that is going to be debated over the next few years."

I agree with your statement wholeheartedly and would like to contribute my "few cents worth" to the policy debate on local ownership. As the business and financial environment becomes progressively more difficult, and the local, over-the-air TV model is feeling some stress, the desire to add more viewership choice and perspective in local markets remains a challenge. But this challenge is not insurmountable.

Duopoly, Local Marketing Agreements and Cross-Ownership Rules.

We support relaxation of local ownership rules because we believe that it simultaneously creates a stronger television business and more viewership choices.

We have written two research pieces on local television rules, "Will Choices Outweigh the Voices" and "LMAze". In the first piece, we tried to answer the hypothetical question, "When it comes to duopoly or LMAs, should the FCC be more concerned with increasing viewership choices or increasing ownership concentration?" Interestingly, we concluded that the average LMA simultaneously increased viewership choice and did not diminish competition in a local market.

To date, LMAs have proliferated in smaller television markets as the newer broadcast networks, WB and UPN, which were launched in January 1995, pressed to find affiliates. In fact, 80% of LMAs are in television markets 25 and below. Confronted with high costs of entry, smaller television markets, with smaller advertising dollar bases, have difficulty supporting more than a few viable television properties. In smaller television markets, we believe that combinations, like LMAs, actually encourage more viewership choices because one stronger player can subsidize the launch, operating losses, and development of another station that would arguably lack the financial capacity to be relevant in the local TV market on its own. With economic support, LMAed stations have been able to air higher quality programming, add news programming and to affiliate with emerging networks; 80% of LMA's are affiliates of the WB and UPN networks.

We also believe that the average LMA does not alter the balance of competition in local television markets. We examined the 63 marketing agreements in the top 100 U.S. markets and believe that the average LMAed station captured only 4.6% and 3.3% of the revenue and viewership share, respectively, of a local market in 1997. The typical combined revenue shares of the LMAing and LMAed stations approximate 21%, far below the revenue shares cited by the Department of Justice in its review of radio deals.

While the Commission does propose to take a first step in creating "duopolies" by permitting out-of-market Grade B signal overlaps, we believe that this step is too conservative relative to the changes confronting the television business. First, we believe that the Commission should expand the duopoly concept to permit out-of-DMA (designated marketing area) duopoly generally. We believe that television markets and the economies contained within a particular DMA are distinct.

Second, we believe that the Commission should consider permitting duopoly. Large television markets already have the most broadcast and cable viewership choices and also have the most undeveloped stations. In smaller markets, we also see no reason not to permit duopolies which help put a station on the air or strengthen the position of weaker players. That essentially is the role that LMA's currently play.

Regarding the one-to-a-market rule, we take guidance provided by the Department of Justice in its determination of whether to consider radio a distinct business from television. In a speech given by Joel Klein at the ANA Hotel in Washington, D.C. in February 1997, Mr. Klein noted that "The peak audience for radio is during the morning drive time while the peak viewing audience for television is during evening prime time. The demographics of the audience is also different, with radio stations tending to be much more focused in their demographic appeal." In reaching his conclusion, Mr. Klein also noted that "our view of radio as a distinct market does not mean that there are no advertisers who can divert their advertising to other media to avoid a price hike, but only that such behavior will not ultimately defeat an anticompetitive price increase." Ultimately, advertisers can not simply substitute radio advertising for other media in a market. If radio is a distinct marketplace in its own right, then the one-to-a-market rule is moot in terms of economic competition.

Lastly, we would encourage the FCC not to force divestitures of properties as part of a ruling on LMAs and the one-to-a-market rule. As I eluded to earlier, the stock and debt markets look for changes in the prospects of a businesses to trigger buying and selling of stocks or to determine whether to lend, or not lend to, a particular company. If LMAs were forced to be divested, we estimate that 12 public companies and at least another dozen private companies could be harmed in the form of lower valuations and tighter access to capital. Additionally, in terms of the one-to-a-market rule, we believe that if the FCC forces divestitures, it would have a significant impact on nearly a half dozen public companies and force the FCC to "unwind" portions of approximately 33 of its last 50 waivers. The debt and equity markets do not like uncertainty or economic distress, and these types of moves would create that.

In summary, I have tried to suggest to you that the operating and financial markets for local television broadcasters are difficult, that local free over the air television is a critical component of the video marketplace and that LMAs (duopolies), in general, have been important in the development of new television entrants without affecting local competition. We support the relaxation of ownership rules, including permitting LMAs and duopoly and the repeal of the one-to-a-market rule. I thank you for your time and look forward to your comments and questions.

ANDREW JAY SCHWARTZMAN

Andrew Jay Schwartzman is the President and CEO of Media Access Project (MAP). He has directed the organization since June, 1978.

MAP is a non-profit public interest telecommunications law firm which represents the public in promoting the First Amendment rights to speak and to hear. It seeks to promote creation of a well informed electorate by insuring vigorous debate in a free marketplace of ideas. In recent years, MAP has led efforts to insure that broad and affordable public access is provided during the deployment of advanced telecommunications networks and the Internet.

Mr. Schwartzman has appeared on behalf of MAP before the Congress, the FCC and the courts on issues such as cable TV regulation, minority and female ownership and employment in the mass media, and "equal time" laws. Among his recent accomplishments was obtaining a decision from the United States Court of Appeals which expanded candidates' rights to control when and how their commercials will be broadcast (*Becker v. FCC)*.

Mr. Schwartzman is a member of the Advisory Board of the Center for Democracy and Technology, and a board member of the Minority Media Telecommunications Council and the Safe Energy Communications Council. In 1998, was appointed to the District of Columbia Bar's Technology Task Force. Mr. Schwartzman was the Law and Regulation Contributor to *Les Brown's Encyclopedia of Television*, and is the author of the telecommunications chapter in the *Encyclopedia of the Consumer Movement*. His work has been published in major legal and general journals, including *Variety*, *Electronic Media*, *The Washington Post*, *COMM/ENT Law Journal* and *The ABA Journal*. He is a frequent guest on television and radio programs such as *The Today Show*, *Nightline*, *CNN's Reliable Sources*, network evening newscasts, and *All Things Considered*.

Mr. Schwartzman is the 1992 recipient of the United Church of Christ Office of Communication's Everett C. Parker Award.

After graduating from the University of Pennsylvania in 1968, and its law school in 1971, Schwartzman was staff counsel to the Office of Communication of the United Church of Christ. From 1974 until he took his current position, Schwartzman worked for the U.S. Department of Energy and predecessor agencies. He is married to Linda Lazarus, a hearing officer with the United States Department of Energy.

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MEDIA ACCESS PROJECT

TESTIMONY OF
ANDREW JAY SCHWARTZMAN
PRESIDENT, MEDIA ACCESS PROJECT

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

En Banc Hearing on Local TV Ownership Rules

February 12, 1999

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Repeal of local ownership rules to create larger local station combinations, increased TV/radio cross-ownership, and TV duopolies may well generate economic efficiencies. However, this does not automatically translate to more, or more varied, programming. It does not insure that broadcasters address the needs of citizens who are demographically unattractive. And it most certainly does not replenish the creative gene pool to insure that broadcasting can stay in touch with ethnic and social diversification of American society.

Many of the people in this room have heard me say that we have the best system of broadcasting in the world, and that this is because, not in spite of, policies established by the Communications Act of 1934. I fear this is less true today than in the past. There is, as there should be, a lot of good programming, and dedicated public service in this country, but the American people are not receiving their fair share of the supposed benefits of changed ownership rules.

My hometown radio station, WVOX in New Rochelle, New York, is a good example of what we have now, and may lose. It is owner-operated, by a colorful man known to many people here today, Bill O'Shaughnessy. He and I don't agree on much, but his station covers his community, its issues and responds to its tastes. He appears to be prosperous.

Stations like WVOX are endangered by the megachains, for reasons others here can explain better than I. But this local contact is important, and it is being replaced more and more by distantly-manned, computer formatted, distant signal syndicated, management by formula broadcasters who have local licenses, but no local ties.

What does localism mean to broadcasters? Well, to the Television Bureau of Advertising, it is a marketing idea. Its new ad campaign proudly extols the special, localized nature of consumer tastes, telling advertisers that they can "connect your brand to local communities, and hit people where they live."

If TV broadcasters can derive premium revenues by connecting brands to communities, they ought to be to find a way to provide mean even a minute per week of locally originated programming. Many radio stations, and more and more major market TV stations, do not.

them to use free publicly owned spectrum for home shopping without having to pay fees.

Broadcasting is in fine shape. Look at the CPMs. The fragmentation of audience makes broadcasters' unique and exclusive reach into every home all the more valuable. Audiences may grow less quickly, but each viewer is increasingly more valuable. The cost per thousand for spot TV is 25-30% above what it was five years ago.[1]

Just last month, *Broadcasting and Cable* began its annual advertising outlook by saying that "industry [is] upbeat about the millennium."[2] David Poltrak of CBS pooh-poohed the slow erosion of network audiences, pointing out that the networks "still deliver mass audiences."[3]

Neil Braun, until recently the President of the NBC Television Network, gave this explanation of why broadcasting has a bright future:

> ***Why didn't the explosion in channel choices across cable and satellite spectrum diminish the allure of broadcast television?...First, cable has come to be viewed by savvy marketers not as a competitor to broadcast television, but as a complement to it....[T]he advertising capabilities that the two offer are markedly different. Each cable network's strength is delivering a niche audience over time, while each broadcast network delivers a mass market fast and often. ****Second, with increased choices in everything...only strong brands will prosper. For example, the powerful Peacock brand makes possible a symbiotic relationship between NBC's cable and broadcast properties***Third, the notion of broadcast television's "declining share" has obscured the reality of tremendous growth. The size of the audience pie continues to expand**** Fourth, the increasing fragmentation of society-and the audience-makes broadcast television even more valuable. To make the next sale, an advertiser has to reach all the ready to buy consumers. Broadcast television reaches 97 percent of U.S. homes every week.***[4]

The networks are, as always, the loudest whiners. The notion that networks may not

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[1]See Attachment A. According to TvB, The CPM for thirty second early evening spot was $4.62 in 1993, and $6.58 in 1998.

[2]*Broadcasting and Cable*, 1/4/99, p. 30.

[3]*Id.*

[4]Neil Braun, "Why cable hasn't killed broadcasting" (Guest Commentary), *Electronic Media*, 3/17/97, p. 16.

9. Industry nomenclature can be misleading.

10. Cable networks don't deliver their audience evenly.

Broadcasters' gloom and doom scenario overlooks other facts as well. As we have explained in our prior comments, they:

- Ignore the consolidation that has already taken place, and continues to take place, in broadcasting.
- Overstate the number and power of current multichannel video competitors, and understate the extent to which broadcasters also have ownership interests in these competitors.
- Fail to mention how digital television technologies promise to convert broadcasters from single channel to multichannel providers.
- Make unsubstantiated promises of public benefits from economies of scale that would result from common ownership.

However welcome it may be, the emergence of new multichannel providers does not counteract the loss of diversity which would accompany relaxation of the duopoly rule. The fact that several different technologies may soon deliver programming does little to change this, since multiple and cross ownership of these distribution technologies means that their programming will be under common editorial control of the same entities now dominating the program production. And, although the number of broadcast stations has doubled, increasing multiple ownership may have actually ***decreased*** the number of independent voices.

If the Commission were to liberalize waiver policies for duopolies and TV cross-ownership, it should do so only in compelling circumstances, and only when applicants make specific, ***enforceable*** and reviewable promises of additional programming that goes beyond the "public interest programming" already required of them. Unsubstantiated, self serving promises that cost savings will be shared with the public are worthless.

However, no special sympathy should be directed at operators of LMAs. As one of the leading members of the Communications Bar said to me, the term itself is a euphemism for the

J. Gregory Sidak

J. Gregory Sidak is the F.K. Weyerhaeuser Fellow in Law and Economics at the American Enterprise Institute for Public Policy Research and Senior Lecturer at the Yale School of Management. He is also a Principal in the Washington, D.C. office of LECG, Inc. His research concerns regulation of network industries, antitrust policy, and constitutional law issues concerning economic regulation. He directs the American Enterprise Institute's Studies in Telecommunications Deregulation.

Mr. Sidak served as Deputy General Counsel of the Federal Communications Commission from 1987 to 1989, and as Senior Counsel and Economist to the Council of Economic Advisers in the Executive Office of the President from 1986 to 1987. As an attorney in private practice, he worked on numerous antitrust cases and federal administrative, legislative, and appellate matters concerning telecommunications and other regulated industries.

Mr. Sidak is the author of *Foreign Investment in American Telecommunications* (University of Chicago Press 1997). With Daniel F. Spulber, he is co-author of *Deregulatory Takings and the Regulatory Contract: The Competitive Transformation of Network Industries in the United States* (Cambridge University Press 1997) and *Protecting Competition from the Postal Monopoly* (AEI Press 1996). With William J. Baumol, he is the co-author of *Toward Competition in Local Telephony* (MIT Press 1994) and *Transmission Pricing and Stranded Costs in the Electric Power Industry* (AEI Press 1995). Mr. Sidak is the editor of *Competition in International Telecommunications* (AEI Press forthcoming 1999), *Is the Telecommunications Act of 1996 Broken? (If So, How Can We Fix It?)* (AEI Press forthcoming 1999), and *Governing the Postal Service* (AEI Press 1994). He has published articles on antitrust, telecommunications regulation, corporate governance, and constitutional law in the *California Law Review*, *Columbia Law Review*, *Cornell Law Review*, *Duke Law Journal*, *Georgetown Law Journal*, *Harvard Journal on Law & Public Policy*, *Industrial and Corporate Change*, *Journal of Political Economy*, *New York University Law Review*, *Northwestern University Law Review*, *Southern California Law Review*, *Stanford Law Review*, *Yale Journal on Regulation*, and elsewhere. Mr. Sidak has testified before committees of the U.S. Senate and House of Representatives on regulatory and constitutional law matters, and his writings have been cited by the Supreme Court of the United States, the lower federal and state supreme courts, and state and federal regulatory commissions.

From Stanford University, Mr. Sidak received A.B. (1977) and A.M. (1981) degrees in economics and a J.D. (1981). He was a member of the *Stanford Law Review* and served as a law clerk to Chief Judge Richard A. Posner during his first term on the U.S. Court of Appeals for the Seventh Circuit.

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February 1999

Before the
Federal Communications Commission

Local Broadcast Ownership:	)
An En Banc Hearing,	)
February 12, 1999	)

Prepared Statement of J. Gregory Sidak

For more than a decade, I have publicly advocated in articles, books, and testimony the Commission's elimination of its various broadcast ownership rules and its reliance instead on basic principles of antitrust law. I believe that a regime of antitrust enforcement is more conducive than the Commission's rules to subtle and unbiased judgments regarding competition in the marketplace for advertising and competition in the marketplace of ideas. I do not believe that the Commission's broadcast ownership rules produce any benefit for consumers, and surely, over the many years in which those rules have been in effect, the Commission has not articulated a methodology and compiled the data with which to substantiate the efficacy of those policies. As the D.C. Circuit stated in *Bechtel* v. *FCC*: "The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time."[1] I have no confidence that empirical analysis would in fact substantiate the Commission's predictive judgments concerning the broadcast ownership rules. I consider it more likely that the rules fail to produce *any* public benefit.

[1] 957 F.2d 873, 881 (D.C. Cir. 1992).

At the same time, I believe that the Commission's rules have substantial costs. The rules are likely to diminish efficiency in the broadcasting industry by preventing the achievement of economies of scale and scope, one byproduct of which may be to prevent individual stations from having the minimum size of operation to support investment in local program origination. In effect, the Commission's criteria for granting waivers to these rules, and its willingness to allow joint operating agreements, acknowledge that the rules can cause such losses in economic efficiency and diversity of programming. In addition to causing these losses in efficiency and diversity, the cross-ownership rules may compromise the freedom of broadcast speech. If I am correct that the broadcast ownership rules produce no benefits but may produce real costs in terms of lost efficiency, diversity, and freedom of speech, then the balance plainly tips against the Commission's perpetuation of those rules. I therefore conclude that neither the public interest, nor consumer welfare, nor the freedom of speech guaranteed by the First Amendment can be advanced by the continued existence of the broadcast ownership rules.

Last summer, the Newspaper Association of America asked me to comment on whether economic analysis supports the Commission's abolition of its daily newspaper-broadcast cross-ownership rule, which prohibits the common ownership of a broadcast station and a daily newspaper in the same locale. This hearing, of course, does not address the daily newspaper-broadcast cross-ownership rule, but I mention the fact of my earlier testimony for two reasons. First, in the interest of full disclosure, it will benefit the Commission to know on whose behalf I have previously submitted lengthy testimony on a related topic. Second, the general analytical approach of my earlier testimony is applicable as well to the so-called "duopoly rule" and the radio-television cross-ownership rule.

The Commission has justified broadcast cross-ownership rules in the name of promoting "diversity of viewpoints" and promoting "economic competition." Both goals have been irreversibly achieved—and surely for reasons having nothing to do with the Commission's broadcast ownership rules. The Sherman Act and the Clayton Act will suffice to preserve the robust levels of diversity of viewpoints and economic competition that exist today. It is therefore unnecessary for the Commission to retain an industry-specific prophylactic rule. Stated differently, the FCC may safely analyze a potential merger between two television stations in a locale, or between a radio station and a television station in a locale, the same way that the Antitrust Division or the Federal Trade Commission would analyze any other kind of merger in the mass media. Indeed, one must ask the anterior question of why the FCC needs to undertake any antitrust analysis at all when reviewing a license transfer application, given the preexisting jurisdiction of these two federal antitrust enforcement agencies.

The Commission's recurrent justification for cross-ownership rules has been that the electromagnetic spectrum is a scarce resource, and that the attainment of diversity and competition in broadcasting necessitates, paradoxically, the Commission's imposition of airtight regulatory barriers to entry or to the optimal scale and scope of a broadcasting firm. A long line of published scholarship, however, shows that spectrum scarcity cannot logically justify retaining cross-ownership rules. The spectrum scarcity argument has been intellectually demolished in all its variations.[1]

Why, then, do the cross-ownership rules persist in the face of so much demonstrable evidence of the diversity of viewpoints and economic competition? The Supreme Court long ago

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[1]*See, e.g.*, THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 204–19 (MIT Press & AEI Press 1994).

established that government regulation that is ostensibly content-neutral on its face may nonetheless be enforced in a manner that unconstitutionally infringes freedom of speech.[3] The ingenuity of the modern regulatory state requires that the First Amendment bring to bear a healthy skepticism on the assertions of communications regulators that their policies are content-neutral. One must therefore ask whether the cross-ownership rules persist in the face of manifest diversity of viewpoints and economic competition because the rules are an effective means to achieve an unstated goal that differs entirely from the prevention of monopoly in the marketplace of ideas and the marketplace for advertising. If the FCC cannot cogently say, after several decades, what good the various cross-ownership rules serve in a market that is already highly diverse and highly competitive, then one must ask what *bad* those rules might serve. There is, for example, empirical evidence that at least one major policy that the Commission enforced until 1987 on the grounds of increasing the diversity of viewpoints had precisely the opposite effect. News, talk, news/talk, and public affairs formats skyrocketed on both AM and FM radio following the Commission's abolition of the Fairness Doctrine in August 1987.[4]

Economic analysis enables one to identify at least one unstated goal that is advanced by broadcast cross-ownership rules. By constraining a broadcaster's ability to achieve economies of scope with respect to multiple station ownership, a cross-ownership rule increases the degree of asset specificity of the investments made by the broadcaster. The extent of rent extraction to which the broadcaster is vulnerable is an increasing function of the degree of asset specificity of his investment in the licensed television or radio station. One manifestation of rent extraction

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[3]Grosjean v. American Press Co., 297 U.S. 233 (1936).

[4]*See* Thomas W. Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL. STUD. 279 (1997).

imposed on a broadcaster can be content control or censorship, as in the case of incrementally unremunerative programming that the FCC compels the broadcaster to air or incrementally profitable programming that the FCC deters the broadcaster from airing. The broadcaster's ability to resist the FCC's attempt at content control, which the agency ultimately expresses through the threat of denying renewal of the broadcaster's television license, is reduced if the FCC can block the broadcaster's ability to reduce the degree of asset specificity (and hence the cost of mandatory exit from the market) by achieving economies of scope with operation of another radio or television station (or newspaper) in the same locale. The FCC's threat of denial of renewal need not be frequently employed for the strategy of rent extraction to be successful. A cross-ownership rule limits the broadcaster's ability to reduce the extent of his investment that is held hostage to such threats of rent extraction by the FCC. In that respect, a cross-ownership rule—despite being an ostensibly "structural" regulation of the broadcasting industry—is antithetical to a free press.

In short, the broadcast cross-ownership rules cannot produce benefits in terms of competition and the diversity of viewpoints when the market is already competitive and already diverse, and when the antitrust laws already provide an efficacious tool for preserving those conditions. At the same time, the cross-ownership rules impose obvious costs on the efficient structure of the broadcasting industry. Moreover, the cross-ownership rules make broadcasters more susceptible to efforts by regulators to control broadcast content. This insight raises significant First Amendment concerns and may explain the political appeal to some of retaining the rules in the face of the unparalleled levels of economic competition and the diversity of viewpoints in the mass media that have been documented to exist today.

STEVIE WONDER
Biography

Stevie Wonder is a legendary artist, songwriter, musician and producer who has been nominated for a GRAMMY® Award a remarkable 62 times and has received nineteen GRAMMYs and the GRAMMY Lifetime Achievement Award. Stevie has been making music and enriching lives for more than four decades. By demonstrating extraordinary humanitarian efforts, philanthropic leadership and generosity of spirit throughout his celebrated career, Stevie Wonder captures the spirit and purpose of MusiCares. Most recently, Stevie was the featured halftime performer at SuperBowl XXXIII. From "Little Stevie Wonder" to adult superstar, Stevie is beloved for his monumental talent, his compassion for humanity and his desire to challenge injustice

In 1983 Wonder spearheaded the realization of "Martin Luther King Day" as a national holiday. His participation in the massive 1985 "We Are The World" fund-raiser for hunger in Africa was a music industry milestone, while his involvement to put an end to apartheid in South Africa is legendary. Wonder, in conjunction with American Express, led a "Charge Against Hunger" by raising over $150 million to feed nearly six million hungry Americans yearly. The SAP/Stevie Wonder Vision Awards recognizes technological innovations that assimilate blind and the visually impaired into the work force. Stevie Wonder has also been recognized for his philanthropical contributions by receiving the "Distinguished Services Award" from the President's Committee on Employment of Handicapped People, the "Carousel of Hope Award" from the Children's Diabetes Foundation and an "Honorary Global Founder's Award" from Mothers Against Drunk Driving.

Stevie has teamed up with artists such as Roberta Flack, Eddie Kendricks, Sly Stone, Michael Jackson, Diana Ross, Smokey Robinson, the Eurythmics, Elton John, Gladys Knight, Dionne Warwick, Chaka Khan, Paul McCartney, Quincy Jones, Nile Rodgers, Julio Iglesias, Bill Cosby, Patti Austin, James Taylor, Phoebe Snow, Take 6, Bonnie Raitt, Jackson Browne and Stevie Ray Vaughan, and Spike Lee in concerts and fund-raising events to highlight social and political commitments and issues.

Wonder released the first live performance of a song to reach the top of the pop U.S charts with "Fingertips, Part II." He also became the first recording artist to simultaneously reach Number One on the Billboard Hot 100, R&B Singles and Album Charts. He has amassed an amazing career that includes 49 Top 40 singles, 25 #1 singles, worldwide sales of over 100 million units, and an Academy Award for "I Just Called To Say I Love You" from the 1984 movie, "The Woman In Red."

Stevie Wonder is truly a gifted performer and an outstanding human being who is a treasure to us all.

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KAREN E. SLADE
BIOGRAPHY

The Vice President / General Manager of Los Angeles' KJLH Radio Station is one of the few African American females holding such titles in the country.

Entering her tenth year at KJLH, Karen is meeting the business challenges of the second largest radio market with aggressive revenue targets through effective sales strategies and focused program offerings. Ensuring that the programming exceeds the expectations of the targeted Adult taste through enlighten, informative and entertaining program offerings.

Eleven plus years of sales involvement and leadership acquired through positions with Xerox Corporation, include; Regional Sales Manager for the Southeast region of the United States, Senior Consultant for Customer and Marketing Education, Dealer Sales Manager, Project Manager and various Field Marketing positions.

Karen received her Bachelor of Science Degree from Kent State University in Telecommunications and Masters in Business Administration from Pepperdine University.

Organizational Affiliations/ Awards:

Motivating our Students Through Experience (MOSTE) Advisory Council
Los Angeles Urban League Board of Directors (Former)
National Association of Black Owned Broadcasters (NABOB)
1992 NAACP Image Award
1992 Peabody Award

2/1/99

MR. ROYCE YUDKOFF

Mr. Yudkoff is the Managing Partner of ABRY Partners, Inc., a Boston-based private equity investment firm managing $825 million in equity capital and dedicated to investing solely in the broadcasting and media industry.

ABRY has been in existence for over 10 years and currently owns or owns interests in more than 20 television stations as well as other media properties.

Prior to founding ABRY in 1988, Mr. Yudkoff was a partner at the international management consulting firm of Bain & Company, where he was responsible for the media consulting practice area. Mr. Yudkoff holds a BA from Dartmouth College and an MBA from Harvard Business School.

STATEMENT OF MR. ROYCE YUDKOFF

Good morning. My name is Royce Yudkoff and I am Managing Partner of ABRY Partners, Inc. I also am here today on behalf of ALTV, the Association of Local Television Stations. ABRY Partners is a Boston-based private equity investment firm which manages $825 million in equity capital, dedicated to investments in broadcasting and other media.

We acquire under-performing broadcast stations in small and medium markets and improve their performance by upgrading programming, news, staffing and signal coverage. Such investments lead to better service to the public.

ABRY currently holds controlling interests in three television groups, one of which is in the process of being sold. Our two remaining television companies, Nexstar and Quorum, own and operate eighteen television stations.

Since 1993, we have been involved in several television LMAs, each providing valuable public interest benefits. Nexstar and Quorum now are involved in two LMAs.

Nexstar owns WJET-TV, Erie, Pennsylvania, the 142nd market. Nexstar took over an existing time brokerage agreement for channel 66, WFXP, in Erie. WFXP, as a stand-alone Fox affiliate, in a market this small, could not survive. With the LMA, WFXP now broadcasts a local 10:00 P.M. news, five days a week, and provides Erie with the full schedule of Fox programming, including "Fox News Sunday." Last December WFXP broadcast a local high school football play-off game. We made it possible for many local fans to see this game, including grandparents of players. As a stand-alone station, WFXP would have had neither the equipment nor personnel to undertake such a project. Nexstar's future plans for WFXP include expanding its local newscasts to weekends.

The benefit of an LMA is that it allows small market broadcasters to economize on expenses that do not impact the public, in order to provide the public with more that is on the screen. Rather than preach to you about this, let me share with you our economics.

[Chart A]

Erie has four commercial TV stations sharing $13.2 million in net revenue, about 1/15th of the revenues of the TV stations here in Washington. A solidly run Fox affiliate will capture 15 percent of that, or $2.0 million. But it costs about $2.9 million to run a bare-bones small market Fox affiliate with local news. It costs less to do business in Erie than in Washington; but Commissioners, it isn't 1/15th the cost. My top salesman only costs three quarters of a salesman in Washington, but is generating 1/15th the revenue. The electricity to run my UHF transmitter costs the same; so does gasoline for my news trucks.

The station can't stop paying for telephones or rent; it can't reduce its sales force without reducing revenue; it can't shut off the electricity. It can eliminate local news and cut locally-originated programming.

[Chart B]

An LMA allows us to cut expenses that are irrelevant to the public. We can use one building, not two. We consolidate certain selling expenses, share maintenance engineers and equipment and become more competitive in areas that the public wants.

[End Charts]

Our other company, Quorum, recently acquired KSVI-TV, Billings, Montana, the 167th market. With that acquisition came an LMA with KHMT, Hardin, Montana, the market's Fox affiliate. KHMT could not sustain itself as a stand-alone station. In fact, the station was off the air from 1993 until the middle of 1995. Now, under the LMA, KHMT provides the market with over-the-air delivery of all Fox programming, including "Fox News Sunday," plus a great deal of support for local activities. One example is KHMT's "Teens Now," a series of vignettes dealing with problems encountered by teenagers, coupled with a monthly magazine distributed through schools. KHMT's over-the-air coverage is much less than other stations in the market because they cover this geographically vast market with numerous translators. We are committed to spending several hundred thousand dollars in 1999 for translators and microwave links, in order to improve KHMT's service to the public.

It is clear that the LMA in Billings is serving the public interest by providing for an additional free over-the-air station that otherwise would not exist. It is just as clear that there has been no harm in the market due to the LMA. In fact, for 1998 the <u>combined</u> share of revenues of the two stations was less than one-third of the market's total TV revenues.

I have focused on small markets, but the record before you demonstrates the benefits of LMAs in markets of all sizes. These combinations should not be terminated. To the contrary, the opportunities to improve service through local combinations should be open to all. The television duopoly rule should be relaxed to permit the ownership of two stations in a market. Given the fierce competition from multichannel providers, it makes little sense to limit the future of free, over-the-air television to a single channel.

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[CHART A]

SMALL MARKET TELEVISION

(Dollars in Millions)

	Stand-Alone
Market Revenue in Erie, PA	$13.2
WFXP's Net Revenue	$2.0
Expenses:	
Programming	$(.5)
Local News	$(.8)
Engineering & Maintenance	$(.3)
Sales & Marketing	$(.6)
Administrative	$(.7)
Total Expenses	$(2.9)
Profit or (Loss)	$(.9)

Station loses $900,000 per year.

[CHART B]

SMALL MARKET TELEVISION

(Dollars in Millions)

	With Local Marketing Agreement	Stand-Alone
Net Revenue	$2.0	$2.0
Expenses:		
Programming	$(.5)	$(.5)
News	$(.8)	$(.8)
Engineering & Maintenance	$(.1)	$(.3)
Sales & Marketing	$(.4)	$(.6)
Administrative	$(.1)	$(.7)
Total Expenses	($1.9)	($2.9)
Profit or (Loss)	$.1	$(.9)