TESTIMONY OF
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Presented to the Federal Communications Commission
Richmond, VA
February 27, 2003

I appreciate your invitation to testify today. I believe that the Commission can and should retain its existing ownership rules, except that it should eliminate the so-called UHF discount.

I have five points I wish to make.

First, at the risk of seeming discourteous, I must observe that today's hearing is not likely to be very useful. To develop a complete record, you need to hold more hearings under different conditions.

My understanding is that the purpose of field hearings is to obtain viewpoints and perspectives which are unavailable at home. This principle is especially relevant to a panel on diversity.

The structure of today's hearing offers little opportunity for the exchange of ideas. Unlike the public forum held at Columbia University last month, today's agenda has too many familiar faces from inside the Beltway and too few additional perspectives from local residents. This is especially frustrating inasmuch as the record developed in this docket has raised many questions as to which there are as yet not enough answers. This event does little to fill in the blanks and answer those questions.

Second, I want to say what I have said to the Commission on other, similar occasions. We have developed the best system of broadcasting in the world because of, not in spite of, the ownership and public interest regulations which have been utilized since 1934. Broadcasters volunteer to serve as Commission licensees and receive free use of valuable public property in exchange for providing a modicum of public service. The Commission is mandated to insure that broadcasters serve all members of the public. The marketplace works well in many respects, but it is not perfect. In particular, the market does not recognize and serve the needs of those who are too old, too young or too poor to be demographically attractive. Large group owners who increasingly lack roots in the communities they are licensed to serve are less likely to meet the needs of everyone.

Media Access Project is a non-profit public interest telecommunications law firm which protects the public's 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.

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Over the last 25 years, I have testified before the Commission and the Congress on many occasions. More often than not, I appear as I do today, with broadcasters who exemplify the best service standards in the industry. They will tell you about the wonderful things they do.

I urge you to focus on the fact that the Commission must regulate based on the proclivities of the worst and most rapacious broadcasters, not the best and most virtuous of them. Relaxation of national ownership caps and creation of larger local ownership blocks has permitted some broadcasters to ignore news programming and to abandon their communities in favor of voice tracking and central casting. You need to pay attention to who does NOT attend these hearings.

Third, I think the Commission has set an artificially high bar for those of us who support the existing ownership rules. We have been told to avoid emotionalism and to confine ourselves to presenting empirical data to support the rules. I do not apologize for being emotionally attached to localism, diversity and the First Amendment. Moreover, the term "empirical" has been wrongly equated with "statistical." My dictionary defines empirical as meaning "capable of being verified or disproved by observation or experimentation." Indeed, much empirical evidence is not statistical, and the Commission should not be ignoring such observational evidence.

In addition to personal testimony from individuals about cases where local service has deteriorated after acquisitions, the Commission should pay close attention to comments which describe how elimination of the Financial Interest and Syndication Rules has confirmed the worst fears of those of us who unsuccessfully sought to retain them. It should examine the comments demonstrating that the radio ownership deregulation of the 1996 Act has not expanded the diversity of voices and viewpoints. Instead of producing the predicted explosion of creativity, public service, and economic synergies, eliminating these rules has produced debt-ridden corporations so focused on short-term profits that public service has been all but forgotten and programming has become, in the words of Commissioners Copps and Martin, 'a race to the bottom.'

Part of the problem lies in the Commission's willingness to accept without challenge the D.C. Circuit's cramped reading of Section 202(h) of the 1996 Act. I am confident that if and when this question is presented to the Supreme Court, the D.C. Circuit's *Fox* decision will be repudiated. Even accepting the DC Circuit opinion for the moment, I see nothing in Section 202(h) which commands the Commission to rely on statistical evidence alone.

Fourth, I believe that at least some members of the Commission and the staff have placed an undue emphasis on receiving statistical data and searching for elusive formulae. I have heard the Chairman complain that he cannot define the public interest and that the Commission must develop precise definitions of what is in the public interest. That is not, however, what the Supreme Court has said. I commend to your attention a case *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981), a case in which the Commission's deregulatory policy was upheld. The Supreme Court said that

> It is common ground that the Act does not define the term "public interest, convenience, and necessity." The Court has characterized the public-interest standard of the Act as "a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, (1940). Although it was declared in *National*

> *Broadcasting Co. v. United States*, that the goal of the Act is "to secure the maximum benefits of radio to all the people of the United States," 319 U.S. 190, 217, it was also emphasized that Congress had granted the Commission broad discretion in determining how that goal could best be achieved.

Similarly, in upholding the very newspaper/broadcast cross-ownership rules under review in this docket, the Court said that

> [C]omplete factual support in the record for the Commission's judgment or prediction is not possible or required; "a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency," *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, *see Industrial Union Dept., AFL-CIO v. Hodgson*, 499 F.2d 467, 474-475 (D.C. Cir. 1974).

Fifth, and notwithstanding what I have just said, the civic, consumer, labor and civic groups which have filed in this docket have submitted powerful and detailed statistical evidence which strongly supports retaining the existing rules. They have also pointed to important shortcomings in the studies the Commission has generated. And, unlike the broadcast industry, they have also responded to the Commission's request for suggested metrics which can be employed to measure concentration. I repeat that we do not believe that such formulae can be more than one of many factors the Commission should consider, but we have presented a scheme based on developing a weighted HHI index which would be a significant improvement over the traditional HHI index employed in other industries.

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