Consumer Federation of America

STATEMENT OF
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ROUNDTABLE ON FCC OWNERSHIP POLICIES
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The central principle governing media policy in this nation for the past half century was identified early in the Federal Communications Commission's broadcast-newspaper cross-ownership Notice of Proposed Rulemaking.[1]

> **The widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.[2]**

Congress has repeatedly enacted legislation charging the Commission to proactively promote this simple, but extremely powerful principle that is the cornerstone of our democracy. The courts have invoked it across a broad range of cases under both the Communications Act and the antitrust laws.

THE "HARMS" OF ABANDONING STRUCTURAL RULES GOVERNING MASS MEDIA OWNERSHIP

We believe there is substantial evidence that abandoning or radically changing current media ownership rules in exchange for primary reliance on pure economic forces will be disastrous for the marketplace of ideas.[3]

- Even if economic media marketplaces were composed of large numbers of small firms competing aggressively with one another, the result might not be the vibrant marketplace of ideas that a truly democratic society demands because diverse sources of information might not be the object of commercial competition.
- The development of media markets allowed by recent relaxation of rules restricting the accumulation of economic market power reveals that they are anything but atomistically competitive – rather they are evolving toward tight, differentiated oligopolies.

The arguments proffered for the elimination or radical changes in current policy sell the fundamental goals of the marketplace of ideas short in a host of ways.[4]

- They mistakenly equate entertainment with information and variety with diversity.
- They improperly reduce antagonism in the marketplace of ideas to competition in the economic marketplace, failing to recognize that outlets are not independent voices, when they have the same owners.
- They ignore the fact that profit maximization in increasingly centralized media conglomerates prefers standardized, lowest common denominator products that systematically exclude minority audiences and unpopular points of view, eschew controversy, and avoid culturally uplifting but less commercially attractive content.
- They fail to recognize the unique role of news reporting as a fourth estate checking waste, fraud and abuse of power by governments and corporations.
- They forget the difference between national and local news markets and the tendency of national-oriented media to homogenize the local point of view out of existence.

- They overestimate the impact of new electronic media and underestimate the critical role that ownership and control of the media has on its content, as well as the role that "architectural" decisions play in creating discriminatory, closed networks.

THE ENDURING, DISTINCTIVE CHARACTERISTICS OF MEDIA MARKETS

The attached testimony and analysis presented by Consumers Union and the Consumer Federation of America to the Senate Committee on Commerce, Science, and Transportation provides preliminary answers to the economic question posed by the Commission.

We find very clear evidence that different types of media represent distinct product and geographic markets.[5] While the advocates of convergence equate all media, the reality is that different media serve different needs, have different content, and differ widely in their impact and effect. People use different media in different ways, spend vastly different amounts of time in different media environments, consume services under different circumstances and pay for them in different ways. In economic terms, they are separate markets with weak substitution effects. As a result, competition between the media is muted in the marketplace and, in some respects, the specialization of each is worth preserving because of the unique functions provided in the marketplace of ideas.

There has been far less fundamental change in the media marketplace of ideas than meets the eye. While there has been an increase in non-primetime cable TV viewing, the big three networks are still "primetime programming juggernauts." The addition of four new broadcast networks that provide little news and public interest programming has not altered the fact that the big three networks still account for the overwhelming majority of high impact news and information shows – 80 or 90 percent.

The commercial marketplace has not changed that much either. Broadcast is predominantly national, accounting for 60 percent of national advertising revenues; newspapers are local, accounting for 60 percent of local advertising revenues. There has been little change in advertising market shares. In 1985, broadcast accounted for a tad less than one-third of all advertising dollars spent on these media; in 2000, broadcast accounted for a tad more than one-third of all advertising dollars. In 1985, newspapers accounted for just over one-half of all advertising dollars; in 2000, they accounted for just under one-half. In 1985, radio accounted for one-seventh of advertising; and in 2000 it accounted for one-seventh.

In 1985, the much touted Internet was just beginning its commercial phase, accounting for virtually no viewing time or advertising revenue. Fifteen years later, it accounts for only 4 percent of the total of viewer time spent with these media and less than two percent of advertising dollars. The Internet revolution has provided a wonderful new functionality that allows people to conduct commercial transactions and daily activities in a more efficient manner, but to date, it has certainly not significantly altered the dynamics of mass media. It does not balance the immense power of traditional mass media to influence public opinion, particularly when public policy has allowed existing media owners to increasingly control the communications infrastructure underlying the Internet and to direct the flow of information on the Internet.

Within each of the media market segments, we find increasing concentration, corporatization and conglomeration.[6] Each of the market segments is becoming dominated by a small number of large, vertically integrated corporations that pursue profit maximization at the expense of professionalism in journalism and public interest programming. Economies of scale create barriers to entry, particularly in the provision of network facilities. Inadequate rules of fair access have allowed vertically integrated companies to leverage their control over facilities into content markets. As a result, potentially vigorous competition in content markets has been dampened by the much weaker competition in distribution markets.

PREVENTING HARM IN THE MARKETPLACE OF IDEAS

The antitrust laws are intended to protect competition and are largely reactive.[7] The government is empowered to move against attempts to monopolize or restrain trade and it reacts to mergers, after they have been proposed. The Communications Act is quite different. Reflecting the overriding principle of promoting "the widest possible dissemination of information from diverse and antagonistic sources," and the belief that damage to civic discourse can be much more profound and difficult to repair, Congress has generally encouraged the FCC to take proactive measures to promote a vigorous marketplace of ideas and prophylactic measures to prevent actions that undermine this goal.

Nevertheless, one of the central principles of antitrust policy is instructive in implementing policies to foster and protect the marketplace of ideas. Structural solutions are preferable to conduct solutions. This dovetails with the widely held view that it is preferable under the First Amendment to utilize structural solutions in order to avoid government intervention in content.

The structural regulations that the FCC has chosen to implement clear congressional intent are well suited to the task with which it is charged.[8]

- Horizontal ownership caps prevent the accumulation of market power, rather than force the agency wrestle with it after it has been created.
- Cross ownership restrictions preserve the checks and balances between different media, within the same geographic areas, preserving independent views that respond to different institutional imperatives and are driven by different economic models.
- Access regulation diminishes the leverage that vertically integrated facility owners can use to disadvantage competing content providers.

Given the strong legal principle that governs media policy and the clear evidence that reliance on economics alone will not achieve the goal, the Commission must proceed cautiously in rewriting the ownership rules. It should not assume that because we have not achieved a infinitely diverse media market under the current rules, we would be better off without them. The burden should be on those arguing for changes to demonstrate how changes ensure the broadest marketplace of ideas possible. The Commission must be demanding in its review of the evidence offered by those arguing for change. It should certainly not abandon them on the basis of mere theory or the hope that some unspecified revolution will change the media map. The fact that some would like the Internet to provide a new form of more meaningful local content, or that cable TV might someday have a bigger impact on the prime time TV news market cannot provide the necessary discipline a product space that these media have failed to successfully enter or occupy.

This roundtable discussion, coming at the start of a rulemaking process, focuses on economic markets, but the Commission will have to go far beyond that limited concern to faithfully execute its responsibilities under existing Congressional directives that require it to promote a vibrant marketplace of ideas. The economic questions that the Commission raises are a useful starting point for this narrow aspect of the debate, but when all is said and done, we are certain that economic theory and empirical evidence will demonstrate that a strong set of structural rules are consistent with the legal principles established by the courts and necessary to accomplish the goals embraced by the Congress.

[1] *In the Matter of Cross-Ownership of Broadcast Stations and Newspapers; Newspaper-Radio Cross-Ownership Waiver Policy: Order and Notice of Proposed Rulemaking*, MM Docket No. 01-235, 96-197, September 20, 2001.

[2] Id., p. 8, citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)

[3] The questions set out for this session explicitly suggest that public policy can rely on pure economics to accomplish its goals "What harms to competition and industry performance would likely arise in the media industry if no government intervention other than standard antitrust enforcement were imposed?" (see *Questions for Roundtable on FCC Ownership* Policies, Federal Communications Commission, October 17, 2001, hereafter Questions) The complete abandonment of any policy basis for intervention in the media industry, other than antitrust, is clearly contemplated in the framing of this question. In our view, under the Communications Act, the Federal Communications Commission is required to take a much broader view of public policy.

[4] These are the "harms" with which the Commission must be concerned (see Questions). Further, the question – "Which of the identified harms should be of primary concern to the Commission?" – is miscast. The Commission is charged with achieving a positive outcome, not avoid negative ones. It role must be viewed with respect to the overall vision of a vibrant marketplace of ideas – "widest possible dissemination of information from diverse and antagonistic sources."

[5] Questions. "What is the definition of the market in which any identified harm arises?" What are the distinctive characteristics of the media industry that give rise to any harms that you have identified?" How have these characteristics changed over time, and how are they likely to change in the future/"

[6] Questions, "What are the best policies to prevent or eliminate the harms that you have identified above?"

[7] Questions, "What are the relative merits of *ex ante* ownership restrictions and standard *ex post* case-by-case antitrust investigations?"

[8] Questions, "What are the relative merits of and drawbacks to horizontal ownership caps, cross-ownership restrictions, and access regulations?"