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Media Ownership Workshop
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Thank you for inviting me to participate on this panel today. It is an honor to be here to discuss the FCC's rules on media ownership and how the Commission should approach them. The views I present are my own and do not necessarily represent the views of anyone else.

I divide my comments into three areas:

- The First Amendment: Keeping the government away from deciding who may own media assets
- Should the government nevertheless choose to continue to decide who may own a media asset:
    - Any ownership rule is redundant to antitrust review
    - Try to ascertain consumer benefits of a decision;
    - Do not torment the dead and dying; and
- Treat this proceeding no differently from other proceedings.

The First Amendment: Keeping the government away from deciding who may own media assets

In this proceeding, America faces a choice of two very different alternatives:

- Continue to place the federal government in the role of deciding by rule or by waiver who may own and acquire various media outlets and who may not;
- Keep the federal government away from those decisions.

For much of the 20th century, the federal government has taken the former option, giving to itself the heroic and self-serving power to decide who may own various media outlets. This holding of governmental power, and the exercise thereof, perhaps reached its peak during the Nixon Administration when President Nixon allegedly attempted to use various media ownership rules to help his friends and punish his enemies. Indeed, one of

the remaining FCC media ownership rules, the newspaper-cross-ownership rule, is a vestige from that time.

Popular commentary today misplaces its focus on whether it is appropriate for politicians to distinguish between friends and people who are not friends. Some even characterize them as enemies. Of course, everyone has friends, and everyone knows someone who is not necessarily a friend.

The problem for politicians is whether they have the power to use the offices of government to punish people who are not their friends and reward those who are. If President Nixon did not have the power to attempt to use governmental power such as media ownership rules to harm his enemies, there would have been little harm in his ruminations about whether someone liked him or not.

The federal government has not always had the power to circumscribe media ownership. Anyone casually familiar with the early years of our republic recalls the hostility that some newspapers expressed about government officials of the day, including the president. Political views were often published with little if any restraint but with the comfort that those targeted for editorial attack, even the president of the United States, could not use his office to retaliate.

Newspaper editors of those times took comfort in the First Amendment to the Constitution. Religious freedom, freedom of the press, freedom of assembly, and freedom to petition the government are linked because government interference in any one of them is abhorrent to the American conscience.

Jefferson and Madison wrote at length about these freedoms, noting that even seemingly innocent and constructive laws in these areas could ultimately do great harm. Here we are more than two hundred years later. Government officials today have the power to review and to make decisions about who can acquire media outlets and who may own media outlets, even newspapers. America has progressed in many ways, but not necessarily in its understanding and appreciation of the First Amendment.

The self-evident approach to this proceeding is to return to the First Amendment, to take away the power of the government to review and to make decisions about who may own a media outlet including newspapers, to take away the power of government officials—whether well-intentioned or not—to use their offices to make decisions about who may own a media asset in America.

II. If the government chooses to continue deciding who may own a media asset …

Regretfully, it does not take a seasoned observer of the FCC to recognize that change is slow. A government agency such as the FCC that has made decisions on media ownership for decades will not lightly forbear from that authority. No one at the FCC today wrote the original rules permitting such authority. Sadly, few in government find government decision-making in this area as repugnant as it truly is.

Under the assumption that the FCC will choose to continue to make decisions about who may own media outlets, I offer the following advice.

A. Any ownership rule is redundant to antitrust review

Even if there were a need for a governmental rule reviewing media ownership and acquisitions, the federal antitrust agencies already review mergers and acquisitions in this area. Presumably, those agencies protect the public interest as well as the FCC does. Given First Amendment concerns, a federal review of media ownership must meet an extraordinarily high standard to be deemed necessary. Given at least one federal agency already reviews all mergers and acquisitions in this area, a redundant federal review of the same ownership situation must meet an even more extraordinary standard.

B. Try to ascertain consumer benefits of any rule

The American consumer has a wealth of information, news, and entertainment at her disposal. She can read newspapers, magazines, books, and practically unlimited information on the internet; she can speak with friends in her neighborhood or around the world by phone; she can listen to news, entertainment, and information on radio, CD, and MP3 players, and internet sites; she can watch news, entertainment, and information on television, cable, satellite, DVDs, and the Internet. Americans can find information of their choice ranging from inspiring theologians to edifying academics to captivating entertainers. We live not in a world of scarce information but of an excess of information. For most of us, the challenge is not finding additional information, but sorting through the seemingly limitless information we already have.

At its best, government regulation has a clear purpose, and that purpose almost always is intended to benefit American consumers and citizens, and the benefits of the regulation exceed its costs. After being in place for decades, the purpose and the benefits and the costs of FCC media ownership rules are largely forgotten. Market conditions have changed dramatically over the past decade, yet we still have media ownership rules from the past.

The first step is to explain the purpose of rule; the second step is to determine whether the rule meets that purpose; and the third is to determine whether the benefits to consumers of the rule demonstrably exceed the costs. These simple steps are rarely taken, and even more rarely with economically defensible measures.

C. Do not torment the dead or dying

Much of American media is flourishing; other parts are dying or dead. The dying and dead of American media—particularly television broadcasters, radio broadcasters, and newspaper—are the very entities still regulated by the FCC ownership rules. I am not suggesting that FCC ownership rules by themselves have killed off the newspaper and broadcast industries. But these rules do torment, gratuitously, the dead and dying.

Among publicly traded newspapers and broadcast ownership groups, many if not most are either in bankruptcy or on the verge of bankruptcy. Those that are financially healthier have nervous investors.

FCC rules make a bad situation worse. The most likely buyer of a distressed newspaper or broadcast station today is often an entity that is prohibited from doing so by FCC rules. Yes, the FCC can and does grant waivers, but those waivers take time and money and seemingly endless patience to process. During the pendency, there is the unseemly spectacle of government review and deliberation of exactly who may own a media outlet. That review gives rise to concerns—perhaps unfounded and unspoken but all to present--that news outlets will modify their newsgathering activities to curry favor with regulators.

A dying newspaper or broadcast station is not a pretty sight. These entities are a central part of many communities. They employ many workers. It is not the responsibility of the FCC to prop up dying businesses, nor is it the responsibility of the FCC to unnecessarily foreclose or hinder options that would enable a distressed business to survive. But it is a sad day when a government official must tell a worker or the community in which she lives: "Based on a rule--that violates the First Amendment, that has no necessity under statute, that is redundant to other federal rules, and for which there no clear evidence of benefits exceeding costs—the FCC has determined to prohibit a transaction between a willing a buyer and willing seller, a transaction superior to all alternatives."

Treat this proceeding no differently from other proceedings

Finally, I offer some words of procedural advice. I do not necessarily expect them to be followed, but I offer them as an observer to all too many of these proceedings.

Each year, the FCC has hundreds of proceedings. They all follow a predictable and moderately efficient process: public content followed by Commission review followed by Commission decisions. Typically, there are no workshops, no field hearings, no sponsored research studies, and no carnival atmosphere.

There is of course one notable exception: media ownership rules. Thus we have today a "workshop." Other proceedings do not warrant a workshop, or more accurately, other proceedings find a more efficient course with one.

I fully understand that those of you on staff do not make these decisions to turn governmental processes into public spectacles. No doubt, most of you would be happy to abandon the extraneous procedures that do little to enhance the public record but much to confuse it. The explanation I am constantly given is that prior Commissions had workshops, field hearings, sponsored research, and carnival atmospheres for media ownership proceedings, and so the new Commission must as well.

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And so we have the lesson of media ownership rules. Most people recognize that they are not working well, but we keep them because prior Commissions kept them, and precedent, even bad precedent, has substantial force even today. Much the same, we have a circus-like process to review these rules, not because the process is efficient, but because it is the same process that prior Commissions used. Someone should whisper to the current commissioners: you can do much better.