S. HRG. 108–938

FCC OVERSIGHT: MEDIA OWNERSHIP AND FCC REAUTHORIZATION

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

JUNE 4, 2003

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED EIGHTH CONGRESS

FIRST SESSION

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FCC OVERSIGHT: MEDIA OWNERSHIP AND FCC REAUTHORIZATION

WEDNESDAY, JUNE 4, 2003,

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 9:30 a.m. in room SR–253, Russell Senate Office Building, Hon. John McCain, Chairman of the Committee, presiding.

OPENING STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

The CHAIRMAN. Good morning. We'll start the hearing on time here. This morning, today, the Committee will hear from the Commissioners of the Federal Communications Commission.

Two days ago, the Federal Communications Commission issued rules for setting new limits on media ownership. These rules were promulgated after 18 months of accumulating data and comments from the public in commissioning and reviewing 12 research studies setting forth empirical evidence about the media industry.

It's difficult to overstate the importance of these rules. The media has a tremendous impact on the everyday lives of all Americans. By selecting and framing issues and ideas and promoting public discourse, the media facilitates a critical function in our democracy, and, as a result, the biennial review has been the source of much passionate public debate.

It appears that each of the Commissioners has approached these complex issues seriously. Whether one agrees with the outcome or not, they are to be commended for their devotion to public service. I look forward to hearing from each of them today.

Congress placed the Commissioners in this position by mandating, in section 202(h) of the Telecommunications Act of 1996, that, "the Commission review its media ownership rules every 2 years to ensure the rules remain necessary in the public interest as a result of competition."

The courts have repeatedly struck down the FCC's previous attempts at meeting this mandate. Chairman Powell has stated that the courts placed, "a high hurdle before the Commission for maintaining a given regulation and made clear that failure to surmount that hurdle, based on a thorough record, must result in the rule's modification or elimination."

The rules the FCC adopted appear to preserve important restrictions on media ownership, but I'm not sure that even an expert agency can predict with precision where the lines should be drawn.

Legislation has already been introduced to keep the national TV ownership cap at 35 percent, and I will put this item on the Committee's agenda for consideration at our next executive session this month. Other bills may be introduced, and other efforts undertaken by Congress, to undo what the FCC has just done.

I might say, I was a little disturbed that Members of this Committee, who immediately decided that maybe we should resort to putting a rider on an appropriations bill, of course, in complete contradiction to what Members of this authorizing Committee should be all about.

Regardless of what is accomplished legislatively, however, the FCC continues to be subject to the requirement that it review its media ownership rules biennially. This continuing review can play an important role as a check on unforeseen consequences of relaxing the ownership rules. But it can only serve this role if the Commission is permitted to tighten its ownership restrictions, if necessary.

I believe the law already allows the Commission to take such action, but it's not clear that the courts would agree. The D.C. Circuit has stated that section 202(h) of the Act, "carries with it a presumption in favor of repealing or modifying ownership rules," and that Congress set in place, "a process of deregulation" by enacting section 202(h) in the Telecommunications Act of 1996. The court likened this process to, "Farragut's order at the Battle of Mobile Bay, 'Damn the torpedoes—full speed ahead,'" toward deregulation. I think we have to clarify this provision of the bill, because I believe that the FCC should be allowed to both deregulate and re-regulate, as it deems necessary.

Because of the uncertainty created by the courts regarding the FCC's ability to strengthen as well as relax media ownership rules, I intend to include specific language in the forthcoming FCC reauthorization bill to clarify that the Commission may and should reimpose ownership restrictions as part of its biennial review, where it finds such action would be in the public interest. And this way, the biennial review by the Commission will serve as an opportunity to ensure that our media ownership restrictions are effective in preserving the goals of competition, diversity, and localism.

I thank the Commissioners for coming before the Committee today. I look forward to your comments and responses to the Committee's questions. Senator Hollings?

STATEMENT OF HON. ERNEST F. HOLLINGS,
U.S. SENATOR FROM SOUTH CAROLINA

Senator HOLLINGS. Thank you, Mr. Chairman, for the hearing and on the comment about going to an appropriations rider. As the Chairman of that Subcommittee for years, we've withheld any legislation with respect to appropriations on the Federal Communications Commission. Last year, Chairman Gregg and I withstood some 17 suggestions.

I, yes, made the suggestion that we might be forced to that and that the Chairman of this Committee had said he didn't think that we could get the bill up, or at least get it approved for the statutory 35 percent. And I wonder whether we can pass the particular resolution of disapproval. If those two fail, yes, I would still attempt

to do it, because I think it's that serious a problem that we have here.

I'd ask consent that my prepared statement be included, and let me highlight just two things. One is that Chairman Powell has engaged in so much spin and fraud that I've got to clarify two things immediately. One, with respect to the graying of the rules in the old black-and-white era—of course, we've got a Constitution that's over 200-and-some years old, graying and in the black-and-white era, and it's still a living document. Otherwise, our friend, Commissioner Martin, joined in harkening the days when he was a boy when they only had three particular networks. Well, I can go back when we didn't have any networks. We barely had radio. No satellite. No cable. Nothing.

[Laughter.]

Senator HOLLINGS. But you had a little machine you wound up and called Central and asked her to please connect you.

[Laughter.]

Senator HOLLINGS. However, in those particular days when they had three networks, Commissioner Martin, they could only own seven stations. And the seven stations that they owned had to submit regularly to the license renewal. Every 3 years. I was the author to extend it to 3 to 5 years. Years back. We've been moving along with the times, this Committee has. And they had to have the license renewal and justify local and community service. Otherwise, we had the financial syndication rule where they couldn't own any programming.

Now, according to the morning news, they own 98 percent of it, and the writers and the authors and the producers are complaining because My Big Fat Greek Wedding is about to be ruled out totally with this particular rule. So much for the Greeks.

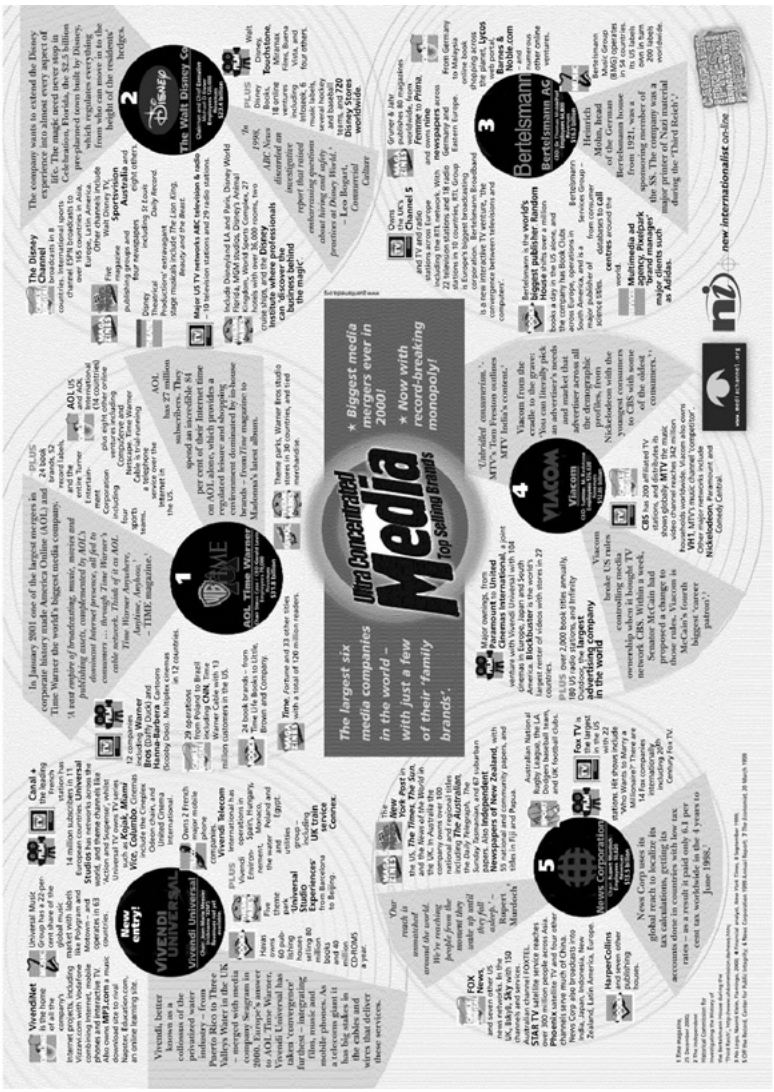
Otherwise, they had no vertical integration, because they couldn't integrate. Now, instead of integrating, let's find out what they have to integrate.

I'd ask consent that we include in the record the five conglomerate ownership——

The CHAIRMAN. Without objection. Without objection.

Senator HOLLINGS. We'll include that.

[The information referred to follows:]



Senator HOLLINGS. And one company owns a network, some 37 stations, cable, satellites. Five media conglomerates control 75 percent of prime-time viewers, and it's projected that they'll soon reach 85 percent. Ninety percent of the top 50 channels on cable are owned either by the major television networks or by cable operators. And the top 20 Internet news sites are owned by the existing television or newspaper companies. So if we've got one ill in communications, it's over-consolidation.

And let's not go along with the idea—I think Commissioner Adelstein pointed it out—you could have all the outlets you wanted in your room here for electricity, but you only had one electrical company giving you service. I use the Rockefeller example which

brought about antitrust. When I grew up, all they had was Standard Oil stations in my home town. And if you read J.D. Carr's book on Rockefeller, you'll find out it wasn't oil; it was the delivery system, the tank cars, that he controlled.

Then Chairman Powell says, and I've got the exact quote here, "If yesterday's rules had not been adopted, there would effectively be no national cap." Absolutely, absolutely false. And he knows it. He knows it. He's a good lawyer. And the Chairman knows that. The FOX versus FCC—and I've got the thing, and I'll ask consent that we include its decision in the record at this time——

The CHAIRMAN. Without objection.

[The information referred to follows:]

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 7, 2001 Decided February 19, 2002

No. 00–1222

Fox Television Stations, Inc.,
Petitioner

v.

Federal Communications Commission and
United States of America,
Respondents

National Association of Broadcasters, *et al.,*
Intervenors

Consolidated with
00–1263, 00–1326, 00–1359, 00–1381, 01–1136

On Petitions for Review of an Order of the
Federal Communications Commission

Edward W. Warren and Paul T. Cappuccio argued the cause for petitioners. With them on the joint briefs were Bruce D. Sokler, Richard A. Cordray, Ashley C. Parrish, Ellen S. Agress, Diane Zipursky, Michael D. Fricklas, Mark C. Morril, John G. Roberts, Jr., Stuart W. Gold, Laurence H. Tribe, Jonathan S. Massey, Arthur H. Harding, R. Bruce Beckner and Henk Brands. Jay Lefkowitz entered an appearance.

C. Grey Pash, Jr., Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were Jane E. Mago, General Counsel, Daniel M. Armstrong, Associate General Counsel, James M. Carr, Lisa S. Gelb and Roger D. Citron, Counsel, Mark B. Stern and Jacob M. Lewis, Attorneys, U.S. Department of Justice. Christopher J. Wright, General Counsel, Federal Communications Commission, Robert B. Nicholson and Robert J. Wiggers, Attorneys, U.S. Department of Justice, entered appearances.

Robert A. Long, Jr. argued the cause for intervenors National Association of Broadcasters and the Network Affiliated Stations Alliance. With him on the brief was Jack N. Goodman.

Harold J. Feld, Andrew J. Schwartzman and Cheryl A. Leanza were on the brief for intervenors/amici curiae Consumer Federation of America and United Church of Christ, Office of Communication, Inc. Wade H. Hargrove, Jr. entered an appearance.

Before: Ginsburg, Chief Judge, Edwards and Sentelle, Circuit Judges.

Opinion for the Court filed by Chief Judge Ginsburg.

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Ginsburg, Chief Judge: Before the court are five consolidated petitions to review the Federal Communications Commission's 1998 decision not to repeal or to modify the national television station ownership rule, 47 C.F.R. § 73.3555(e), and the cable/broadcast cross-ownership rule, 47 C.F.R. § 76.501(a). Petitioners challenge the decision as a violation of both the Administrative Procedure Act (APA), 5 U.S.C. § 551 et seq., and § 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104–104, 110 Stat. 56. They also contend that both rules violate the First Amendment to the Constitution of the United States. The network petitioners—Fox Television Stations, Inc., National Broadcasting Company, Inc., Viacom Inc., and CBS Broadcasting Inc.—address the national television ownership rule, while petitioner Time Warner Entertainment Company, L.P. addresses the cable/broadcast cross-ownership rule. The National Association of Broadcasters (NAB), the Network Affiliated Stations Alliance (NASA), the Consumer Federation of America (CFA), and the United Church of Christ, Office of Communications, Inc. (UCC) have intervened and filed briefs in support of the Commission's decision to retain the national television station ownership rule.

We conclude that the Commission's decision to retain the rules was arbitrary and capricious and contrary to law. We remand the national television station ownership rule to the Commission for further consideration, and we vacate the cable/broadcast cross-ownership rule because we think it unlikely the Commission will be able on remand to justify retaining it.

I. Background

In the Telecommunications Act of 1996 the Congress set in motion a process to deregulate the structure of the broadcast and cable television industries. The Act itself repealed the statutes prohibiting telephone/cable and cable/broadcast cross-ownership, 1996 Act §§ 302(b)(1), 202(I), and overrode the few remaining regulatory limits upon cable/network cross-ownership, *id.* § 202(f)(1). In radio it eliminated the national and relaxed the local restrictions upon ownership, *id.* § 202(a), (b), and eased the "dual network" rule, *id.* § 202(e). In addition, the Act directed the Commission to eliminate the cap upon the number of television stations any one entity may own, *id.* § 202(c)(1)(A), and to increase to 35 from 25 the maximum percentage of American households a single broadcaster may reach, *id.* § 202(c)(1)(B).

Finally, and most important to this case, in §202(h) of the Act, the Congress instructed the Commission, in order to continue the process of deregulation, to review each of the Commission's ownership rules every 2 years:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

The Commission first undertook a review of its ownership rules pursuant to this mandate in 1998. This case arises out of the resulting decision not to repeal or to modify two Commission rules: the national television station ownership rule and the cable/broadcast cross-ownership rule.

A. The National Television Station Ownership (NTSO) Rule

The NTSO Rule prohibits any entity from controlling television stations the combined potential audience reach of which exceeds 35 percent of the television households in the United States.[1] As originally promulgated in the early 1940s, the Rule prohibited common ownership of more than three television stations; that number was later increased to seven. Amendment of Multiple Ownership Rules, Report & Order, 100 F.C.C.2d 17, pp. 14, 16 (1984) (1984 Report). The stated purpose of the seven-station rule was "to promote diversification of ownership in order to maximize diversification of program and service viewpoints" and "to prevent any undue concentration of economic power." *Id.* p. 17.

In 1984 the Commission considered the effects of technological changes in the mass media, *id.* p. 4, and repealed the NTSO Rule subject to a six-year transition period during which the ownership limit was raised to 12 stations. *Id.* pp. 108–112. The Commission determined that repeal of the NTSO Rule would not adversely affect either the diversity of viewpoints available on the airwaves or competition among broadcasters. It concluded that diversity should be a concern only at the local level, as to which the NTSO Rule was irrelevant, *id.* pp. 31–32, and that "[l]ooking at the national level [the Rule was unnecessary because] the U.S. enjoys an abundance of independently owned mass media outlets," *id.* p. 43. The Commission also concluded that group owners were not likely to impose upon their stations a "monolithic" point of view. *Id.* pp. 52–54, 61. With respect to economic competition, the Commission considered the markets for national and for local spot advertising and concluded that neither would be made less competitive by repeal of the NTSO Rule. *Id.* pp. 66–71.

Implementation of the 1984 Report was subsequently blocked by the Congress. See Second Supplemental Appropriations Act, Pub. L. No. 98–396, § 304, 98 Stat. 1369, 1423 (1984). The Commission thereupon reconsidered the matter and prohibited common ownership: (1) of stations that in the aggregate reached more than 25 percent of the national television audience, and (2) of more than 12 stations regardless of their combined audience reach. Amendment of Multiple Ownership Rules, Mem. Op. & Order, 100 F.C.C.2d 74, pp. 36–40 (1984). These limitations remained in place until 1996, when the Congress (in § 202(c)(1) of the Act) directed the Commission to eliminate the 12-station rule and to raise to 35 percent the cap upon audience reach, both of which actions the Commission promptly took. Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations), 61 Fed. Reg. 10,691 (Mar. 15, 1996).

B. The Cable/Broadcast Cross-Ownership (CBCO) Rule

The CBCO Rule prohibits a cable television system from carrying the signal of any television broadcast station if the system owns a broadcast station in the same local market.[2] In conjunction with certain "must-carry" requirements, 47 U.S.C. §§ 534–535; 47 C.F.R. § 76.55 et seq., to which cable operators are subject, *see Turner Broad. Sys., Inc.* v. *FCC,* 512 U.S. 622, 630–32 (1994) (Turner I), the Rule has

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[1] "No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent." 47 C.F.R. § 73.3555(e).

[2] "No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station whose predicted Grade B contour, computed in accordance with § 73.684 of part 73 of this chapter, overlaps in whole or in part the service area of such system (*i.e.,* the area within which the system is serving subscribers)." 47 C.F.R. § 76.501(a).

the effect of prohibiting common ownership of a broadcast station and a cable television system in the same local market.

The Commission first promulgated the CBCO Rule in 1970 along with a rule banning network ownership of cable systems. Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, Second Report & Order, 23 F.C.C.2d 816, pp. 11, 15 (1970). In 1984 the Congress codified the CBCO Rule but not the network ownership ban. Cable Communications Policy Act of 1984, Pub. L. No. 98–549, § 2, 98 Stat. 2779.

In 1992 the Commission repealed the rule prohibiting net-work ownership of cable systems. Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations, Report & Order, 7 F.C.C.R. 6156, p. 10 (1992) (1992 Report). The Commission also revisited the CBCO Rule and concluded that "the rationale for an absolute prohibition on broadcast-cable cross-ownership is no longer valid in light of the ongoing changes in the video marketplace." *Id.* p. 17. Because the Congress had imposed a similar prohibition by statute, however, the Commission did not repeal the Rule; instead, the Commission recommended that the Congress repeal the statutory prohibition. *Id.* In the 1996 Act the Congress did just that without, however, requiring the Commission to repeal the CBCO Rule. 1996 Act § 202(i).

C. Applying § 202(h)

As mentioned above, the 1996 Act, in addition to raising the national ownership cap to 35 percent and repealing the statutory ban upon cable/broadcast cross-ownership, required the Commission biennially to review all its ownership rules in order to determine whether they remain "necessary in the public interest." To begin the first review thus called for in § 202(h), the Commission, on March 13, 1998, issued a Notice of Inquiry seeking comments on all ownership rules, including specifically both the NTSO and the CBCO Rules. 1998 Biennial Regulatory Review, Notice of Inquiry, 13 F.C.C.R. 11276, pp. 14, 43 (1998). The Commission described as follows the approach it intended to take:

> We solicit comment on our broadcast ownership rules to determine whether these rules are no longer in the public interest as we have traditionally defined it in terms of our competition and diversity goals. Once this phase is completed, we will review the comments and issue a report. In the event we conclude there is good reason to believe that any of the rules within the scope of the review, or portions thereof, should be repealed or modified, we will issue the appropriate Notice(s) of Proposed Rule Making.

Id. p. 3.

Reply comments were filed in June, 1998 but as of the fall of 1999 the Commission had not yet completed its review. Therefore, in November, 1999 the Congress directed that: "Within 180 days . . . [the] Commission shall complete the first biennial review required by section 202(h) of the Telecommunications Act of 1996." Consolidated Appropriations Act, 2000, Pub. L. No. 106–113, § 5003, 113 Stat. 1501, 1501A–593 (1999). The accompanying Conference Report instructed: "[I]f the Commission concludes that it should retain any of these rules under the review unchanged the Commission shall issue a report that includes a full justification of the basis for so finding." H.R. Conf. Rep. No. 106–464, at 148 (1999).

On May 26, 2000 the Commission announced its decision (by a 3–2 vote) to retain the NTSO and CBCO Rules, among others, and to repeal or to modify certain other of its ownership rules. A few weeks later the Commission issued a written report in which it explained its actions. 1998 Biennial Regulatory Review, Biennial Review Report, 15 F.C.C.R. 11058 (2000) (1998 Report).

1. The NTSO Rule

The Commission gave three primary reasons for retaining the NTSO Rule: (1) to observe the effects of recent changes to the rules governing local ownership of television stations; (2) to observe the effects of the increase in the national ownership cap to 35 percent; and (3) to preserve the power of affiliates in bargaining with their networks and thereby allow the affiliates to serve their local communities better. *Id.* pp. 25–30. The Commission also stated that it believed repealing the rule would "increase concentration in the national advertising market"—presumably to the detriment of competition—and "enlarge the potential for monopsony power in the program production market"—presumably to the detriment of both competition and diversity. *Id.* p. 26 n.78. Commissioners Furchtgott-Roth and Powell dissented. *Id.* at 74; *id.* at 94.

The effect upon petitioners Fox and Viacom of the Commission's decision to retain the NTSO Rule was direct and immediate. Viacom's acquisition of CBS brought its audience reach to 41 percent; only a stay issued by this court has enabled Viacom

to avoid divesting itself of enough stations to come within the 35 percent cap. *Fox Television Stations, Inc.* v. *FCC,* No. 00–1222 at 2 (April 6, 2001). Similarly, the Rule is preventing Fox from going forward with its purchase of Chris-Craft Industries, which purchase would enable Fox to reach more than 40 percent of the national audience.

2. The CBCO Rule

In the 1998 Report the Commission decided that retaining the CBCO Rule was necessary to prevent cable operators from favoring their own stations and from discriminating against stations owned by others. 1998 Report p. 104 ("current carriage and channel position rules prevent some of the discrimination problems, but not all of them"). The Commission also determined that the CBCO Rule was "necessary to further [the] goal of diversity at the local level." *Id.* p. 106. The Rule, according to the Commission, contributes to the diversity of viewpoints in local markets by preserving the voices of independent broadcast stations, which provide local news and public affairs programming. *Id.* pp. 106–108. Commissioners Furchtgott-Roth and Powell dissented from the retention of this Rule as well. *Id.* at 74; *id.* at 100.

The effect upon Time Warner of the Commission's decision to retain the CBCO Rule was significant. Although Time Warner has not identified any specific transaction it would have consummated but for the CBCO Rule, the Rule is preventing it from acquiring television stations in markets, such as New York City, where it owns a cable system. Time Warner asserts that "obvious procompetitive efficiencies" would result from "combining" a television station in that area with its all-local-news cable programming service, NY1. Time Warner also argues that the CBCO Rule hinders its "WB" network from competing with networks that own stations in major television markets.

II. Threshold Issues

Before turning to the merits of the petitions we must consider several threshold issues. The Commission, supported by the intervenors, contends that its decision not to repeal or to modify the Rules is not final agency action, was not meant by the Congress to be subject to review, and in any event is not ripe for review. Intervenors NAB and NASA also argue that the petitioners failed to exhaust their administrative remedies and lack standing.

A. Finality

This court has jurisdiction to review "final orders" of the Commission and "final agency action for which there is no other adequate remedy in a court." 28 U.S.C. § 2342(1); 5 U.S.C. § 704. Consequently, the court must determine whether the Commission's determination was "final." Agency action is final if: (1) it is "the consummation of the agency's decisionmaking process," and (2) "rights or obligations have been determined" by the action or "legal consequences will flow" from it. *Bennett* v. *Spear,* 520 U.S. 154, 178 (1997). The Commission argues that its retention decision does not meet this test; the networks and Time Warner argue persuasively to the contrary.

There is no question a Commission determination not to repeal or to modify a rule, after giving notice of and receiving comment upon a proposal to do so, is a final agency action subject to judicial review. *Montana* v. *Clark,* 749 F.2d 740, 744 (D.C. Cir. 1985). Equally clear, an agency's denial of a petition to initiate a rulemaking for the repeal or modification of a rule is a final agency action subject to judicial review. *Capital Network Sys., Inc.* v. *FCC,* 3 F.3d 1526, 1530 (D.C. Cir. 1993). The question presented here is whether the Commission's determination not to repeal the NTSO and CBCO Rules, made pursuant to § 202(h) after issuing a "Notice of Inquiry" and receiving comment, is likewise a final agency action subject to judicial review.

The Commission first appears to contend that only a decision made pursuant to an adjudicative or rulemaking proceeding is final. The Commission fails, however, either to offer support for this argument or to acknowledge that we have held other types of agency actions to be final and reviewable. *See, e.g.,* Ciba-Geigy Corp. v. *EPA,* 801 F.2d 430, 435–37 (1986) (holding letter expressing EPA's position on procedural question was final agency action because it was definitive and had direct and immediate effect upon petitioners); *Nat'l Automatic Laundry and Cleaning Council* v. *Schultz,* 443 F.2d 689, 702 (1971) (holding letter from Administrator of Wage and Hour Division of Department of Labor interpreting provision of Fair Labor Standards Act was final agency action).

Second, the Commission argues that the 1998 Report is not final because the agency intends to continue considering the ownership rules. That, however, does not mean the determination is not "final" as a matter of law. The 1998 Report is the

Commission's last word on whether, as of 1998, the Rules were still "necessary in the public interest as the result of competition."

Finally, the Commission says the 1998 Report does not impose an obligation or deny a right because the petitioners would receive no immediate relief if they were to prevail in their present challenge; all they could get would be an order requiring the Commission to initiate a rulemaking. We shall have more to say below about the relief to which the petitioners are entitled. For now it is sufficient to observe that by the Commission's own account its decision is, in effect, at the least a decision not to initiate a rulemaking, and it is established that "an agency's refusal to institute [rulemaking] proceedings has sufficient legal consequence to meet the second criterion of the finality doctrine." Capital Network Sys., 3 F.3d at 1530. Therefore we conclude, as we must, that the decision under review—holding that the NTSO and CBCO Rules were necessary in the public interest—is a final agency action.

B. Reviewability

Separate from the question whether the 1998 decision is a final agency action, the Commission argues that the "Congress did not intend for the Commission's biennial reviews . . . to create reviewable action." In support of this proposition, the Commission notes that § 202(c)(2) of the 1996 Act calls for the Commission to conduct a rulemaking to determine whether to retain, to modify, or to eliminate local television ownership limitations; in contrast, § 202(h) requires only that the Commission "review" rules to determine whether to repeal or to modify them. The Commission next argues that under the 1996 Act a "determination," unlike a rulemaking decision, is not a reviewable event. It contends that if the Congress had wanted to subject to judicial scrutiny determinations made pursuant to the biennial reviews required by § 202(h), then it would have said so, as it said in § 252(e)(6) of the Act that a state commission's "determination" approving or disapproving an interconnection agreement shall be reviewable in Federal court. Additionally, the Commission observes that § 202(h) does not require it to submit a written report to the Congress. All this, according to the agency, indicates the Congress did not intend that the courts review agency determinations made pursuant to § 202(h). In any event, the Commission argues, under *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), the court must defer to the Commission's statutory interpretation to that effect. Finally, the Commission contends that if its every decision to retain a rule under § 202(h) were subject to judicial review, then the agency and the courts alike would face tasks so overwhelming as not to be a result sensibly ascribed to the Congress.

In light of the presumption that final agency action is reviewable, see *Abbott Labs.* v. *Gardner,* 387 U.S. 136, 140–41 (1967), we must reject the Commission's argument that the text and structure of the 1996 Act preclude judicial review. The contrasts the Commission draws between § 202(c) and § 202(h), and between § 252 and § 202(h), fall short of the "clear and convincing evidence" of congressional intent needed to foreclose review under Abbott Labs., 387 U.S. at 141. Nor is an agency's interpretation of a statutory provision defining the jurisdiction of the court entitled to our deference under Chevron. *Adams Fruit Co.* v. *Barrett,* 494 U.S. 638, 650 (1990). We appreciate that § 202(h) requires the Commission to undertake a significant task in a relatively short time, but we do not see how subjecting the result to judicial review makes the Commission's responsibility significantly more burdensome, let alone so formidable as to be improbable. In sum, having held that the 1998 decision is a final agency action, we see nothing in the 1996 Act that forecloses judicial review thereof.

C. Ripeness

Next the Commission contends that its decision not to repeal or to modify the ownership rules in question is not ripe for review because the issues are not "fit" for judicial review, and delay would not cause the petitioners any hardship. See Abbott Labs., 387 U.S. at 149. First, the Commission points out that it is in a better position than the court to determine whether the challenged rules are necessary in the public interest. Second, the Commission argues that the petitioners will not be harmed if the 1998 Report is not subject to review because they can seek relief from the operation of the rules in other ways—a petition for a rulemaking or a request for a waiver; and again, the relief available to the petitioners would be, in any event, only an order directing the Commission to conduct a rulemaking to consider modification or repeal of the challenged rules. In addition, intervenors CFA and UCC contend that the decision is not ripe for judicial review because they "and other interested parties have not yet had an opportunity to present responsive arguments relating [to the] rules here at issue."

We find these arguments unpersuasive. First, the issues in this case are fit for judicial review because the questions presented are purely legal ones: whether the Commission's determination was arbitrary and capricious or contrary to law, and whether the challenged rules violate the First Amendment. Because the court will not review de novo the Commission's decision to retain the Rules, the Commission's argument that it is in the better position to make that determination is, while doubtless true, quite beside the point.

Second, the petitioners will indeed be harmed if we do not review the Commission's decision now. Although they could challenge the Rules by other means, retention of the Rules in the interim significantly harms both the networks and Time Warner. As we have said, the NTSO Rule constrains Fox and Viacom from entering into or completing certain specific transactions, and the CBCO Rule prevents Time Warner from acquiring television stations in certain markets where it would like to do so. Moreover, the Commission is mistaken in asserting that the only remedy available to the petitioners is a remand for rulemaking. For the reasons we provide below (in Part III.C), we think that under § 202(h) a reviewing court may vacate the underlying rule if it determines not only that the Commission failed to justify retention of the rule but that it is unlikely the Commission will be able to do so on remand.

Finally, CFA, UCC, and all other interested parties were invited in the Notice of Inquiry to comment specifically upon whether the broadcast ownership rules should be retained. 1998 Biennial Regulatory Review, Notice of Inquiry, 13 F.C.C.R. 11276, p. 3 (1998). Perhaps CFA and UCC, unlike the other intervenors and many members of the public, chose not to comment in anticipation of doing so if the Commission were later to propose repealing the Rules. Be that as it may, we do not see how that can make unripe an otherwise ripe issue or deprive those harmed of their right to timely review of a final agency action. Hence, we conclude the Commission's decision is ripe for review.

D. Exhaustion and Standing

Intervenors NAB and NASA argue that the petitioners failed to exhaust their administrative remedies because they neither petitioned for a rulemaking to amend or repeal the Rules nor asked the Commission for a waiver of the Rules. They argue that in *Tribune Co.* v. *FCC,* 133 F.3d 61, 69 (1998), this court "made clear that the exhaustion requirement applies to challenges launched against the ownership rules that are subject to the Commission's biennial review process." The intervenors' reliance upon the Tribune case is misplaced, however. When that case was decided the Commission had not yet completed a review pursuant to § 202(h). In this case, where the Commission had just determined that the rules in question were still necessary in the public interest, it obviously would have been futile for the petitioners to have petitioned the agency for a rulemaking to repeal them. And the intervenors cite no authority suggesting the petitioners were required to request a waiver from the agency even though a waiver is not the relief they seek from the court; nor do the intervenors proffer any reason to believe the petitioners would have been entitled to a waiver had they sought one.

The intervenors also argue that the petitioners lack standing because a favorable decision in this case would not redress their injuries. Their point is that the Commission would still have to consider in a rulemaking whether to repeal the Rules, but as we have just seen in connection with the Commission's objection that this case is not ripe for review, that is not so. We therefore conclude that the petitioners have standing to bring their claims before the court.

III. The NTSO §Rule

Having found no obstacle to our adjudication of this dispute, we turn at last to the merits. The networks assert that the Commission's decision to retain the NTSO Rule was contrary to §202(h) and arbitrary and capricious in violation of the APA; alternatively they contend the Rule violates the First Amendment.

A. Section 202(h) and the APA

The networks argue that the Commission's decision not to repeal the NTSO Rule was arbitrary and capricious and contrary to § 202(h) for three reasons: (1) the Rule is fundamentally irrational, and the Commission's justifications for retaining it are correlatively flawed; (2) the Commission failed meaningfully to consider whether the Rule was "necessary" in the public interest; and (3) the Commission failed to explain why it departed from its previous position that the Rule should be repealed.

1. Is the Rule irrational?

The networks advance three reasons for thinking that retention of the NTSO Rule was irrational: The 35 percent cap is if anything less justified than the aggregate

limitation upon cable system ownership we held a violation of the First Amendment in *Time Warner Entertainment Co., L.P.* v. *FCC,* 240 F.3d 1126 (2001) (Time Warner II); the Commission has provided no persuasive reason to believe retention of the Rule is necessary in the public interest; and retention of the Rule is inconsistent with some of the Commission's other recent decisions.

Time Warner II. According to the networks, "[t]he logic of Time Warner II applies with even greater force here." They contend that the television station ownership cap of 35 percent is more severe than the cable system ownership cap of 30 percent struck down in Time Warner II, because unlike cable systems "broadcasters face intense competition from numerous stations in each local market" and the 35 percent cap is measured in terms of homes potentially rather than actually served. In response, the Commission, supported by intervenors NAB and NASA, notes two distinctions between Time Warner II and this case: The 30 percent cap in Time Warner II was set by the Commission whereas the 35 percent cap at issue here was set by the Congress; and the provision of the Cable Act at issue in the prior case limited the extent to which the Commission could regulate in furtherance of diversity, whereas § 202(h) mandates that a rule necessary "in the public interest"—including the public interest in diversity—be retained.

The networks are right, of course, that a broadcaster faces more local competition than does a cable system. We must also acknowledge that under the cap expressed in terms of a "potential audience reach" of 35 percent, an owner of television stations cannot in practice achieve an audience share that approaches 35 percent of the national audience. Nonetheless, we find the networks' reliance upon Time Warner II less than convincing for two reasons, one advanced by the Commission and one not. As the Commission points out, we concluded in Time Warner II that the 1992 Cable Act limited the agency's authority to impose regulations solely in order to further diversity in programming, Time Warner II, 240 F.3d at 1135–36, whereas no such limitation is at work in this case. See page 18 below. Additionally, in Time Warner II we reviewed the challenged regulations under first amendment "intermediate scrutiny," which is more demanding than the arbitrary and capricious standard of the APA. See Time Warner II, 240 F.3d at 1130 ("a government regulation subject to intermediate scrutiny will be upheld if it 'advances important government interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests' ") (quoting *Turner Broad. Sys., Inc.* v. *FCC,* 520 U.S. 180, 189 (1997)). In sum, although Time Warner II does give the court a point of reference, it is not controlling here.

The Commission's reasons: competition, diversity, *et al.,* The networks next argue that neither safeguarding competition nor promoting diversity generally can support the Commission's decision to retain the NTSO Rule. They then take on the specific reasons given by the Commission in support of its 1998 decision.

As to competition, the networks note that there is no evidence "that broadcasters have undue market power," such as to dampen competition, in any relevant market. The Commission attempts to rebut the point, but to no avail. In its brief the agency cites a single, barely relevant study by Phillip A. Beutel *et al.,* entitled Broadcast Television Networks and Affiliates: Economic Conditions and Relationship—1980 and Today (1995). Insofar as there is any point of tangency between that study and the matter at hand, it is in the authors' conclusion that "the available evidence tends to refute the proposition that affiliates have gained negotiating power since . . . 1980." *Id.* at 12. The study plainly does not, however, suggest that broadcasters have undue market power. The only other evidence to which the Commission points is a table said to show that "many group owners have acquired additional stations and increased their audience reach since the Telecom Act's passage." 1998 Report p. 27. As the networks point out, however, "such figures alone, without some tangible evidence of an adverse effect on the market, are insufficient to support retention of the Cap." Finally, the Commission's reference in the 1998 Report to the national advertising and the program production markets is wholly unsupported and undeveloped. 1998 Report p. 26 n.78. Consequently, we must conclude, as the networks maintain, that the Commission has no valid reason to think the NTSO Rule is necessary to safeguard competition.

As to diversity, the networks contend there is no evidence that "the national ownership cap is needed to protect diversity" and that in any event § 202(h) does not allow the Commission to regulate broadcast ownership "in the name of diversity alone." The Commission, again supported by intervenors NAB and NASA, persuasively counters the statutory point: In the context of the regulation of broadcasting, "the public interest" has historically embraced diversity (as well as localism), see *FCC* v. *Nat. Citizens Comm. for Broad.,* 436 U.S. 775, 795 (1978) (NCCB), and nothing in § 202(h) signals a departure from that historic scope. The question, therefore, is whether the Commission adequately justified its retention decision as necessary

to further diversity or localism. In the 1998 Report the Commission mentioned national diversity as a justification for retaining the NTSO Rule but never elaborated upon the point. 1998 Report p. 26 n.78. This justification fails for two reasons. First, the Commission failed to explain why it was no longer adhering to the view it expressed in the 1984 Report that national diversity is irrelevant. 1984 Report pp. 31–32. Second, the Commission's passing reference to national diversity does nothing to explain why the Rule is necessary to further that end. The Commission did, however, discuss at some length fostering local diversity by strengthening the bargaining position of affiliates vis-á-vis their networks, 1998 Report p. 30, a justification to which we shall come shortly.

As to the Commission's three more specific reasons for retaining the NTSO Rule, the networks contend that each is inadequate. The Commission stated that retaining the cap was necessary so it could: (1) observe the effects of recent changes in the rules governing local ownership of television stations; (2) observe the effects of the national ownership cap having been raised to 35 percent; and (3) preserve the power of local affiliates to bargain with their networks in order to promote diversity of programming. 1998 Report pp. 25–30. We agree with the networks that these reasons cannot justify the Commission's decision.

The first reason is insufficient because there is no obvious relationship between relaxation of the local ownership rule—which now permits a single entity to own two broadcast stations in the same market in some situations, see Review of the Commission's Regulations Governing Television Broadcasting, Report & Order, 14 F.C.C.R. 12903, p. 64 (1999)—and retention of the national ownership cap, and the Commission does nothing to suggest there is any non-obvious relationship. Furthermore, as the networks point out, neither the first nor the second reason is responsive to § 202(h): The Commission's wait-and-see approach cannot be squared with its statutory mandate promptly—that is, by revisiting the matter biennially—to "repeal or modify" any rule that is not "necessary in the public interest."

The Commission, with the support of intervenors NAB and NASA, argues that it was required to defer to the decision of the Congress to set the initial ownership cap in the 1996 Act at 35 percent. For this the Commission relies upon both the House and the Senate having rejected a proposal to raise the cap to 50 percent, and upon the statement of Congressman Markey, ranking minority Member of the relevant subcommittee of the House, that the Congress's choice of the 35 percent cap "should settle the issue for many years to come." 142 Cong. Rec. H1145–06, H1170 (daily ed. Feb. 1, 1996). This legislative history is no basis whatever for the Commission's decision. First, the choice of 35 percent rather than any other number determined only the starting point from which the Commission was to assess the need for further change. Section 202(h) itself requires the Commission to determine whether its ownership rules—specifically including "rules adopted pursuant to this section," such as the present NTSO Rule—are necessary in the public interest. Thus, the statute imposed upon the Commission a duty to examine critically the new 35 percent NTSO Rule and to retain it only if it continued to be necessary; for the Commission to defer to the Congress's choice of 35 percent as of 1996 is to default upon this ongoing duty. Second, "the remarks of a single legislator, even the sponsor," cannot be allowed to alter the plain meaning of the legislation upon which he comments. *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 311 (1979). In this instance, moreover, the Congressman did not even purport to interpret the statute; he merely offered his own prediction that competitive conditions would not warrant a change in the Rule anytime soon. Maybe yes, maybe no. The statute says that is for the Commission to decide. Consequently, the first two reasons given by the Commission do nothing to support its decision.

Nor does the Commission's third reason—that the Rule is necessary to strengthen the bargaining power of network affiliates and thereby to promote diversity of programming—have sufficient support in the present record. Although we do not agree with the networks that this reason is unresponsive to § 202(h)—as we have said, that section allows the Commission to retain a rule necessary to safeguard the public interest in diversity—we must agree that the Commission's failure to address itself to the contrary views it expressed in the 1984 Report effectively undermines its present rationale. In the 1998 Report (p. 30) the Commission asserted that independently-owned affiliates play a valuable role by "counterbalancing" the networks' strong economic incentive in clearing all network programming "because they have the right . . . to air instead" programming more responsive to local concerns. In the 1984 Report, however, the Commission said it had "no evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming." 1984 Report p. 53. The later decision does not indicate the Commission has since received such evidence or otherwise found reason to repudiate its prior conclusion.

In sum, we agree with the networks that the Commission has adduced not a single valid reason to believe the NTSO Rule is necessary in the public interest, either to safeguard competition or to enhance diversity. Although we agree with the Commission that protecting diversity is a permissible policy, the Commission did not provide an adequate basis for believing the Rule would in fact further that cause. We conclude, therefore, that the 1998 decision to retain the NTSO Rule was arbitrary and capricious in violation of the APA.

Other Commission actions. The networks argue that the Commission's decision is also arbitrary and capricious because it is inconsistent with recent Commission decisions relaxing the local television station ownership and the radio/televison cross-ownership rules, as well as its decisions repealing the prime time access and the financial and syndication rules. The Commission answers that it has properly followed the lead of the Congress in taking an "incremental" approach to the deregulation of broadcast ownership. Although we are not convinced the Congress required such an approach—the mandate of § 202(h) might better be likened to Farragut's order at the battle of Mobile Bay ("Damn the torpedoes! Full speed ahead.") than to the wait-and-see attitude of the Commission—because the decisions to which the networks point deal with regulations that are not closely related, analytically, to the NTSO Rule, they are not inconsistent with the Commission's decision to retain the national ownership cap.

2. Failure to comply with §*202(h)*

The networks argue that the Commission's decision to retain the NTSO Rule was not only arbitrary and capricious but also contrary to § 202(h). As just discussed, we agree with the networks that two of the reasons the Commission gave for retaining the Rule did not even purport to show the Rule was necessary in the public interest, as required by the statute. Furthermore, we agree that the Commission "provided no analysis of the state of competition in the television industry to justify its decision to retain the national ownership cap." The Commission's brief description of the broadcasting market, a single paragraph of the 1998 Report under the heading "Status of Media Marketplace," is woefully inadequate: The Commission merely listed the number of television households, the number of television stations, the percentage of those stations that are affiliated with networks, and the number of stations an average viewer can receive, without defining the relevant markets, let alone assessing the state of competition therein. See 1998 Report p. 9. Nor did the Commission attempt to link the listed facts to its decision to retain the national ownership cap. That, however, is precisely what § 202(h) requires. Consequently, we agree with the networks that the Commission "failed even to address meaningfully the question that Congress required it to answer."

3. Failure to address the 1984 Report

The Commission's failure to address its 1984 Report in the course of its contrary 1998 Report is yet another way in which the decision to retain the NTSO Rule was arbitrary and capricious. Recall that in the 1984 Report the Commission concluded the NTSO Rule should be repealed because it focuses upon national rather than local markets and because even then any need for the Rule had been undermined by competition. 1984 Report p. 108. Indeed, even when the Commission subsequently reconsidered its decision to eliminate the national ownership cap—as necessitated by the moratorium the Congress imposed upon implementing the 1984 Report—it expressly re-affirmed the conclusions reached in the Report. Amendment of Multiple Ownership Rules, Mem. Op. & Order, 100 F.C.C.2d 74, p. 3 (1984). To retain the cap in 1998 without explanation of the change in the Commission's view is, therefore, to all appearances, simply arbitrary. The Commission may, of course, change its mind, but it must explain why it is reasonable to do so. *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 57 (1983) ("An agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis."); *Telecomm. Research and Action Ctr.* v. *FCC,* 801 F.2d 501, 518 (D.C. Cir. 1986).

The Commission now argues that the refusal of the Congress to allow the agency to implement the 1984 Report and its decision in the 1996 Act to retain an ownership cap rendered irrelevant the views the Commission expressed in the 1984 Report. When the Congress in 1996 directed the Commission periodically to review the ownership cap, however, it did nothing to preclude the Commission from considering certain arguments in favor of repealing the cap—including the arguments the Commission had embraced in 1984. So long as the reasoning of the 1984 Report stands unrebutted, the Commission has not fulfilled its obligation, upon changing its mind, to give a reasoned account of its decision.

In sum, we hold that the decision to retain the NTSO Rule was both arbitrary and capricious and contrary to § 202(h) of the 1996 Act. The networks argue that this requires us to vacate the Rule rather than merely to remand the case to the agency for further consideration. As will be discussed below, we disagree, and for this reason we must go on to consider the networks' first amendment challenge to the NTSO Rule which, if successful, without question would require that the Rule be vacated.

B. The First Amendment

The networks contend that the NTSO Rule violates the First Amendment because it prevents them from speaking directly—that is, through stations they own and operate—to 65 percent of the potential television audience in the United States. They would have the court subject the Rule to "intermediate scrutiny," rather than to rationality review, on the grounds that: (a) in today's populous media marketplace the "scarcity" rationale associated with *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367 (1969)—but in fact, we note, first set forth in *National Broadcasting Co.* V. *United States,* 319 U.S. 190, 226–27 (1943) (NBC)—"makes no sense" as a reason for regulating ownership; (b) even if scarcity is still a valid concern, the NTSO Rule, which does not prevent an entity from owning more than one station in the same local market, does nothing to mitigate the effect of scarcity; and (c) *FCC* v. *League of Women Voters,* 468 U.S. 364 (1984), which postdates Red Lion, mandates heightened scrutiny for all restrictions on broadcast speech. In the alternative, the networks argue that even if the NTSO Rule is subject only to review for mere rationality—the least demanding type of first amendment scrutiny—then it is still unconstitutional because it "severely restricts [their] free speech rights and fails to advance any countervailing public interest."

The Commission urges the court to accord the NTSO Rule more deference than is accorded under intermediate scrutiny on the ground that the Supreme Court upheld similar ownership rules in NCCB and NBC upon determining they were merely reasonable. Just so.

In NCCB the court upheld the newspaper/broadcast cross-ownership rule stating: "The regulations are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them." 436 U.S. at 802. In NBC the court upheld a regulation that prohibited a network from owning more than one radio station in a market and from owning any station in a market with few stations. 319 U.S. at 206–08. As in NCCB, the Court in NBC held the regulation to be consistent with the First Amendment because it was based upon network practices deemed contrary to the public interest and not upon the applicants' "political, economic or social views, or upon any other capricious basis." *Id.* at 226–27.

The networks offer no convincing reason those cases should not control. First, contrary to the implication of the networks' argument, this court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense. The Supreme Court has already heard the empirical case against that rationale and still "declined to question its continuing validity." Turner I, 512 U.S. 622, 638 (1994). In any event, it is not the province of this court to determine when a prior decision of the Supreme Court has outlived its usefulness. *Agostini* v. *Felton,* 521 U.S. 203, 237 (1997).

Second, contrary to the networks' express protestations, the scarcity rationale is implicated in this case. The scarcity rationale is based upon the limited physical capacity of the broadcast spectrum, which limited capacity means that "there are more would-be broadcasters than frequencies available." Turner I, 512 U.S. at 637. In the face of this limitation, the national ownership cap increases the number of different voices heard in the Nation (albeit not the number heard in any one market). But for the scarcity rationale, that increase would be of no moment.

Third, we do not think League of Women Voters mandates heightened scrutiny in this case. That case involved a prohibition upon editorializing by noncommercial broadcasters that received government money under the Public Broadcasting Act, which prohibition the Court concluded was a content-based restriction upon speech. 468 U.S. at 383–84. The Court applied heightened scrutiny, noting that restrictions placed upon broadcasters in order to "secure the public's First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern," such as the fairness doctrine at issue in Red Lion, 395 U.S. at 386, "have been upheld only when we were satisfied that the restriction is narrowly tailored to further a substantial government interest." 468 U.S. at 380. The Court did not question, however, the continued propriety of deferential scrutiny of structural regulations. *Id.* The NTSO Rule, unlike the ban upon editorializing at issue in League of Women Voters, is not a content-based regulation; it is a regulation of industry struc-

ture, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in NCCB, and like the network ownership restriction upheld in NBC. See NCCB, 436 U.S. at 801; NBC, 319 U.S. at 226–27. For these reasons, the deferential review undertaken by the Supreme Court in NCCB and NBC is also appropriate here.

The networks, drawing directly upon the Commission's 1984 Report, argue that the Rule fails even rationality review because "[p]ermitting one entity to own many stations can foster . . . more programming preferred by consumers." They also suggest that but for the Rule "buyers with superior skills [could] purchase stations where they may be able to do a better job" of meeting local needs even as they realize economies of scale.

This paean to the undoubted virtues of a free market in television stations is not, however, responsive to the question whether the Congress could reasonably determine that a more diversified ownership of television stations would likely lead to the presentation of more diverse points of view. By limiting the number of stations each network (or other entity) may own, the NTSO Rule ensures that there are more owners than there would otherwise be. An industry with a larger number of owners may well be less efficient than a more concentrated industry. Both consumer satisfaction and potential operating cost savings may be sacrificed as a result of the Rule. But that is not to say the Rule is unreasonable because the Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency—including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy. Simply put, it is not unreasonable—and therefore not unconstitutional—for the Congress to prefer having in the aggregate more voices heard, each in roughly one-third of the nation, even if the number of voices heard in any given market remains the same.

C. Remedy

We have concluded that, although the NTSO Rule is not unconstitutional, the Commission's decision to retain it was arbitrary and capricious and contrary to law because the Commission failed to give an adequate reason for its decision, failed to comply with § 202(h), and failed to explain its departure from its previously expressed views. Now we must determine the appropriate remedy.

The networks ask us to vacate the Rule, relying upon this court's opinion in Radio-Television *News Directors Ass'n* v. *FCC,* 229 F.3d 269 (2000) (RTDNA II). See also RTNDA I, 184 F.3d 872, 888 n.21 (D.C. Cir. 1999) (holding open possibility court could vacate political editorial and personal attack rules after deciding Commission, which had proposed to repeal them, had inadequately justified decision not to do so). The Commission, supported by the intervenors, argue that the petitioners are entitled only to an order requiring the Commission to "conduct a rulemaking proceeding, which might or might no[t] result in repeal of the rules. . . ."

Under the APA reviewing courts generally limit themselves to remanding for further consideration an agency order wanting an explanation adequate to sustain it. Thus, when an agency arbitrarily and capriciously denies a petition for rulemaking the proper remedy is typically to remand the case for reconsideration. *See, e.g.,* Geller v. *FCC,* 610 F.2d 973, 980 (D.C. Cir. 1979) (vacating denial of petition for rulemaking to repeal cable television rules and remanding for reconsideration). The case upon which the networks rely involved extraordinary circumstances—extreme delay and non-responsiveness by the Commission—that ultimately caused the court to issue a writ of mandamus. RTDNA II, 229 F.3d at 272; *see also Am. Horse Prot. Ass'n, Inc.* v. *Lyng,* 812 F.2d 1, 7 (D.C. Cir. 1987) (explaining that remand with instructions to institute rulemaking is appropriate "only in the rarest and most compelling of circumstances"). In the present case, however, the agency appears to have been more errant than recalcitrant. At the same time, the Commission's argument that the court should limit itself to setting aside the decision found to be deficient overlooks the relevance of § 202(h).

Although a decision under § 202(h) to retain a rule is similar to an agency's denial of a petition for rulemaking, the underlying procedures differ in at least one important respect that requires a different approach upon judicial review: Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules. Under § 202(h) the Commission may retain a rule only if it reasonably determines that the rule is "necessary in the public interest." If the reviewing court lacked the power to require the Commission to vacate a rule it had improperly retained and could require the Commission only to reconsider its decision, then the presumption in § 202(h) would lose much of its bite. It is not surprising, therefore, that counsel for the Commission conceded at oral argument that the court has the power to vacate—technically, to order the Commission to vacate—the ownership rules. For this

reason, we conclude that vacatur is one remedy available to redress a violation of § 202(h).

At the same time, it is clear that § 202(h) should not be read to require the court always to vacate a rule improperly retained by the Commission. After all, vacatur is not necessarily indicated even if an agency acts arbitrarily and capriciously in promulgating a rule. *United States Telecom Ass'n* v. *FBI,* 2002 WL 63087, *7 (D.C. Cir. 2002); *Ill. Pub. Telecomm. Ass'n* v. *FCC,* 123 F.3d 693, 693 (D.C. Cir. 1997). The question is one of degree; as we said in *Allied-Signal, Inc.* v. *United States Nuclear Regulatory Comm'n,* 988 F.2d 146 (D.C. Cir. 1993): "The decision whether to vacate depends on the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Id.* at 150–51. Although here we are reviewing an order declining to institute a rulemaking rather than an order promulgating a rule, we think the Allied-Signal test remains appropriate. Indeed, the situation at hand is procedurally similar to that we faced in RTNDA I, where we applied the Allied-Signal test. 184 F.3d at 887–89.

Applying that test we conclude the NTSO Rule should not be vacated. Although the Commission's decision to retain the Rule was, as written, arbitrary and capricious and contrary to § 202(h), we cannot say with confidence that the Rule is likely irredeemable because the Commission failed to set forth the reasons—either analytical or empirical—for which it no longer adheres to the conclusions in its 1984 Report. We do not infer from this silence that the agency cannot justify its change of position, for the Commission apparently labored under the misapprehension of law that the Congress, by blocking implementation of the 1984 Report, had relieved the Commission from further concern with the analysis therein. If the Commission rested its decision upon the erroneous premise that the Congress had made its 1984 Report irrelevant, then having been disabused the Commission may yet conclude the Rule is necessary to promote diversity at the local or the national level. To reach these conclusions, of course, the Commission would have to state the reason(s) for which it believes its contrary views set out in the 1984 Report were incorrect or are inapplicable in the light of changed circumstances, but that is by no means inconceivable; the Report is, after all, now almost 20 years old. For this reason alone, a remand rather than vacatur is indicated. Moreover, we note that although the Commission, in its 1998 Report, failed to develop any affirmative justification for the Rule based upon competitive concerns, it did, albeit somewhat cryptically, advert to possible competitive problems in the national markets for advertising and program production, 1998 Report p. 26 n.78; and intervenors NAB and NASA make a plausible argument that the NTSO Rule indeed furthers competition in the national television advertising market. The Commission needs either to develop or to jettison these points on remand. In sum, we cannot say it is unlikely the Commission will be able to justify a future decision to retain the Rule.

In these circumstances, the other factor to be considered under Allied Signal—the disruption that might be caused if the court were now to vacate the Rule and the agency were later to re-promulgate it with an adequate explanation—is only barely relevant. It does not appear to us that there would be a significant disruption of the agency's regulatory program—contrast Allied-Signal, 988 F.2d at 151, where the agency would have had to pay refunds and could not have regulated retroactively—because the Commission presumably could require an entity to divest any station it acquired, at peril of being in violation of a newly promulgated ownership cap. Cf. NCCB, 436 U.S. at 802 (upholding Commission's decision, upon promulgation of newspaper/broadcast cross-ownership rule, to require divestiture in some markets where ownership concentration was particularly high). At the same time, if the Commission is right about the NTSO Rule, vacating it would for a time deprive some viewers of some diversity in the points of view available on the airwaves. *See Davis County Solid Waste Mgm't* v. *EPA,* 108 F.3d 1454, 1458–59 (D.C. Cir. 1997) (considering harm to environment that vacatur of emissions standards would impose). In the end, it appears that vacatur could cause some but not a great loss to the viewing public.

Upon consideration of both the Allied-Signal factors, we conclude that, though the disruptive consequences of vacatur might not be great, the probability that the Commission will be able to justify retaining the NTSO Rule is sufficiently high that vacatur of the Rule is not appropriate. See United States Telecom Ass'n, 2002 WL 63087 at *7 (focusing upon first factor of Allied-Signal test). We therefore remand this case to the Commission for further consideration whether to repeal or to modify the NTSO Rule.

IV. The CBCO Rule

Time Warner's principal contention is that the CBCO Rule is an unconstitutional abridgment of its first amendment right to speak. Time Warner also argues that the Commission's decision to retain the Rule was arbitrary and capricious and contrary to § 202(h). Because we agree that the retention decision was arbitrary and capricious as well as contrary to §202(h), and that this requires us to vacate the Rule, we do not reach Time Warner's first amendment claim.

A. Section 202(h) and the APA

Time Warner raises a host of objections to the Commission's decision to retain the CBCO Rule. The Commission is largely unresponsive to these arguments; to the extent it is responsive, it is unpersuasive.

First, Time Warner argues that the Commission impermissibly justified retaining the Rule on a ground, namely that cable/broadcast combines might "discriminate against unaffiliated broadcasters in making cable-carriage decisions," different from the one it gave when it promulgated the Rule, namely, that "cable should be protected" from acquisition by networks bent upon pre-empting new competition. The Commission does not respond but even so we think the argument is clearly without merit. Nothing in § 202(h) suggests the grounds upon which the Commission may conclude that a rule is necessary in the public interest are limited to the grounds upon which it adopted the rule in the first place.

Next, Time Warner argues that the Commission applied too lenient a standard when it concluded only that the CBCO Rule "continues to serve the public interest," 1998 Report p. 102, and not that it was "necessary" in the public interest. Again the Commission is silent, but this time we agree with Time Warner; the Commission appears to have applied too low a standard. The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest.

Finally, Time Warner attacks the specific reasons the Commission gave for retaining the Rule. All three reasons relate either to competition or to diversity, and we have grouped them below accordingly.

1. Competition

The Commission expressed concern that a cable operator that owns a broadcast station: (1) can "discriminate" against other broadcasters by offering cable/broadcast joint advertising sales and promotions; and (2) has an incentive not to carry, or to carry on undesirable channels, the broadcast signals—including the forthcoming digital signals—of competing stations. 1998 Report pp. 103–105. Addressing the first concern, Time Warner argues that the Commission failed both to explain why joint advertising rates constitute "discrimination—which is simply a pejorative way of referring to economies of scale and scope"—and to "point to substantial evidence that such 'discrimination' is a non-conjectural problem." Addressing the second concern (in part), Time Warner contends that refusals by cable operators to carry digital signals must not be a significant problem because the Commission has declined to impose must-carry rules for duplicate digital signals. See Carriage of Digital Television Broadcast Signals, First Report & Order and Further Notice of Proposed Rulemaking, 16 F.C.C.R. 2598 (2001). Both of Time Warner's points are plausible—indeed the first is quite persuasive—and we have no basis upon which to reject either inasmuch as the Commission does not respond to them.

Next, Time Warner gives four reasons for which the Commission's concern about discriminatory carriage of broadcast signals is unwarranted. First, must-carry provisions, see 47 U.S.C. §§ 534–535; 47 C.F.R. § 76.55 et seq., already ensure that broadcast stations have access to cable systems; indeed, the Commission pointed to only one instance in which a cable operator denied carriage to a broadcast station (Univision). See 1998 Report p. 104. Second, competition from direct broadcast satellite (DBS) providers makes discrimination against competing stations unprofitable. Third, the Commission failed to explain why it departed from the position it took in the 1992 Report, where it said that the CBCO Rule was not necessary to prevent carriage discrimination. Fourth, because a cable operator may lawfully be co-owned with a cable programmer or a network, the Rule does little to cure the alleged problem of cable operators having an incentive to discriminate against stations that air competing programming.

In response the Commission concedes it did not address Time Warner's second and third points—competition from DBS services and the contradiction of the 1992 Report: "Since the Commission did not address any of these issues in the 1998 Report, counsel for the Commission are not in a position to respond to Time Warner's claims concerning these issues." The same might have been said of Time Warner's fourth point. These failings alone require that we reverse as arbitrary and capri-

cious the Commission's decision to retain the CBCO Rule. *See Motor Vehicles Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983) (a decision is arbitrary and capricious if the agency fails "to consider an important aspect of the problem").

The only argument to which the Commission does respond is that the Univision incident alone cannot justify retention of the Rule: The Commission first points to its predictive judgment that there would be more discrimination without the CBCO Rule and then, citing Time Warner I, 211 F.3d at 1322–23, points out that the availability of behavioral remedies does not necessarily preclude it from imposing a structural remedy. We acknowledge that the court should ordinarily defer to the Commission's predictive judgments, and we take the Commission's point about remedies. In this case, however, the Commission has not shown a substantial enough probability of discrimination to deem reasonable a prophylactic rule as broad as the cross-ownership ban, especially in light of the already extant conduct rules. A single incident since the must-carry rules were promulgated—and one that seems to have been dealt with adequately under those rules—is just not enough to suggest an otherwise significant problem held in check only by the CBCO Rule.

We conclude that the Commission has failed to justify its retention of the CBCO Rule as necessary to safeguard competition. The Commission failed to consider competition from DBS, to justify its change in position from the 1992 Report, and to put forward any adequate reason for believing the Rule remains "necessary in the public interest."

2. Diversity

As for retaining the Rule in the interest of diversity, the Commission had this to say: "Cable/TV combinations . . . would represent the consolidation of the only participants in the video market for local news and public affairs programming, and would therefore compromise diversity." 1998 Report p. 107. Time Warner argues that this rationale is contrary to § 202(h), as well as arbitrary and capricious, for essentially three reasons.

First, Time Warner contends that § 202(h), by virtue of its exclusive concern with competition, plainly precludes consideration of diversity and that, in any event, it should be so interpreted in order to avoid the constitutional question raised by the burden the CBCO Rule places upon the company's right to speak. Second, Time Warner argues that the increase in the number of broadcast stations in each local market since the promulgation of the CBCO Rule in 1970 renders any marginal increase in diversity owing to the operation of the Rule too slight to justify retaining it. Finally, Time Warner asserts that the decision to retain the Rule cannot be reconciled with the TV Ownership Order, in which the Commission concluded that a single entity may own two local television stations as long as there are eight other stations in the market and one of the two stations coming under common ownership is not among the four most watched stations. See Review of the Commission's Regulations Governing Television Broadcasting, Report & Order, 14 F.C.C.R. 12903, p. 64 (1999).

The Commission responds feebly. First, it does not address Time Warner's argument that diversity may not be considered under § 202(h), but that is of little moment because it adequately addressed essentially the same argument when it was presented by the networks in connection with the NTSO Rule: A rule may be retained if it is necessary "in the public interest"; it need not be necessary specifically to safeguard competition. Second, the Commission concedes that it decided to retain the Rule without considering the increase in the number of competing television stations since it had promulgated the Rule in 1970. The Commission gives no explanation for this omission, yet it is hard to imagine anything more relevant to the question whether the Rule is still necessary to further diversity.

Finally, the Commission makes no response to Time Warner's argument that the concern with diversity cannot support an across-the-board prohibition of cross-ownership in light of the Commission's conclusion in the TV Ownership Order that common ownership of two broadcast stations in the same local market need not unduly compromise diversity. The Commission does object that Time Warner failed to raise this argument before the agency, but it appears that Time Warner did what it could to bring the argument to the Commission's attention. The TV Ownership Order was issued in August, 1999, after the close of the comment period, but almost a year before the 1998 Report was issued (in June, 2000). A few months thereafter Time Warner proffered supplemental comments raising this point but the Commission declined to consider them. 1998 Report p. 100 n.257. For this reason, we find the Commission's forfeiture argument unpersuasive. Even if it was proper for the agency to refuse to accept the comments, however, it does not follow that the agency was free to ignore its own recently issued TV Ownership Order. Yet the Commission made

no attempt in the 1998 Report and makes no attempt in its brief to harmonize its seemingly inconsistent decisions.

In sum, the Commission concedes it failed to consider the increased number of television stations now in operation, and it is clear that the Commission failed to reconcile the decision under review with the TV Ownership Order it had issued only shortly before. We conclude, therefore, that the Commission's diversity rationale for retaining the CBCO Rule is woefully inadequate.

B. Remedy

The only question left is whether, as Time Warner requests, we should order the Commission to vacate the CBCO Rule itself—as opposed merely to reversing the Commission's decision not to initiate a proceeding to repeal the Rule and remanding the matter for further consideration by the agency. Again, this type of decision is governed by the test laid out in Allied-Signal. As discussed above, the Commission put forward justifications for retaining the NTSO Rule—furthering local diversity by strengthening the bargaining position of network affiliates and furthering national diversity—that we rejected principally because the Commission failed to address the contrary position it took in its 1984 Report. We noted, however, that the Commission's failure to explain why it departed from the views it expressed in 1984 appears to have stemmed from an error of law and not necessarily from an inability to do so. In addition, the intervenors presented plausible reasons for thinking the NTSO Rule may be necessary to further competition. The same cannot be said with respect to the CBCO Rule. The Commission gave no reason to think it could adequately address its conclusions in the 1992 Report or in the TV Ownership Order. Rather, the Commission simply failed to respond to the objections put before it. Furthermore, neither the Commission nor the intervenors gave any plausible reason for believing the CBCO Rule is necessary to further competition. Although the Commission presumably made its best effort, the reasons it gave in the 1998 Report for retaining the CBCO Rule were at best flimsy, and its half-hearted attempt to defend its decision in this court is but another indication that the CBCO Rule is a hopeless cause.

Nor does it appear that vacating the CBCO Rule will be disruptive of the agency's regulatory program. If the agency wants to re-promulgate the Rule and is able to justify doing so, it presumably can require any entity then in violation of the Rule to divest either its broadcast station or its cable system in any market where it owns both. Cf. NCCB, 436 U.S. at 802. Although viewers may, in the interim, experience some diminution of diversity, the loss would seemingly be no greater than the diminution attendant upon the combination of two broadcast stations in the same market, which combination the Commission recently sanctioned in the TV Ownership Order. In sum, vacating the Rule might cause some disruption, but we hardly think it could be substantial.

Because the probability that the Commission would be able to justify retaining the CBCO Rule is low and the disruption that vacatur will create is relatively insubstantial, we shall vacate the CBCO Rule.

V. Conclusion

The decision of the Commission not to repeal or to modify the NTSO Rule is vacated and the question whether to retain the Rule is remanded to the Commission for further proceedings consistent with this opinion. This court's stay order of April 6, 2001, is vacated without prejudice to the petitioners' ability to seek a further stay from the Commission during the pendency of such proceedings. The decision of the Commission not to repeal or to modify the CBCO Rule is also vacated, and the Commission is directed to repeal the CBCO Rule forthwith.

So ordered.

Senator HOLLINGS. Without reading it all, they, yes, vacated the cable rule, but remanded, sent back to the Commission to make for a record, take the testimony and give authorization and substantiation to the 35-percent rule. So we find that there was nothing wrong with enforcing a 35-percent rule. The Commission has been lax, but that's—the rule is there. And it's not that we don't have any particular rule.

And this decision came out in February. The notice of rulemaking was not given until September. And I'm concerned that we have not complied with the Administrative Procedures Act, which was cited in that FOX decision. I can't find the support for a 45-

percent ruling. It was a general rule. In fact, I'd ask consent that the general counsel of SBA said, "Now, don't call that a rule of—a particular rule of rule-making, but actually make it a notice of inquiry."

I'd ask consent to include that letter in the record——

The CHAIRMAN. Without objection.

Senator HOLLINGS.—to save time.

[The information referred to follows:]

OFFICE OF ADVOCACY—U.S. SMALL BUSINESS ADMINISTRATION
Washington, DC, April 9, 2003

Hon. MICHAEL K. POWELL,
Chairman,
Federal Communications Commission,
Washington, DC.

RE: *EX PARTE* PRESENTATION IN A NON-RESTRICTED PROCEEDING INITIAL REGULATORY FLEXIBILITY ANALYSIS FOR 2002 BIENNIAL REVIEW—REVIEW OF THE COMMISSION'S BROADCAST OWNERSHIP RULES (MB DKT. NO. 02–277)

Dear Mr. Chairman:

As part of its statutory duty to monitor and report on an agency's compliance with the Regulatory Flexibility Act of 1980 (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[1] the Office of Advocacy of the U.S. Small Business Administration ("Advocacy"), has reviewed the Federal Communications Commission's ("FCC" or "Commission") compliance with the RFA's requirements for the Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.[2] The Office of Advocacy is an independent entity within the U.S. Small Business Administration (SBA), so the views expressed by the Office of Advocacy do not necessarily reflect the views of the SBA or the Administration.

In the NPRM, the Commission seeks to review its broadcast ownership rules as required by Section 202 of the Telecommunications Act of 1996.[3] The Commission conducted an Initial Regulatory Flexibility Analysis (IRFA), which stated that there was no impact on small businesses from the proposed rulemaking. Advocacy disagrees with the Commission's assessment that the rule will have no impact on small businesses.

Advocacy recommends that the Commission treat this NPRM as a Notice of Inquiry (NOI) and issue a further notice of proposed rulemaking (FNRPM). The Commission's NPRM seeks extensive comment on issue areas rather than specific proposals or tentative conclusions. These sorts of requests to the public are better suited for an NOI than a proposed rule. Furthermore, when the Commission proposes specific rules in an FNPRM, it should complete a supplemental initial regulatory flexibility analysis (IRFA) to comply with the RFA.[4]

1. Advocacy Background

Congress established the Office of Advocacy in 1976 by Pub. L. No. 94–305[5] to represent the views and interests of small business within the Federal Government. Advocacy's statutory duties include serving as a focal point for the receipt of complaints concerning the government's policies as they affect small business, developing proposals for changes in Federal agencies' policies, and communicating these proposals to the agencies.[6] Advocacy also has a statutory duty to monitor and report to Congress on the Commission's compliance with the RFA.

Congress designed the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete,

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[1] Pub. L. No. 96–354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. § 601 *et seq.*) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104–121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

[2] In the Matter of 2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MB Dkt. No. 02–227, MM Dkt. No. 01–235, MM Dkt. No. 01–317, MM Dkt. No. 00–244, FCC 02–249 (rel. Sept. 23, 2002).

[3] NPRM, paras. 1–8.

[4] Pub. L. No. 96–354, 94 Stat. 1164 (1980)(codified at 5 U.S.C. § 601 *et seq.*).

[5] Pub. L. No. 94–305 (codified as amended at 15 U.S.C. §§ 634 a–g, 637).

[6] 15 U.S.C. § 634(c)(1)–(4).

innovate, or to comply with the regulation.[7] The major objectives of the RFA are: (1) to increase agency awareness and understanding of the potential disproportionate impact of regulations on small business; (2) to require that agencies communicate and explain their findings to the public and make these explanations transparent; and (3) to encourage agencies to use flexibility and provide regulatory relief to small entities where feasible and appropriate to its public policy objectives.[8] The RFA does not seek preferential treatment for small businesses. Rather, it establishes an analytical requirement for determining how public issues can best be resolved without erecting barriers to competition. To this end, the RFA requires the agencies to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing any disproportionate burden on small entities.[9]

On August 14, 2002, President George W. Bush signed Executive Order 13272 that requires Federal agencies to implement policies protecting small businesses when writing new rules and regulations.[10] This Executive Order authorizes Advocacy to provide comment on draft rules to the agency that has proposed or intends to propose the rules and to the Office of Information and Regulatory Affairs of the Office of Management and Budget.[11] It also requires agencies to give every appropriate consideration to any comments provided by Advocacy regarding a draft rule. The agency shall include, in any explanation or discussion accompanying publication in the *Federal Register* of a final rule, the agency's response to any written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.[12]

2. The NPRM Does Not Propose Any Concrete Rules and Is Better Suited as a Notice of Inquiry

In the NPRM the Commission does not propose the actual terms or drafts of any proposed rules. Instead, the Commission sought general comment on dozens, if not hundreds, of issues that addressed the value of diversity, competition, and localism. This is valuable information, and the Commission did an excellent job asking thorough and provocative questions. While the questions are certainly worthwhile, it does not counter the fact that the Commission is not proposing anything concrete in its proposed rulemaking.

This manner of soliciting information from commenters is more consistent with an NOI than an NPRM. The purpose of an NOI is to gather information and intelligence about the scope of a problem, factors that contribute to a problem, the benefits, or limitations of different regulatory alternatives and the different impacts of each alternative. The FCC should use an NOI whenever the Commission lacks information about the industry to be regulated or the exact nature of the problem to be addressed.

This style of rulemaking is very costly to the telecommunications industry. By issuing an NPRM that lacks specific proposals, the FCC creates uncertainty in the industry, resulting in thousands of comments that, at best, can only speculate as to what action the FCC may take and the potential impacts. Commenters spend resources answering hundreds of questions, and do so repeatedly over the comment period, the reply comment period, and the ex-parte period. Consequently, the lack of specificity is costly and potentially harmful to the industry and its customers. Small businesses, in particular, are often overwhelmed by the scope of a vague NPRM and cannot contribute meaningfully to the rulemaking process. If the FCC instead issues an NOI, interested parties would have answered the questions raised with the added comfort of knowing that they would later have the opportunity to comment on a more detailed and specific proposed rule, reducing anxiety and the need to address all possible iterations of regulatory approaches the FCC could conceivably adopt.

This is the not the first time the Commission has issued an NPRM when an NOI is more appropriate. Advocacy has sent letters to the Commission in other proceedings, commenting that the Commission is using the NPRM process to gather basic information from industry and without providing specific information on the

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[7] 5 U.S.C. § 601(4)–(5).

[8] See generally, Office of Advocacy, U.S. Small Business Administration, The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies, 1998 ("Advocacy 1998 RFA Implementation Guide").

[9] 5 U.S.C. § 604.

[10] Exec. Order. No. 13272 § 1, 67 Fed. Reg. 53,461 (2002).

[11] *Id.* at § 2(c).

[12] *Id.* at § 3(c).

terms of the regulatory proposal.[13] Consistent with our earlier statements, Advocacy encourages the Commission to utilize NOIs and reserve NPRMs for when the Commission is prepared to propose rules as opposed to soliciting information.

3. The IRFA Does Not Address the Impact on Small Businesses

In its IRFA, the Commission described the need for and the objectives of the proposed rules, as well as identified the affected classes of small businesses.[14] However, the FCC did not analyze the impact that the proposed rule would have on small businesses.[15] Instead, the Commission limits its review of the impact to reporting and recording keeping requirements of which its says there are none.[16]

The requirements of an IRFA are more than reporting and record keeping requirements. The RFA requires the Commission to describe all impacts, not just reporting and record keeping.[17] Therefore, the Commission must analyze effects such as the impact on small broadcast affiliates, the impact on small advertisers, or the impact on small program providers, if there is further consolidation.

The Commission's failure to conduct a complete analysis of the impact on small businesses is a direct result of the Commission not proposing specific rules in the NPRM. Because there are no concrete rules, it is difficult for the Commission, Advocacy, or small businesses to accurately predict and analyze what the impacts of the rules will be. As a consequence, any substantive analysis of the proposed rule is nearly impossible. We believe that by not proposing specific rules, the Commission is limiting the ability of small businesses to provide the agency with needed information on the impacts of the rule and possible alternatives that will lessen any impacts.

4. Commission Should Issue an FNPRM and Conduct a Supplemental IRFA After Specific Rules Are Proposed

Unless the Commission issues a supplemental rulemaking, the next step in the Commission process would be a final rule adopting specific language on which the public would not have had a chance to comment. This lack of specificity is not consistent with the Administrative Procedure Act and frustrates the spirit of the RFA, as it is difficult for small businesses to comment meaningfully.

Rather than immediately publish a final rule, Advocacy recommends that the Commission issue an FNPRM. This will allow the Commission to utilize the comments gathered in this NPRM while providing small businesses the opportunity to comment on specific rules before the Commission adopts them.

Even if the Commission does not issue a FNPRM, the Commission should issue a supplemental IRFA to examine any rules that the Commission decides to adopt in a final rule. The Commission stated that the proposed rule had no impacts on small businesses in the current IRFA, and consequently the Commission has done no analysis of impacts on small businesses. If the FCC releases a final rule that does contain small business impacts, it will be adopting rules on which small businesses have not been had the opportunity to comment. This is a violation of the RFA and could result in the courts remanding the entire rule.[18] The Commission must inform small businesses of the regulatory impacts that will result from the rulemaking and give them a chance to respond. The proper avenue for this is a supplemental IRFA.

Conclusion

The Commission's NPRM seeks comment on issue areas rather than specific proposals or tentative conclusions. Because of a lack of specific regulatory proposals in

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[13] Comments of the Office of Advocacy, U.S. Small Business Administration, to the Notice of Proposed Rulemaking in MM Dkt. Nos 01–317, 00–244 (March 27, 2002); Letter from Thomas M. Sullivan, Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in CC Dkt. No. 01–338; CC Dkt. No. 96–98; CC Dkt No. 98–147 (February 5, 2003); Letter from Mary K. Ryan, Deputy Chief Counsel, Office of Advocacy to Michael K. Powell, Chairman, Federal Communications Commission, in MM Dkt. No. 00–167 (February 6, 2001); Comments of the Office of Advocacy, U.S. Small Business Administration, to the Notice of Proposed Rulemaking in CC Dkt. No. 01–92 (November 6, 2001).

[14] NPRM, Appendix A, p. 56.

[15] Advocacy has identified several issues that would have an impact on small businesses in paragraphs. 39, 50, 55, 59, 70, 97, 107, 144, and 151 of the NPRM. Advocacy does not intend this list to be exhaustive.

[16] NPRM, Appendix A, p. 62.

[17] 5 U.S.C. § 603(a).

[18] *Northwest Mining Assoc.* v. *Babbitt,* 5 F. Supp. 2d 9 (D.D.C. 1998) (recognizing the public interest in preserving the right of parties which are affected by government regulation to be adequately informed when their interests are at stake and participate in the regulatory process as directed by Congress).

the proposed rulemaking, Advocacy recommends that the Commission treat this NPRM as an NOI and issue an FNRPM when the FCC is in a position to consider concrete rules. When the Commission proposes specific rules in an FNPRM, it should complete a supplemental IRFA to comply with the RFA.

Thank you for your consideration of these matters, and please do not hesitate to contact me or Eric Menge of my staff if you have questions, comments, or concerns.

Sincerely,

THOMAS M. SULLIVAN,
Chief Counsel for Advocacy.
ERIC E. MENGE,
Assistant Chief Counsel for Telecommunications.
RADWAN SAADE, PH.D.,
Regulatory Economist.

cc: Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
W. Kenneth Ferree, Chief, Media Bureau
Carolyn Fleming Williams, Director, Office of Communications Business Opportunities
John D. Graham, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget.

Senator HOLLINGS. But that inquiry didn't actually propose the rule and get comments. In fact, we didn't get the rule until 3 weeks, the exact hour and so forth, in the dark of night, the exact 3-week measurement, like a lawyer that was trying his case would measure it. And the actual text of the rule was not given by the Chairman to the Commissioners until last Friday night. And so Commissioners were working all Sunday night preparing their statements for the Monday ruling.

So when they asked for 30-days extension, which was a time-honored tradition, according to former Commissioner Scott, they said, "No way, that we had to get this ruling out, because without a rule, there would be no cap at all." That's absolutely false.

Then the unmitigated gall to say that they—"I'm saving"—put on the white hats, they take on the good guys—"I'm saving free over-the-network broadcasts, because if I don't do this, they're not making money." Barry Diller says, "If you can't make money in broadcasting, then they're stealing from you. You'd better look quick and find out, because that's the only way you can lose money in broadcasting." But what has really happened is that they've got 9.2 billion, I think, in advanced advertising for this fall, so the networks, the broadcasters, are not in any trouble whatsoever.

But what we have done, Mr. Chairman, is, the Commission, with this order, has turned the people's public-interest commission into an instrument of corporate greed. Blair Levin, the particular former member of—former top official for the Commission, who is now an instrument and an analyst in the investment bank of Legg Mason, said, quote, "Everyone in the business has to wake up tomorrow and ask, Do I want to be a buyer or a seller?"

I'll elaborate on my comments. Let me stop there.

[The prepared statement of Senator Hollings follows:]

PREPARED STATEMENT OF HON. ERNEST F. HOLLINGS,
U.S. SENATOR FROM SOUTH CAROLINA

Thank you, Mr. Chairman. As the Supreme Court recognized over 50 years ago, the first amendment—one of the founding principles of our democracy—"rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the people." Regrettably, however,

the recent actions taken by the Federal Communications Commission are fixed on turning this fundamental tenet into a historical footnote.

The spin coming out of the FCC is dizzying. Amazingly, yesterday's *Washington Post* quotes Chairman Powell as saying that "if yesterday's rules had not been adopted, there would effectively be no national cap." Luckily for us, the case law tells us otherwise.

The truth of the matter is that the 35 percent national television ownership cap is in effect today. While the D.C. Circuit in *Fox* v. *FCC,* eliminated the cable ownership rules, it specifically declined to vacate the national television ownership cap. Instead, it gave the FCC a job to do—a job that they have been avoiding ever since. The court was explicit, stating that:

> [A]lthough the Commission, in its 1998 report, failed to develop any affirmative justification for the rule based on competitive concerns, it did, albeit somewhat cryptically, advert to possible competitive problems in the national markets for advertising and program production . . . and interveners nab and NASA make a plausible argument that the NTSO rule indeed furthers competition in the national television advertising market. The Commission needs either to develop or to jettison these points on remand. *In sum, we cannot say it is unlikely the Commission will be able to justify a future decision to retain the rule.*

As a result, the Court specifically held that the question of "whether to retain the rule is remanded to the Commission for further proceedings. . . ." Unfortunately, rather than seeking to make the case for the 35 percent cap imposed by Congress, a bare majority decided to pick its own number—45 percent—without any specific justification for this level and in the face of a mountain of evidence that consolidation has already gone too far.

On television and in print, large media conglomerates already control the vast majority of what Americans see, read, and hear. Just five media companies today control 75 percent of prime time programming and in the near future are projected to increase their market share to 85 percent. New outlets such as cable and the Internet, which could have served to check big media's power, have instead followed the old adage, "if you can't beat 'em, join 'em." Thus, today these same five companies control 90 percent of the top 50 channels on cable. Similarly on the Internet, existing newspapers and tv stations dominate the 20 most popular sites for news and information. Technology may have increased the number of media outlets, but it has not stopped big media from further extending its reach.

While Monday's decision promising further media deregulation may well be celebrated in a few New York and Hollywood boardrooms, it will be remembered as a dark day in thousands of American communities who look to the FCC to ensure that use of the public airwaves serves the interests of all Americans, not the economic self-interest of a chosen few.

But instead of encouraging a meaningful, open debate, the FCC has instead chosen to stack the deck. By refusing to provide the American people with a clear roadmap of the changes in store for the media marketplace, a bare, three-member majority of FCC Commissioners has employed a "damn-the-torpedoes, full speed ahead" strategy to hammer through one of the most far-reaching policy decisions in the history of media. Gone are prior rules that prevent a single corporation from controlling more than 35 percent of all TV households; and that restrict cross-media mergers in local communities. Under the FCC's new direction, a single entity will in many cases be free to corner the market on public discourse and control a community's cable system, its most popular television channel, its biggest radio station, and its only daily newspaper.

Broadcast media is not just another appliance, it's not a toaster with pictures. It makes government and business directly accountable to the American people for their actions; and it teaches our children the values of deliberative democracy. The free flow of diverse and antagonistic views cannot be guaranteed if a few large businesses control all the information across every medium—television, radio, magazines, books, and the internet.

While critics argue that existing limits are antiquated in light of the modern media marketplace, we should not mistake age with infirmity. The constitution has served us well for more than 200 years. And the principles that have long supported our regulation of the broadcast industry—the values of promoting competition, diversity and localism—remain as vital today as when they were enacted in 1934. While the FCC's Monday decision has called into question our Government's commitment to these enduring values, let us hope that the Congress and the courts have the last word.

The CHAIRMAN. Thank you, Senator Hollings.

I would remind my colleagues that all five of the witnesses have an opening statement, and we're eager to hear from them so I would appreciate brevity in our opening statements. I thank you.

Senator Burns?

STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. Mr. Chairman, I'll honor that, and I'll put my statement in the record. And with my questions, I think we can sort of make the gist of what we're—the direction from which we're coming.

I thank you for holding these hearings, though.

[The prepared statement of Senator Burns follows:]

PREPARED STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

I thank the Chairman for convening this critical and timely hearing on media consolidation. Two days ago, the Federal Communications Commission decided to significantly ease limits on media ownership. I appreciate the difficulty of analyzing the current media marketplace in light of the rapid pace of technological change in recent years. However, for a variety of reasons, I fear that the Commission's sweeping and historic ruling will lead to a wave of media consolidation that will imperil media diversity and localism in rural America.

While there has been much talk about the "500-channel universe" we now all supposedly live in, the simple fact of the matter is that Montana is not Manhattan. The reality in rural America in particular is that the vast majority of consumers still receive vital local news and public safety information through free, over-the-air television. It is for this reason that I simply do not believe that the significant relaxation of the national cap on television broadcast ownership from 35 percent to 45 percent is in the public interest.

While many have cast the Commission's decision in coarsely partisan terms, I do not believe this is the case at all. This issue is about as bipartisan as you can get—along these lines, I joined with Sen. Hollings, Sen. Dorgan, Sen. Wyden and many others on both sides of the aisle to sponsor Sen. Stevens' bill to maintain the national caps at the previous, reasonable 35 percent standard which was adopted in the 1996 Telecommunications Act. I believe that any further movement from this level of ownership tips a delicate balance and grants excessive leverage to the networks, turning local broadcast affiliates into simple generic outlets for national programming.

Clearly, the media landscape has been altered by an increase in video programming choices available to the consumer—direct satellite, cable services and on-demand video over the Internet. However, the vast majority of these services are produced and marketed at a national level. There is little room, if any, to cater to programming of local interest. Local broadcast television has historically filled this vital role.

Those in favor of relaxing the national broadcast ownership cap yet again argue that nearly all consumers have access to local programming over cable or DBS. The situation in rural America could not be more different, however. While consumers in Manhattan have a wide variety of local programming alternatives, my state of Montana has a cable penetration rate of barely over 50 percent, which is among the lowest in the Nation. Futhermore, unfortunately the average income in Montana is such that a lot of Montanans simply can't afford cable even if they do have access to it. As for other alternatives, the majority of Americans in rural areas still don't have access to their local stations over direct broadcast satellite services. The fact remains that large numbers of rural Americans rely on free, over-the-air broadcast television to receive important local news and community information.

The mission of the national broadcast networks is clear and certainly understandable-they strive to increase their share of the national viewing audience. The networks must recognize, however, both the need for local programming as well as the sensitivities of viewing audiences in different parts of the country. In my opinion, some degree of local ownership is the key that strikes the balance between such competing demands. We must ensure that affiliates continue to have flexibility in providing local programming without fears of undue retribution from the networks.

Unfortunately, yesterday's decision only increases the networks' powerful leverage over increasingly isolated and vulnerable locally-owned stations.

Again, while I disagree with yesterday's decision, I recognize the difficulty of the task before the Commission and I look forward to the hearing from the Commissioners. Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Senator Burns.

Senator Wyden?

STATEMENT OF HON. RON WYDEN,
U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you. I'll be very brief, Mr. Chairman.

Mr. Chairman and colleagues, I believe the Federal Communications Commission's decision rings the dinner bell for the big media conglomerates who are salivating to make a meal out of the Nation's many small media outlets, and I think the question now is whether this Congress is going to stand up for the public interest.

And I had town meetings around Oregon this last weekend, and this was the dominant topic. People kept coming back again and again with one person saying, "If the Federal Communications Commission has stood up for the powerful, who's going to stand up for us?"

And now I just hope that the Congress—we have a Dorgan proposal, we have a Hollings proposal, we have a variety of initiatives—that this Congress takes steps to make sure that these big media conglomerates, who just want to get bigger, aren't going to end up producing policies that make this country's news and entertainment less diverse, less locally oriented, and more mass produced.

We have seen what happened with radio in the kind of fake localism, where DJs on one side of the country pretend to be thousands of miles away, in the Pacific Northwest. We will have, essentially, fake diversity and fake localism become the norm if this Federal Communications decision, as written, goes into effect. I hope that the Congress won't allow that. I look forward to working with my colleagues, and I hope we will have a bipartisan coalition that protects the public interest on this issue.

I thank you, Mr. Chairman.

The CHAIRMAN. Senator Hutchison?

STATEMENT OF HON. KAY BAILEY HUTCHISON,
U.S. SENATOR FROM TEXAS

Senator HUTCHISON. Thank you, Mr. Chairman. I do appreciate your holding the hearing. Let me just say that I thought, in some ways, the Commission was measured by going from 35 to 45 percent, rather than taking all of the percentages off. The part that is most troubling to me, though, is the allowing of ownership of the major newspaper or the only newspaper in a market—and generally, in America today, we only have one newspaper in the major markets; there are a few exceptions—along with a major television station and radio stations.

I'd just give you the example of Cox Enterprise Holdings, in Atlanta. They have the only newspaper in Atlanta, five radio stations, with a 32-percent share of Atlanta's radio market, and, although Atlanta is the tenth largest broadcast market, their Cox WSB TV

is the top-performing ABC affiliate in the country. And so I think that is an alarming amount of concentration, and it's grandfathered.

In Dallas, Texas, a major market in our country, the one newspaper in Dallas also owns the number-one television station. Sometimes it's number two, but it's always in the top two. That, too, is grandfathered. But I don't want to see other cities get into that kind of concentration. And you have allowed that with your proposed ruling, and it concerns me greatly.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Dorgan?

STATEMENT OF HON. BYRON L. DORGAN,
U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much. I'll just be a minute.

I think the FCC decision is wrongheaded and destructive, and I want to read a letter from an investment banking firm sent to one of the major newspapers in our country. I'll read one paragraph. "As you know, the FCC is considering elimination of the ban on cross-ownership of media properties within a daily newspaper publisher's given markets. There are now strong indications these restrictions may, indeed, be removed by late spring or summer. In anticipation of that ruling, several newspaper groups are already forging alliances and cutting handshake agreements with both radio and television broadcasters in their markets. If you are considering broadcast acquisitions to bolster your market presence, we believe the time to act is now. We would like to be your broker."

And so it goes. My colleague calls it a "dinner bell," but it will be an orgy of mergers, acquisitions. All of us understand that. In a conflict between the public interest and the big interest, the majority of the FCC did not have the strength to stand up for the public interest. It is the case that, with this ruling, in one of our largest cities in this country, you could see the same owner owning the newspaper, three television stations, eight radio stations, and the cable system. I have no idea how anyone justifies that as competitive or moving in any direction that represents the public interest.

I intend to push for a congressional review act, a legislative veto. I will also, next week—if we mark up the 35-percent legislation, I will offer an amendment that will prohibit cross-ownership. I think we ought to find several ways to try to undo what the FCC has now done, because I think it's destructive.

The CHAIRMAN. Senator Sununu?

STATEMENT OF HON. JOHN E. SUNUNU,
U.S. SENATOR FROM NEW HAMPSHIRE

Senator SUNUNU. Thank you, Mr. Chairman. Welcome to the Commissioners.

It seems to me that the question shouldn't be whether or not we're worried about one company buying another. That happens in America every single day. I don't think we should be surprised that investment bankers are communicating with newspaper stations that may be given the legal right to buy a newspaper and saying, "If you're thinking about making an acquisition, we'd like to work

with you." That's what these people do for a living. That should not surprise us in the least. There's nothing wrong with that.

The basic question should come back to competition, localism, and diversity, and whether or not these rule changes protect those interests. I hope and I believe that those were the interests and the principles that all of the Commissioners were working toward, whether they agree or disagree on specific provisions of this rulemaking. I hope we hear more from them today about their thinking and their approach to those principles.

But, at the end of the day, I do believe that times have changed. That doesn't mean that we don't need more—that we don't need any regulations, but if times have changed, technology has changed, if we do have more outlets, then we ought to at least make sure that the process we use to regulate these media companies is keeping pace with those changes.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Lautenberg?

STATEMENT OF HON. FRANK R. LAUTENBERG,
U.S. SENATOR FROM NEW JERSEY

Senator LAUTENBERG. Thanks, Mr. Chairman.

Just very briefly and out of respect to your request for statements in the record, I would—I just want to note the fact that there is an awful lot of personal time spent by people from the Commission with those who we're trying to regulate. It's prohibited for the Senate. We're not even allowed to do it. Perhaps up to 50 bucks, but it's hard to get to Las Vegas and back for less than 50 bucks.

And I note the incredible amount of travel, and socializing that I assume goes along with that travel, that is taken by the agency, that there are some 330 trips to Las Vegas during the period, 173 to New Orleans, 102 to New York, during a period from May 1995 to February 2003.

But I want to find out what it is that permits the kind of attention that the companies who support these trips and support this free time together, how do they convey the public interests to the commissioners? Because I assume that the public does not have a chance to carry the bag or hit a few balls with the rest of the Commissioners.

The CHAIRMAN. Thank you, Senator Lautenberg.

Senator Snowe?

STATEMENT OF HON. OLYMPIA J. SNOWE,
U.S. SENATOR FROM MAINE

Senator SNOWE. Thank you, Mr. Chairman. I thank you for holding this hearing. I thank the Commissioners for being here.

And I, too, share the profound disappointment and disagreement with the way in which the FCC has ultimately reached a decision that paves the way for further consolidation and concentration of power further in the hands of a few. I think, certainly, that these changes will alter news as we know it. And given the enormity and the magnitude of what was at stake here, I think it required the fullest public disclosure.

It may well be that it wasn't required by law, in terms of how this process would unfold. But given what was at stake, I think it did require the highest level of scrutiny and the fullest public disclosure.

Now, I know some have said this is a victory for free enterprise and free speech. And most assuredly, it's a victory for free enterprise. But it is not a victory for free speech.

And so, Mr. Chairman, I hope that we will review the process here, because I don't happen to believe that the 1996 statute or the courts preordained what occurred here in the FCC. The courts said that the FCC should establish a rationale, a basis, for what is necessary in the public interest. And I don't know how you establish what's in the public interest if you don't have a public process.

And so I would hope, through this hearing today and in the ensuing days, that we determine how best to proceed, because once these rules take place, you cannot turn the clock back, Mr. Chairman.

And so I would hope that the FCC would rule favorably on petitions for reconsideration. And, in the meantime, I do think that Congress will have to intervene, to review and to reconsider. Because to do otherwise, we will see the reality of these rules in place. And the reality is that acquisitions and further consolidation and an amalgamation of control will occur—may not be immediately, but it will occur in this environment, without question.

Now, I know that the FCC has used the rationale, "Well, you know, we have more media outlets, greater numbers." And that well may be true, but more mouthpieces doesn't guarantee diversity and localism and competition. Diversity of ownership does.

And so, Mr. Chairman, I am greatly concerned about the actions that have been taken by the FCC and do believe that we will have to weigh in on this mighty question.

The CHAIRMAN. Senator Breaux?

STATEMENT OF HON. JOHN B. BREAUX,
U.S. SENATOR FROM LOUISIANA

Senator BREAUX. Thank you very much, Mr. Chairman.

I'll probably be the only person that congratulates the FCC for acting, for the simple reason that had they not acted, there would be no regulations. And I think that it's very important that we remember that the way we structured this operation, with the court's interpretation of striking down all the regulations, really had the FCC not taken any action at all, there would have been no ownership restrictions at all. So I congratulate you for acting, because, you know, we may not like the product, but without some action by the FCC, there would have been no ownership restrictions at all.

The point I would like to make, just very briefly, is I think that the standard by which we restrict the ownership, the 35-percent cap now going up to 45 percent because of the decision, really does not make any sense at all. It doesn't make any sense, because it doesn't talk and it doesn't address the question of the impact of a station owner in a particular area. I mean, some owner could own stations, a single station, in every single large market in the country and would have reached the 35-percent cap, or probably the 45-percent cap, even though they have 1 percent viewership.

I mean, in the large cities you have access to hundreds of channels. And if no one watches your channel because you have a lousy product, you still would be prohibited, because you're too powerful, because you happen to have a station in a city that has a large amount of population, when the population standard really has nothing to do with the impact of an owner of a network or the owner of a group of stations. So whether it's 35 percent or 45 percent, we're only measuring the size of the city that they're located in. We're not, indeed, measuring the impact of that dominance of the market by a particular owner.

So it seems to me there ought to be a better way of measuring whatever caps we come up with than merely the size of the city that a tower happens to be located in.

Thank you, Mr. Chairman.

The CHAIRMAN. Senator Allen?

STATEMENT OF HON. GEORGE ALLEN,
U.S. SENATOR FROM VIRGINIA

Senator ALLEN. Thank you, Mr. Chairman. And thank you to all the FCC Commissioners for appearing today.

I agree with what Senator Breaux was saying, in the sense that, first and foremost, the FCC has finally done what the Congress and, indeed, the courts, have commanded them to do in adopting ownership rules that are based on empirical evidence, and you'll be presenting that empirical evidence, and I guarantee it'll be challenged by the Congress by re-hearings, and in the courts. But it is, I think, reflective of reality in the marketplace today.

You've taken some steps in crafting updated rules, having to take into account the new media outlets that are available to consumers for entertainment, for news, and for information. And, indeed, I'd dare say that anyone would not agree with this statement that now consumers have more access to information than any other time in our history. There are more TV stations. There are more radio stations. There's cable. There's over the air, of course. There's satellite. There's the Internet. And so whether it's for local information, national, or international, consumers have more choices.

I will be interested in hearing your justification, though, I will say to members of the Commission, on why small markets are treated differently than large markets. Running an operation in a small market, without the same revenue, is more difficult than in large markets, where you get more advertising revenue.

And I would insert into the record, Mr. Chairman, a story in yesterday's *Wall Street Journal* by Emily Nelson regarding small-market TV stations that are not pleased with the new FCC rules, because they have all the cost of technology, reporters, and so forth, and they actually could benefit more if these rules were updated for small markets.

And I look forward to hearing the testimony and rationale of this and other issues by the commissioners.

Thank you, Mr. Chairman.

[The information referred to follows:]

Wall Street Journal Article—June 3, 2003

SMALL-MARKET TV STATIONS MAKE STATIC OVER NEW FCC RULES

By Emily Nelson

No one will confuse Robert Gluck with Rupert Murdoch. Like the News Corp. chief, Mr. Gluck, a television station owner in Fargo, N.D., has been keenly watching the debate in Washington over media-ownership rules. But while Mr. Murdoch and other media moguls were applauding a sweeping overhaul of rules that could trigger additional consolidation, Mr. Gluck was glum.

That is because the new rules don't hold much benefit for TV station owners in small towns—even though they argue they need regulatory relief the most.

Yesterday, the Federal Communications Commission passed its highly anticipated new broadcast ownership rules, but in the section dealing with small towns, the FCC made it very difficult for a broadcaster to own two stations, known in the industry as a "duopoly."

Mr. Gluck, president and chief executive of North Dakota Television LLC, says he could improve his local news reporting and amortize expenses from computers to reporters if he were allowed to own two stations in the same market.

It is more expensive than ever to run a television station in a small town: It means buying new digital equipment and staffing a news operation. Combining with another station would allow an owner to spread its costs and realize other financial savings.

"I certainly think it would be in the community's best interest to let me run both stations," he says. As for owners in large cities who can own several stations under the new rules, he adds, "it doesn't seem like everyone's on the same playing field."

Under the old rules, station ownership was determined by the so-called eight-voice test, meaning that a market had to have eight separate voices or TV stations, each held by a different owner, for a duopoly to be allowed.

The new rules permit a combination of stations in markets with five or more stations, leaving many stations in small towns to go it alone.

To understand who this affects, consider that the U.S. is divided into 210 markets, ranging from No. 1 New York, with the most TV households (7.3 million), to No. 210, Glendive, Mont., (4,960 TV households), according to Nielsen Media Research. Victor Miller, an analyst with Bear Stearns, calculates that 44 of the 100 markets ranked from 51 through 150 won't be allowed a duopoly under the new rules.

The FCC restrictions on duopoly in small markets were meant to ensure that TV stations reflect the sensibilities of their local communities while also offering a variety of viewpoints. When the FCC was designing its new rules easing ownership restrictions, it was easier to argue that larger markets already offer a variety of voices and that deregulation in big cities wasn't likely to affect that. But it also reflected the fact that the big media markets wielded more influence with regulators, small station owners say.

"We were looking for a much broader deregulation," says Paul Karpowitz, vice president of television for Lin TV Corp., a TV station owner and operator, based in Providence, R.I. "It's just unfortunate that in smaller markets where they need it the most, it doesn't appear this ruling will give them the relief they need."

Reporting local news isn't the only expense confronting small TV stations: They also are required to upgrade their equipment to meet new Federal requirements that TV stations broadcast digitally for high-definition TV. Today, few people own high-definition TV sets but in a few years, that number is expected to grow and the government has set compliance guidelines for the big networks as well as small local stations.

Installing a digital antenna, necessary to transmit in high-definition, costs a station $3 million to $5 million, Mr. Karpowitz says. "It's going to be very difficult to recoup those costs, certainly in the short term."

Of course, some owners already are spotting loopholes around the prohibition on duopolies in smaller markets by signing marketing or management agreements with another station. Such agreements allow one station to handle some operations of another TV station and spread out the costs of maintaining its own operation.

In Providence, Lin TV owns the CBS-affiliated station and has a marketing agreement with the Fox affiliate. Because it has two stations, it was able to add a 10 p.m. local news on the Fox station by using its CBS anchors and reporters, Mr. Karpowitz says, but he adds, "it would be a heck of a lot easier if we owned both stations."

As a result, viewers will start seeing the same news stories and same anchors on different stations, station owners say.

"It will be a little confusing for viewers. They'll see the same talent on opposing networks," says Robb Atkinson, news director at WWAY, the ABC-affiliated station in Wilmington, N.C., owned by Liberty Corp. He predicts "the new model" for stations in small markets will be a similar arrangement to get around the duopoly prohibition.

One small-market owner angry about the new FCC rules is Jim Goodmon, president and chief executive of Capitol Broadcasting Co., in Raleigh, N.C. He testified before the FCC against the changes and, yesterday, said he can't find "anyone who supports this other than the major media companies, their lawyers, and their investment bankers."

[Table]
Left Behind?
The biggest small-market broadcasters.
Company/Headquarters Stations*
Gray Television/Atlanta 22
Raycom Media/Montgomery, Ala. 15
Nexstar Broadcasting Group/Irving, Texas 14
Media General/Richmond, Va. 13
Sinclair Broadcast Group/Hunt Valley, Md. 12
*Number of stations owned in small markets
Source: Broadcast Investment Analysts

The CHAIRMAN. Senator Boxer?

STATEMENT OF HON. BARBARA BOXER, U.S. SENATOR FROM CALIFORNIA

Senator BOXER. Mr. Chairman, I'd like to speak for about 2 minutes.

First of all, thank you very much for calling the Commissioners before the Committee. In California, this is perhaps the biggest issue. People are up in arms about what the FCC did. And I'm going to try to convey why.

First, I don't agree with my colleagues, Senator Breaux and Senator Allen, when they say congratulations. The fact of the matter is, the court didn't ask the FCC to strike down the 35-percent cap. They told you to justify it. You had that justification in the form of 700,000 communications from the people.

And the people of this country have spoken out so eloquently on this point. And it is your job to represent the people, not the big special interests. I am dismayed and disappointed at what you have done.

I guess the point that there are a lot of outlets is true. All the more damaging to have just a few people control the communication from those outlets. That's the point. Yes, we do. And, if anything, the Commission should have learned from the history, your own history, on the radio situation, which is a total disaster for free speech and ideas. Just talk to average people on that issue.

And what about Enron? Think about that. You had nothing to do with it except for the fact that they became bigger and bigger and bigger, and the regulatory commissions just stood back and became a lapdog instead of a watchdog. And I hate to say it, but that's what I think is happening here.

So I'm going to do everything I can as a Senator representing the largest State in the Union with a lot of voices out there that want to get heard. Entertainment voices, personalities, from the left to the right and everywhere in between. And it's interesting that the left and the right have gotten together on this, as well, in criticizing what you've done. And I hope to overturn what you did. I

really do. And I know we have a lot of good leadership on that, whether it's Senator Hollings, Stevens, Dorgan, we have a lot of—Senator Lott—lots of us who feel this is wrong. Senator Snowe added her eloquence, I thought, this morning.

Thank you.

The CHAIRMAN. Senator Smith?

STATEMENT OF HON. GORDON H. SMITH, U.S. SENATOR FROM OREGON

Senator SMITH. Thank you, Mr. Chairman. And in the interest of hearing our witnesses, I'd like to just simply say I'm here to find out whether the response to your action is based on hype and hyperbole or if what you have done is based on what is reasonable and reasoned given that we live in an age of information. It does seem to me that, if anything, the public is on information overload. So I'm trying to find out if you've responded well to what the Congress has required, the courts are demanding, and I look forward to the testimony.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you.

I'd like to welcome all five Commissioners. It's the custom here to restrict opening statements to 5 minutes. But given the seriousness of this issue, we will allow the witnesses to speak as fully as possible and—of course, recognize that we do have a lot of questions, obviously.

So please proceed, and we'll be begin with you, Chairman Powell, and then we'll just go back and forth to the other members of the Commission. Welcome, Chairman Powell.

STATEMENT OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Chairman POWELL. Thank you, Mr. Chairman. And I'd ask that my full statement be submitted for the record.

The CHAIRMAN. Without objection.

Chairman POWELL. Mr. Chairman and distinguished Members of the Committee, it's my pleasure to come before you today to discuss the Commission's biennial review of our broadcast ownership rule. I also want to personally thank all of you who have provided the Commission with your respective views on the proceeding, along with well over 500,000 Americans. We have helped build the most comprehensive and complete broadcast-ownership record in FCC history.

Monday represented the culmination of a 20-month process that was required by the framework Congress crafted in the 1996 Telecom Act. In the now-infamous Section 202(h), Congress ordered the Commission to review its broadcast-ownership regulations every 2 years and to, quote, "determine whether any of such rules are necessary in the public interest as a result of competition." Further, we're required to repeal or modify any regulation we determine no longer serves the public interest in its current form.

I think critical to understanding our actions is an understanding of the court's view of Congress's charge. In FOX, the D.C. Circuit held, and I quote, "The Congress set in motion a process to deregulate the structure of the broadcast and cable television industries,"

end quote. It noted, in support of its view, that in 1996 Congress had repealed a myriad of rules, including repealing the statutory cable broadcast ban, repealing limits on cable network ownership, eliminating the national cap restrictions in radio and relaxing local radio rules. It directed the Commission to eliminate the national cap on the number of television stations any one entity may own. And it directed the Commission to increase the television ownership cap from 25 to 35 percent.

As to the biennial review provision that's the subject of our actions today, the court stated clearly that the Commission was required by Congress, quote, "to continue the process of deregulation," end quote, by reviewing each of the Commission's ownership rules every 2 years.

It is this Congressional framework that guides the Commission's work, and it was the prior Commission's failure to heed the Congressional direction that led to so many of the broadcast rules being struck down or remanded.

The FCC is an administrative agency, and it is constitutionally bound to comply, willingly or not, with Congress's direction, as expressed by the text of the statute. The Commission does not have the luxury of always doing what is popular. Thus, I must reject the sensationalist claims that our effort is nothing more than gratuitous deregulation. I believe we did our job, and I believe we did it well.

Indeed, over the past 20 months we have been working tirelessly toward achieving three critically important goals. One, to reinstate legally enforceable broadcast-ownership limits that promote diversity, localism, and competition, replacing those that had been struck down by the courts. Two, by building modern rules that take proper account of the explosion of new media outlets for news, information, and entertainment. And, three, striking a careful balance that does not unduly limit transactions that promote the public interest while ensuring that no company can monopolize the medium. I am confident we achieved these goals.

Indeed, because of the critically important nature of this proceeding, we set out to build a stronger foundation for our rule choices. It began when I created the Media Ownership Working Group, which commissioned 12 studies of how Americans use the media for different purposes and how media markets function. This was the first time ever the agency sought to survey the American people to see how it is they access news. We put out five notices of proposed rulemakings and public notices during the time and gave the public 15 months or more of open comment time to assist the Commission in its fact-gathering efforts. Indeed, approximately ten public hearings were held on the subject. And I do commend, in large measure, the efforts of Commissioners Copps and Adelstein in bringing the benefits of those hearings to the Commission deliberation. As a result of this effort, we amassed the most thorough record ever in order to fulfil this statutory responsibility.

Here is what we learned about the media marketplace. It is marked by abundance. For example, we found the number of outlets and the number of independent owners have risen dramatically over the course of the last 40 years. We learned that in 1960, the purported Golden Age of Television, if you missed the half-hour

evening newscast, you were out of luck. But today, news and public affairs programming, the fuel of our democratic society, is overflowing. There used to be three broadcast networks, each with 30 minutes of news. Today, there are 24—there are three 24-hour all-day news networks, seven broadcast networks, and over 300 cable networks. Local networks are bringing the American public more local news than at any point in history. And there are new tools, such as the Internet, becoming increasingly important as a diverse source of news and information.

There has been a 200-percent increase in outlets. But, more importantly for diversity, as so many people have mentioned, there has been a 139-percent increase in owners. In sum, citizens do have more choices and more to depend on for information than any time in history.

Finally, I would emphasize the public interest does remain protected. While competition in the marketplace of ideas is robust, the Commission still believes deeply in the values of diversity, localism, and competition. They remain paramount public objectives. Thus, while we concluded many of the rules could not be sustained in their current form, many dating back to nearly 60 years, we opted to modify the regime, rather than eliminate it, Congress having provided only those two options.

The package of changes, in my opinion, are modest. We kept in place the rule that forbids the top networks from merging. We have tightened the radio rules, fixing the anomaly that led to the now-vaunted situation in Minot, North Dakota. Given pending transactions, in fact, that market would be said to have 45 stations under the old rules. Under our new rules, it would only be ten, limiting the number of stations any one entity can own.

We modified the remaining rules to better reflect the record evidence and strengthen the public-interest benefits. We retained a national cap, which is, as Senator Breaux notes, curiously defined in terms of the number of households an owner can potentially speak to, not the number of stations one owns or controls. Indeed, all networks, each own less than 3 percent of the television stations in the United States.

We raised the cap from 35 percent to 45 percent in order to better balance the public-interest benefits of network ownership. Yes, the record shows they actually produce more local news in markets than non-network-owned stations. And we balanced the putative harms resulting from their bargaining power with a local affiliate.

We also could not find that an absolute complete ban on cross-ownership between newspapers and broadcast properties, or radio and television properties, was defensible on the record. Such a complete prohibition was clearly harming the public interest in significant ways. Yet, again, we retained some meaningful limits on cross-ownership, utilizing a diversity index for the first time to weigh diversity consistent with the manner in which consumers do in drawing these limits.

Finally, our competition caps are modified to better reflect the state of competition in different markets.

Let me conclude by saying that the most important public-interest benefit, by far, resulting from our actions is that we have reinstated meaningful limits that are once again enforceable. The exist-

ing rules haven't been taken out of action, suffering from their judicially delivered wounds. And I believe we did faithfully implement the Congressional scheme.

I recognize, too, that by doing so we have forced an important debate about media regulation and the role of media in our society. I, personally, welcome and encourage that discussion, and stand ready to aid the Congress in any way to consider any changes in its media blueprint that it may see fit to make.

Thank you, Mr. Chairman.

[The prepared statement of Chairman Powell follows:]

PREPARED STATEMENT OF HON. MICHAEL K. POWELL, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss our recent decision to adopt new broadcast ownership limits. I am proud that this Commission and its staff can say that we conducted the most exhaustive and comprehensive review of our broadcast ownership rules ever undertaken. We have done so, obligated by our statutory duty to review the rules biennially and prove those rules are "necessary in the public interest." The Court of Appeals has interpreted this standard as placing a high hurdle before the Commission for maintaining a given regulation, and made clear that failure to surmount that hurdle, based on a thorough record, must result in the rule's modification or elimination. This is an exceedingly difficult charge, but a critical one to fulfill if we hope to continue to promote the cherished values of diversity, competition and localism.

Over the past twenty months we have been working tirelessly toward achieving three critically important goals in this proceeding: (1) Reinstating legally enforceable broadcast ownership limits that promote diversity, localism and competition (replacing those that have been struck down by the courts); (2) Building modern rules that take proper account of the explosion of new media outlets for news, information and entertainment, rather than perpetuate the graying rules of a bygone black and white era; and (3) Striking a careful balance that does not unduly limit transactions that promote the public interest, while ensuring that no company can monopolize the medium. I am confident we achieved these goals with the June 2, 2003 *Order*.

To achieve these goals, however, the Commission needed to come face to face with reality. So, we faced the reality of the law and our responsibility to implement Congress' will, as interpreted by the courts. We faced the reality of having to compile and analyze a record unlike any other in our history. We faced the reality of the modern media marketplace. And by doing so, the Commission was able to craft a balanced package of enforceable and sustainable broadcast ownership limits that will best serve to achieve our public interest objectives of diversity, competition and localism for our Nation's citizens.

I. Statutory Mandate and Court Decisions

In the Telecommunications Act of 1996, Congress established the biennial review mandate. In relevant part, Section 202(h) requires that the Commission review all of its broadcast ownership rules every 2 years and determine "whether any of such rules are necessary in the public interest as a result of competition." The Commission, as a consequence, is required to repeal or modify any regulation it cannot prove is necessary in the public interest. Congress gave the Commission a sacred responsibility, one that I do not take lightly. We are duty bound to obey the law. It is not an optional exercise or one that we can choose to ignore.

Recent court decisions have established a high hurdle for the Commission to maintain a given broadcast ownership regulation. As interpreted by the U.S. Court of Appeals for the District of Columbia Circuit in the 2002 *Fox* and *Sinclair* cases, Section 202(h) requires the Commission to study and report on the *current* status of competition. Both decisions provide that the survival of any prospective broadcast ownership rules depends on this Commission's ability to justify those rules adequately with record evidence on the need for each ownership rule, and ensure that the rules are analytically consistent with each other. The implications of the court decisions were clear—fail to justify the necessity of each of our broadcast ownership regulations at the rules' and our sacred goals' peril.

Indeed, keeping the rules exactly as they were was not a viable option. As the only member of this Commission here during the last biennial review, I watched first hand as we bent to political pressure and left many rules unchanged. Nearly all were rejected by the court because of our failure to apply the statute faithfully. I have been committed to not repeating that error, for I believe the stakes are perilously high. Leaving things unaltered, regardless of changes in the competitive landscape, is a course that only Congress can legitimately chart. This is why I set in motion the process—over 20 months ago—that brought the Commission to the point we find ourselves at today.

II. FCC Procedural Action

The court admonitions demonstrated the need to rebuild our decaying broadcast ownership regulations from the ground up. Like any reconstruction project, our task began with the need to lay a solid foundation to support our structural regulations. Our cement was not the blind intuitions of generations past—but facts that would lay the foundation for a sustainable set of broadcast ownership regulations built around, and for, today's media marketplace.

Because of the critically important nature of this proceeding, we set out to lay this foundation by embarking on an exhaustive review, indeed the most comprehensive in the agency's history. It began in earnest 20 months ago when I created the Media Ownership Working Group. They commissioned studies of how Americans use the media for different purposes and how media markets function. The group's work formed the initial foundation of our review. More importantly, those studies sent a message that this review would not be business as usual when it comes to media ownership rules. For the first time, this agency took on the challenge of updating and reconciling years of piecemeal, decades old, ownership regulations in a rigorous and comprehensive way.

We put out no less than three Notice of Proposed Rulemakings during that time and gave the public over fifteen months of open comment time to assist the Commission in its fact-gathering efforts. Approximately ten public hearings were held on the subject, thanks in large measure to the efforts of Commissioners Copps and Adelstein. I am enormously pleased that the public accepted our challenge. The record we received in this proceeding is deeper and more insightful than any I have seen in my 6 years of service at the Commission. I take pride in the fact that our decisions rest on an extraordinarily strong empirical record. For the agency charged with preserving the free flow of information in our democracy, the public should expect no less from us.

III. The Modern Marketplace

Our fact-gathering effort demonstrated that today's media marketplace is marked by abundance. Since 1960 there has been an explosion of media outlets throughout the country. Even in small towns like Burlington, Vermont, the number of voices—including cable satellite radio, TV stations and newspapers has increased over 250 percent during the last 40 years. Independent ownership of those outlets is far more diverse, with 140 percent more owners today than in 1960.

What does this abundance mean for the American people? It means more programming, more choice and more control in the hands of citizens. At any given moment our citizens have 4 access to scores of TV networks devoted to movies, dramatic series, sports, news and educational programming, both for adults and children. In short, niche programming to satisfy almost any of our citizens' diverse tastes.

In 1960—the "Golden Age of Television"—if you missed the ½ hour evening newscast, you were out of luck. In 1980, it was no different. But today, news and public affairs programming—the fuel of our democratic society—is overflowing. There used to be three broadcast networks, each with 30 minutes of news daily. Today, there are three *24 hour all-news networks,* seven broadcast networks, and over 300 cable networks. Local networks are bringing the American public more local news than at any point in history.

The Internet is also having a profound impact on the ever-increasing desire of our citizenry to inform themselves and to do so using a wide variety of sources. Google news service brings information from 4,500 news sources to one's finger tips from around the world, all with the touch of a button. As demonstrated by this proceeding, diverse and antagonistic voices use the Internet daily to reach the American people. Whether it is the *New York Times* editorial page, or Joe Citizen using e-mail to let his views known to the Commission, or the use by organizations such as *MoveOn.org* to perform outreach to citizens, the Internet is putting the tools of democracy in the hands of speakers and listeners more and more each day.

I have not cited cable television and the Internet by accident. Their contribution to the marketplace of ideas is not linear, it is exponential. Cable and the Internet explode the model for viewpoint diversity in the media. Diversity-by-appointment has vanished. Now, the media makes itself available on our schedule, as much or as little as we want, when we want. In sum, citizens have more choice and more control over what they see, hear or read, than at any other time in history. This is a powerful paradigm shift in the American media system, and is having a tremendous impact on our democracy.

IV. Public Interest Benefits

The marketplace changes mentioned above were only the beginning, not the end of our inquiry. The balanced set of national and local broadcast ownership rules we adopted preserve and protect our core policy goals of diversity, competition and localism. Certain public interest benefits have clearly been documented in the record and the rules we adopted embrace and advance those benefits for the American public.

As an initial matter, the public interest is served by having enforceable rules that are based on a solid, factual record. For the last year, several of the Commission's broadcast ownership regulations have been rendered unenforceable—vacated or remanded by the courts.

Protecting Viewpoint Diversity

In addition, the Commission, recognizing that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," introduced broadcast ownership limits that will protect viewpoint diversity. The Commission concluded that neither the newspaper-broadcast prohibition nor the TV-radio cross-ownership prohibition could be justified in larger markets in light of the abundance of diverse sources available to citizens to rely on for their news consumption.

By implementing our cross-media limits, however, the Commission will protect viewpoint diversity by ensuring that no company, or group of companies, can control an inordinate share of media outlets in a local market. We developed a Diversity Index to measure the availability of key media outlets in markets of various sizes. By breaking out markets into tiers, the Commission was able to better tailor our rules to reflect different levels of media availability in different sized markets. For the first time ever, the Commission built its data in implementing this rule directly from input received from the public on how they actually use the media to obtain news and public affairs information.

Furthermore, by instituting our local television multiple ownership rule (especially by banning mergers among the top-four stations, which the record demonstrated typically produce an independent local newscast) and our local radio ownership limit, the Commission will foster multiple independently owned media outlets in both broadcast television and radio—advancing the goal of promoting the widest dissemination of viewpoints.

Enhancing Competition

Moreover, our new broadcast ownership regulations promote competition in the media marketplace. The Commission determined that our prior local television multiple ownership limits could not be justified as necessary to promote competition because it failed to reflect the significant competition now faced by local broadcasters from cable and satellite TV services. Our revised local television limit is the *first* TV ownership rule to acknowledge that competition. This new rule will enhance competition in local markets by allowing broadcast television stations to compete more effectively not only against other broadcast stations, but also against cable and/or satellite channels in that local market. In addition, the record demonstrates that these same market combinations yield efficiencies that will serve the public interest through improved or expanded services such as local news and public affairs programming and facilitating the transition to digital television through economic efficiencies.

The Commission found that our current limits on local radio ownership continue to be necessary to promote competition among local radio stations and we reaffirmed the caps set forth by Congress in the 1996 Telecommunications Act. The Order tightens the radio rules in one important respect—we concluded that the current method for defining radio markets was not in the public interest and thus needed to be modified. We found the current market definition for radio markets which relies on the signal contour of the commonly owned stations, is unsound and produces anomalous and irrational results, undermining the purpose of the rule. We therefore adopted geographic based market definitions which are a more rational means for protecting competition in local markets. For example, we fixed the case of Minot,

North Dakota which under our former rules produced a market produced a market with forty-five (45) radio stations. Under our reformed market definition, Minot would have only ten (10) radio stations included in the relevant geographic market.

By promoting competition through the local television and radio rules, the Commission recognized that the rules may result in a number of situations where current ownership arrangements exceed ownership limits. In such cases the Commission made a limited exception to permit sales of grandfathered stations combinations to small businesses. In so doing, the Commission sought to respect the reasonable expectations of parties that lawfully purchased groups of local radio stations that today, through redefined markets, now exceed the applicable caps. We promote competition by permitting station owners to retain any above-cap local radio clusters but not transfer them intact unless such a transfer avoids undue hardships to cluster owners that are small businesses or promote the entry into broadcasting by small businesses—many of which are minority- or female-owned.

Finally, by retaining our ban on mergers among any of the top four national broadcast networks, the Commission continues to promote competition in the national television advertising and program acquisition markets.

Fostering Localism

Recognizing that localism remains a bedrock public interest benefit, the Commission took a series of actions designed to foster localism by aligning our ownership limits with the local stations' incentives to serve the needs and interests of their local communities. For instance, by retaining the dual network prohibition and increasing the national television ownership limit to 45 percent, the Commission promoted localism by preserving the balance of negotiating power between networks and affiliates. The National Cap will allow a body of network affiliates to negotiate collectively with the broadcast networks on network programming decisions to best serve the needs of their local community, while at the same time allowing the networks to gain critical mass to prevent the flight of quality programs, such as sports and movies, to cable or satellite.

The record further demonstrated that by both raising the National Cap to 45 percent and allowing for cross-ownership combinations in certain markets the Commission would promote localism. Indeed, the record showed that broadcast network owned-and-operated stations served their local communities better with respect to local news production—airing more local news programming than did affiliates. Furthermore, the record demonstrated that where newspaper-broadcast television combinations were allowed, those televisions stations have produced dramatically better news coverage in terms of quantity (over 50 percent more news) and quality (outpacing non-newspaper owned television stations in news awards).

The Commission crafted a balanced set of broadcast ownership restrictions to preserve and promote the public interest goals of diversity, competition and localism.

V. Conclusion

This critical review has been an exhaustive one. The Commission has struggled with a difficult conundrum: building an adequate record, satisfying the administrative burden of the Section 202(h) mandate, and ultimately justifying its rules before the courts that have expressed growing impatience with irrational and indefensible ownership rules. Four years ago, in the last completed biennial review, I concluded "[i]t is indeed time to take a sober and realistic look at our broadcast ownership rules in light of the current competitive communications environment." With a full record in hand, it was appropriate to fulfill Congress's mandate of completing our broadcast ownership review. The extraordinary coverage of the issue and the comments and evidence on the record have allowed the Commission to make an informed judgment, and hopefully to resist claims of being both "arbitrary and capricious" before the courts.

The CHAIRMAN. Thank you.

Commissioner Adelstein?

STATEMENT OF HON. JONATHAN S. ADELSTEIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. ADELSTEIN. Thank you, Mr. Chairman, Senator Hollings, Members of the Committee. Thank you for this opportunity to testify.

I'm just convinced that the FCC can benefit from the careful review that you're going to provide of our recent decision to allow fur-

ther media concentration. We really need your help, because this issue goes to the heart of our democracy. So we desperately need to hear input from elected officials like yourselves.

I'm afraid that democracy was not well-served by Monday's decision. Allowing fewer media outlets to control what Americans see, hear, and read can only give our people less information to make up their own minds about the issues they face.

As media conglomerates go on buying sprees after this decision, they'll accumulate huge debts that will force them to chase the bottom line ahead of all else. Their growth will likely fuel even more sensationalism, more crassness, more violence, and even less serious coverage of the news and local events. The American people instinctively grasp this.

Commissioner Copps and I reached out to Americans at field hearings across the country. We heard a loud and unanimous chorus that media concentration has gone too far already and should go no further. I've rarely seen an issue on which such strong opinion is so one-sided. This has hit a raw nerve. There's no doubt in my mind. Three-quarters of a million people contacted the FCC, the likes of which we'd never seen. 99.9 percent of those people, who took their time to contact us, oppose further media consolidation.

Of course, the FCC can't make these decisions according to popular opinion, but our statutory mandate is very simple. It's to do what's in the public interest. We shouldn't assume that the people are wrong about what's in their own interests unless we have overwhelming evidence to prove it. And here, there's plenty of evidence that the American people are right.

Senator Snowe has noted that we can't know what's in the public interest about a public process. Well, I'll tell that, you know, Commissioner Copps and I did a public process of our own, and we went out, we talked to the American people. And I'll tell you, it had a profound influence on me, because we heard from people in organizations from every political stripe—from liberal to conservative, from Republican to Democrat, and virtually everyone in between—that they oppose the allowance of further media consolidation.

This shouldn't be seen as a partisan issue simply because the Commission's vote broke down along party lines. My own dad, for example, is a Republican, and he's an elected State Representative in the State of South Dakota. He told me he's concerned that if media giants swallow up locally owned outlets in rural states like ours, citizens will see less coverage of local concerns, including key issues facing state governments, which have such a critical role under our Constitution and for which Republicans have so long and so hard fought to protect. His concerns highlight a real threat to our democracy.

One national study found that combined TV coverage of all the campaigns in 2000 was about 74 seconds per night, and that includes local, state, and Federal elections, all elections for the Senate, President of the United States, state and local officials, Mayors, Governors, everything, 74 seconds. As you know all too well, people heard a lot more in the population from paid political ads, many of them negative, which only serves to depress voter turnout.

Could the media activities help explain why half of the American population doesn't vote? Can anyone seriously argue that this will get better if we allow media giants to fortify their already massive market power?

The FCC's order assumes that somehow the cost savings that come from mergers will always get channeled into better news and programming, but it requires no steps whatsoever to ensure that really happens. The majority made a huge leap of faith that the fixed rules based on oftentimes arbitrary numbers are the be-all and end-all of what's in the public interest.

For example, the order assumes that every time a newspaper buys a TV station in the communities where 97 percent of Americans live, it's in their interest. Now, in some cases, that might be right. Those mergers may actually bring some news help to a struggling TV station in certain cases. But is that true in every case, as this order assumes?

In many areas, such a deal eliminates an important voice that serves the community. It takes what was two voices and makes it one. But the order makes no effort to sort that out or to require any public-interest commitments whatsoever.

The order also allows one TV station to swallow another in most communities in this country. Potentially, 95 percent of the population lives in a community where they can see one television station be swallowed up by another, again with no requirement that the broadcasters do anything to serve the public or to use any of the benefits that result from that merger to actually provide better news, better local programming, any investigative journalism, nothing, no requirements whatsoever, carte blanche.

And this order assumes that networks should be able to own stations reaching 45 percent of the population—90 percent if you count the UHF discount—with no justification as to how this will help diversity or localism. We're about to create new media giants, media moguls that make Citizen Kane look like a piker.

As Senator Dorgan noted, in larger markets like San Francisco, Senator Boxer's own San Francisco, or L.A., one owner can combine the cable system, three television stations, eight radio stations, the dominant newspaper, the leading Internet provider, some cable networks thrown in, magazines, and the studios that produce most of the programming that goes out over all those outlets.

In smaller markets—say, Senator Burns' town of Great Falls, Montana; population of about 56,000—one entity could own the cable company, the dominant TV station, the dominant newspaper, and multiple radio stations. Is that really good for democracy in Montana?

It's true that Congress and the courts forced a massive review, but they did not force massive deregulation. We could have required a market-by-market, case-by-case approach that ensures each new merger we allow actually serves the public interest. By failing to do so, the order went further than necessary in eliminating most of the last safeguards the FCC had in place to protect the public, and it went further than Congress or the courts required. The public-interest standard, if not dead, is mortally wounded. I'd be happy to answer any questions you have, and thank you for having me.

[The prepared statement of Commissioner Adelstein follows:]

PREPARED STATEMENT OF HON. JONATHAN S. ADELSTEIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman, Senator Hollings and members of the Committee, thank you for the opportunity to testify before you today. It's great to be back here, but, unfortunately, I do not have great things to report. It's been a sad week for me, and I think for the country, as a dark storm cloud now looms over the future of the American media. I'm convinced the FCC can benefit from this careful review by Congress of our recent decision allowing further media concentration. Since this issue goes to the heart of our democracy, we desperately need input from members of the world's greatest deliberative body.

On Monday, over my strong dissent, the FCC approved the most sweeping and destructive rollback of consumer protection rules in the history of American broadcasting.

I'm afraid democracy was not well served by Monday's decision. Allowing fewer media outlets to control what Americans see, hear and read can only give Americans less information to use in making up their own minds about the key issues they face.

The decision will diminish the diversity of voices heard over the public airwaves, which can only diminish the civil discourse and the quality of our society's intellectual, cultural and political life. It will diminish the coverage of local voices and local issues as media giants gobble up local outlets and nationalize the stories they broadcast.

In the end, our new rules will simply make it easier for existing media giants to acquire more outlets and fortify their already massive market power. Monday's order capitulated to many of the longstanding demands of the media companies the FCC oversees.

As media conglomerates go on buying sprees, they will accumulate enormous debt that will force them to chase the bottom dollar ahead of all else. This is likely to result in more sensationalism, more crassness, more violence and even less serious coverage of the news and local events.

The American people instinctively grasp that media concentration is not healthy for our democracy. They know how it will affect coverage of issues of local concern.

This is why we heard such a public outcry. Commissioner Copps and I reached out to Americans at field hearings across the country. People take their media very personally, and they are very articulate and substantive in what they say. We listened to thousands of people firsthand in city halls, schools, churches and meeting rooms. We heard a loud and unanimous chorus that they think media concentration has gone too far already and should go no further.

And the American people have flooded the FCC with nearly unanimous opposition from all sides, from ultra-conservatives to ultra-liberals, and virtually everyone in between.

In my years on the Hill, I worked on a lot of hot issues. But I've never seen an issue on which such strong opinion is so one-sided. It's touched a raw nerve. Three-quarters of a million people contacted the FCC, and 99.9 percent of them opposed further media consolidation. Of the thousands of e-mails I personally received, I saw only one that didn't oppose allowing further media concentration.

The American people appear united in believing that media concentration has gone too far already and should go no further.

I've heard it said the FCC can't make its decision by polls or by weighing postcards. I agree the FCC can't make these decisions according to popular opinion. But our statutory mandate from you is to do what's in the public's interest. Does that mean that we can simply dismiss those people who took the time to alert us to their deep-seated concerns with a passing reference? I don't think we should assume that people are wrong about what's in their own interest unless we have overwhelming evidence to prove it. Here, the opposite is true. There is plenty of evidence the people are right.

We've heard opposition from people and organizations from every political stripe, from liberal to conservative, Republican to Democrat, and virtually everyone in between. Organizations of nearly every political stripe have weighed in, from the National Rifle Association to the National Organization for Women, from the Catholic Conference of Bishops to the Leadership Conference on Civil Rights. The Parents Television Council, Common Cause, the National Association of Black-Owned Broadcasters, the National Association of Hispanic Journalists, the Writers Guild, and the

Association of Christian Schools. Each of these organizations expressed grave doubt about the wisdom of allowing greater consolidation.

We also heard from hundreds of leading musicians and performing artists, including Tom Petty, Billy Joel, Pearl Jam, Neil Diamond, and Tim McGraw. The Small Business Administration's Office of Advocacy worries about the effect of our changes on small businesses. Media moguls like Barry Diller and Ted Turner, who know the industry intimately, are greatly concerned.

This should not be seen as a partisan issue simply because it broke down along party lines at the FCC.

My own Dad, for example, is a Republican—and an elected state representative in our State of South Dakota. He fears that if media giants swallow up locally owned outlets in rural states like ours, citizens will see less coverage of local concerns, including the key issues facing state governments.

He highlights a real threat to our democracy. One study found that the combined TV coverage of all campaigns in 2000 was about seventy-four seconds per night—and that included local, state and Federal elections. As you all know best, people heard a lot more from political ads, many of them negative. That just depresses turnout. Could this media coverage help explain why half of Americans don't vote? Can anyone seriously argue that this will get better if we allow media giants to fortify their already massive market power?

The FCC's order assumes that economic efficiencies and cost savings from mergers will always get channeled into better news and programming. But it requires no steps to actually make that happen.

The majority made the leap of faith that fixed rules based on oftentimes arbitrary numbers are the be-all and end-all of what's in the public interest. They rejected an approach to look case-by-case, market-by-market in favor of bright line rules. They refused even to ask parties that seek to merge to say anything about how many news staff would be retained, the number of hours of local programming planned, cross-programming plans for TV duopolies or the overall impact on news and public affairs programming.

For example, the order assumes that every time a newspaper buys a TV station in communities where 97.7 percent of Americans live, it is in their interest. In some cases, those mergers may actually bring some new heft to a struggling TV station. But is that true in every case? There are many circumstances in which such a deal eliminates an important voice that is now serving a community. The FCC order makes no effort to sort that out, or to require any public interest commitments whatsoever.

The order essentially assumes one TV station swallowing another will always be of benefit in every community where 95.4 percent of the population lives, assuming that the community does not already have a television duopoly and depending on the success of any noncommercial station in the market.

And it assumes that networks should be able to own stations reaching 45 percent of the population—90 percent if you count fully the UHF stations that are discounted by half—with no explanation as to how this will help diversity or localism.

It's true that Congress and the courts forced a massive review. But they did not force massive deregulation. The FCC had to undertake the review, but it had a choice on the outcome. Certainly, the media markets have changed, and our rules must keep pace. But Monday's order goes much further than Congress or the courts required. It elects gratuitous deregulation.

The biennial review called for in the Act provides a simple directive—to determine whether the rules "are necessary in the public interest as the result of competition," repealing or modifying them only if we deem them "no longer in the public interest." The linchpin of our statutory mandate is two words—public interest. In the context of media ownership, the FCC still has a special duty to protect what the Supreme Court referred to as an "uninhibited marketplace of ideas." And the public interest means that the American citizenry should benefit from each decision.

To protect the public, we could have required a market-by-market, case-by-case approach that would ensure that each merger served the interest of the communities affected. By failing to do so, the order went further than necessary in eliminating most of the last safeguards the FCC had in place to protect the public.

One argument in favor of unleashing the media giants is that free over-the-air television is threatened. That's a worthy goal, but the rumors of its demise, widely spread, are greatly exaggerated. In reality, just last month, broadcast network advertisers spent a record $9.4 billion in upfront sales for next season, up 13 percent. The *Wall Street Journal* recently reported that some networks make $600-$700 million, though others are less profitable.

It is quite telling that the best case for consolidation is that the networks need to make still more. It's not the FCC's job to make sure every big TV network makes

money—that's up to network management. Our first priority is ensuring the American people get a wide range of diverse viewpoints.

The day we will know over-the-air TV is in real trouble is when broadcasters start lining up to turn back their licenses. Today, instead, the value of television stations continues to skyrocket because these licenses are so scarce. One station in Los Angeles sold for $800 million. Why are the networks so interested in increasing the nationwide cap or acquiring triopolies or duopolies in local markets if this business is on the way down?

Some argue that the concern about the threat to American democracy is overblown since it is so strong and resilient. While our democracy is strong and not about to crumble, does it mean we can afford to weaken it? Doesn't it matter that only half our citizens vote? The same people argue there is plenty of diversity already, so we can afford to lose some. I just don't agree.

It violates every tenet of a free democratic society to let a handful of powerful companies control our media. The public has a right to be informed by a diversity of viewpoints so they can make up their own minds. Without a diverse, independent media, citizen access to information crumbles, along with political and social participation. For the sake of our democracy, we should encourage the widest possible dissemination of free expression through the public airwaves.

Despite the majority's assumption that technological advancements render broadcasters just another voice in a crowd of ever-expanding and fungible media channels, a simple fact remains. No technological advances have made it possible for every person who wants to broadcast in a local community to do so. Nobody yet has figured out how to replicate the spectrum for everyone who wants to broadcast a message. The exclusive right to use the broadcasting spectrum denies it to all others.

While it is true that many Americans now access hundreds of channels on cable and satellite, the Internet and other media. But it turns out that the same few vertically-integrated global media firms own the bulk of what people see. A person can always add more electrical outlets throughout their home, but that doesn't mean they will get their electricity from new sources. The same goes for media outlets.

Neither the Internet nor cable changes the fact that people still get the vast bulk of their local news and information from the same places they always have: their local newspaper and local TV stations. And these are the very outlets we are giving the most new flexibility to merge.

We are moving to a world where in larger markets one owner can combine the cable system, three television stations, eight radio stations, the dominant newspaper, and the leading Internet provider, not to mention cable networks, magazine publishers and programming studios which could produce the vast bulk of the programming available to those outlets.

In smaller markets, say the town of Great Falls, Montana with a population of 56,690, under our new rules one entity could own the cable company, the dominant television station, the dominant newspaper, and multiple radio stations. Is that automatically in the interest of the residents of Great Falls?

To me, the public interest means more than just efficiencies and cost savings. Every community has local needs, local elections, local news, local talent, and local culture. While localism reflects a commitment to local news and public affairs programming, it also means much more. It means providing opportunities for local self-expression and reaching out to, developing and promoting local talent. It means making programming decisions to serve local needs. It means allocating resources to address the needs of the community. Localism's many virtues are hard to capture, but may get easier to ignore as companies consolidate.

In this order, we face tradeoffs between efficiencies and other public interest goals such as localism and diversity in the media. Guess who wins. The social benefit of diverse, locally originated and oriented programming and program selection to me carries a lot of weight and calls for more individualized decisionmaking.

I don't mean to suggest that bigness is always bad, or that free enterprise will always fail the public. There is some truth to the arguments that my colleagues make today. There's nothing inherently wrong with earning profits from using public property.

But when it comes to gaining even greater profits at the expense of the cornerstones of our democracy, we must carefully question the effect on the public. Our new rules just don't let the big get bigger, they will effectively prevent smaller entities from breaking in.

This is far from over. You may ultimately prove more responsive to the hundreds of thousand of citizens who have passionately pled for the independence and diversity of their media. To paraphrase Winston Churchill, this is not the end, or even the beginning of the end, but just the end of the beginning.

The CHAIRMAN. Thank you.
Commissioner Abernathy?

STATEMENT OF HON. KATHLEEN Q. ABERNATHY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Commissioner ABERNATHY. Good morning, Mr. Chairman, Senator Hollings, and distinguished Members of the Committee. It's a distinct privilege to come before you to discuss the Commission's biennial review of its broadcast-ownership rules and to address your concerns.

I cannot recall a single proceeding over the last several years that generated such extensive concern from citizens, elected officials, and consumer advocates. And the concern was entirely appropriate, because our relationship with the media helps define who we are as a country. It speaks to our love of the First Amendment and our respect for divergent views and opinions. It's a mirror into the soul of America. And that is why I very carefully considered all of the comments and all of the concerns from citizens when crafting the rules that we ultimately adopted.

At the end of the day, we had to decide whether to be guided by facts or by fears. For literally years, the Commission has struggled to strike an appropriate balance in its media-ownership rules.

Many have argued that this proceeding is about the core of our democracy. And I agree. And nothing is more fundamental to democracy than following the rule of law, as given to us by Congress and as interpreted by the courts. It is a heavy responsibility, and I believe we have exercised it well.

I began my review of the FCC's media-ownership rules with three inescapable realities: the Telecommunications Act of 1996, the judicial decisions interpreting it, and the United States Constitution.

First, the act requires the Commission to conduct a review every 2 years to determine which of our broadcast-ownership rules remain necessary in the public interest and can be justified in the modern media world. The statute is written to prefer competition over regulation. We are already 5 months behind schedule for our 2002 biennial review and have, therefore, been unfaithful to the statute. Despite requests that the proceeding be delayed, I could not do that and also adhere to the statutory mandates.

Second, judicial decisions in this area have struck down every broadcast rule the courts have reviewed since the passage of the 1996 act. Each time, the courts found the FCC failed to justify the limits it continued to place on broadcast ownership. To maintain all our rules in their current form would be to defy the Federal courts, something I was unwilling to do.

Third, the First Amendment to the Constitution protects the free-speech rights of broadcasters. Therefore, any ownership restrictions imposed by the FCC must be based on concrete evidence, not on fear and speculation.

Within these parameters, I was persuaded that several ownership limits, in their current form or with some modifications, remain necessary in the public interest to preserve competition, localism, and diversity. There is no doubt that the Commission must continue to improve prophylactic rules to ensure that the public re-

ceives a range of independent and competitive sources of local news and information in each market.

Despite all of the alarmist cries, it is instructive to look at what we actually did. The reality is that, pursuant to the FCC's order, there will continue to be hundreds of pathways into the American home in the average American city or town. The reality is that we are continuing to impose a national television ownership cap in recognition of the important role that affiliates play in promoting localism, competition, and diversity. The reality is that today's order will prevent media companies from owning more than one of the top four stations in a market, and will similarly forbid consolidation to fewer than six voices in the market serving the vast majority of Americans.

We have preserved structural limitations in revised forms, but modified our old rules, not only because they fail to promote competition, localism, and diversity, but because they actually may be harming these goals.

It goes without saying that none of us want to see media ownership concentrated in the hands of a few. While reasonable minds can differ about which particular restrictions might best promote this goal, national ownership caps of 40 versus 45 percent, or a minimum of six versus eight owners of local television stations in a market, and so forth, it's important to recognize that these are, in fact, issues on which reasonable people may disagree.

But I believe the net result of our order is balanced. We preserved core values by maintaining safeguards to protect against undue concentration. We altered rules, as necessary, to respond to the dramatic changes that have occurred in the marketplace since the adoption of our media-ownership rules many years ago. And we provided a rigorous justification with an exhaustive study of the record.

In all cases, our decisions were based on facts, rather than fears. That is what the Communications Act requires, that is what the courts require, and that is what the First Amendment requires.

Thank you, and I'll be happy to answer any questions.

[The prepared statement of Commissioner Abernathy follows:]

PREPARED STATEMENT OF HON. KATHLEEN Q. ABERNATHY, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Good morning, Mr. Chairman, Senator Hollings, and distinguished Members of the Committee. I appreciate the opportunity to appear before you to discuss the Commission's biennial review of its broadcast ownership rules. This hearing provides us with an opportunity to discuss the changes that this Commission has made and why I believe our decision furthers our core goals of competition, localism, and diversity.

Overview

On Monday, the Commission faced another historic decision affecting free speech where we needed to decide whether to be guided by facts or by fears. For literally years, this Commission has struggled to strike an appropriate balance in its media ownership rules. Many have argued that this proceeding is about the core of our democracy—and I agree. And nothing is more fundamental to democracy than following the rule of law as given to us by Congress and as interpreted by the courts. It is a heavy responsibility and I believe we have exercised it well.

I began my review of the FCC's media ownership rules with three inescapable realities: The Telecommunications Act of 1996, the judicial decisions interpreting it, and the United States Constitution.

First, the Act requires the Commission to conduct a review every 2 years to determine which of our broadcast ownership rules can be justified in the modern media world. We are already 5 months behind schedule for our 2002 biennial review and have therefore been unfaithful to the statute. I understand that some Members of Congress, this Committee, and the public have requested that we delay this proceeding, but I could not do that and also adhere to the statutory mandates.

Second, judicial decisions in this area have struck down every broadcast ownership rule the courts have reviewed since the 1996 Act. Each time the courts found the FCC had failed to justify the limits it continued to place on broadcast ownership. A decision to maintain all our rules in their current form would be contrary to the edict from the courts and would most likely be remanded, or indeed vacated, by the courts.

Third, the First Amendment to the Constitution protects the free speech rights of broadcasters. Any rules we retain must be a reasonable means to accomplish our public interest goals. The Federal court opinions specifically tell me that any restrictions we place on ownership must be based on concrete evidence—not on fear and speculation. Based on the record, I could not conclude that most of our previous rules would meet this standard.

Within these parameters, the decision we adopted on Monday tailors our ownership restrictions to the competitive realities of today's media marketplace, which includes not only more broadcast stations than ever before, but also cable operators, direct broadcast satellite providers, and other outlets. It also safeguards free over-the-air television by granting additional flexibility in response to the increased competition broadcasters are facing and the increased costs they are incurring to produce local news and to transition to the digital age. Moreover, by preserving several key ownership restrictions, our decision ensures that the public will continue to receive diverse and independent sources of local news and information. In contrast to previous Commission efforts, we have discharged our statutory obligation to provide a rigorous justification of these rules, thereby diminishing the prospect of our ownership restrictions being vacated by the court of appeals.

Statutory Duty

I am pleased that a majority of the Commission has fulfilled its statutory duty to modify outdated rules where marketplace developments have rendered them no longer "necessary in the public interest." Congress instructed the Commission to determine every 2 years whether our ownership restrictions remain "necessary in the public interest" in light of the competitive developments. Section 202(h) accordingly requires the Commission to determine whether each of our broadcast ownership rules could, in essence, be readopted on the ground that it serves the public interest. The courts interpreting Section 202(h), though, have made clear the statute carries with it a presumption in favor of repealing or modifying our ownership rules. Thus, if we do not affirmatively justify the retention of each rule, it will be eliminated. Furthermore, under the First Amendment, any restrictions we impose on the speech rights of broadcasters must be a reasonable means of promoting the public interest in a diverse and competitive media. In short, we must be able to demonstrate that our existing rules are reasonably necessary to promote competition, localism, and diversity or we must modify or eliminate those rules.

In conducting this analysis, the Commission compiled a record of unprecedented breadth and depth. The record includes hundreds of thousands of comments, 12 independent studies, and testimony from a number of broadcast ownership hearings. We provided adequate notice of the rules under review at a level of specificity that is consistent with the scores of other NPRMs we have issued in other contexts in recent years. I am confident that we have fully complied with the Administrative Procedure Act. And I am satisfied that we had the information and the input we needed to make a sound, judicially sustainable decision that will benefit the public interest.

Timing

Despite concerns that have been expressed, the path that led to Monday's decision was anything but a rush to judgment. The FCC initiated a review of the newspaper/broadcast cross-ownership rule and the local radio ownership rule in Fall of 2001. We were also required to respond to court remands of the local television ownership rule (adopted in 1999) and the national television cap (adopted in 2000). Those decisions were made 3 to 4 years ago and the NPRMs in these cases were issued in 1996 and 1998—*five to seven years ago.* The Commission thus has had, for the most part, between 18 months and 7 years to craft legally sustainable media ownership rules. While some would prefer to continue debating the issues in this 2002 biennial review, it is almost time to begin the 2004 biennial review. The issues before us are

difficult and complex, but our task would not have become any easier a week from now, a month from now, or even a year from now.

Broadcast Ownership Rules

Based on my review of the record, I am persuaded that several ownership limitations—in their current form or with some modifications—remain "necessary in the public interest" to preserve competition, localism and diversity. These rules thus met the legal standard demanded by Congress and the courts. Rules that did not meet this standard were not retained. Overall, our restrictions are grounded in actual evidence of harm, as required by the courts, not in merely hypothetical fears.

First, in the process of retaining our current limits on ownership of radio stations, we have tightened our definition of radio markets to ensure that it more accurately reflects the level of competition in these markets. Second, our television ownership rules continue to maintain the prohibition of mergers among any of the top four networks. Third, for such other matters as restrictions on local television ownership, the national television cap, and our cross-ownership rules, we have preserved structural limitations in revised forms. We have modified these restrictions because, not only do the former rules fail to promote competition, localism and diversity, but they may actually be *harming* these goals. For example, the record demonstrates that combinations of two television stations actually produce more local news. The record also demonstrates that newspaper-owned television stations provide more news and public affairs programming and receive more industry awards for such programming than unaffiliated stations. If we kept our existing rules unchanged, we would artificially restrict such benefits to local communities with no countervailing advantages.

While the public can benefit from some combinations, I strongly believe that the Commission must continue to impose prophylactic rules to ensure that the public receives a range of independent and competitive sources of local news and information in each market. The changes we made to our local television ownership rule will allow common ownership of no more than two television stations in markets with 17 or fewer television stations, and no more than three television stations in markets with 18 or more television stations (thereby ensuring a *minimum* of six distinct owners in many markets). Moreover, media companies may not own more than one of the top four stations in a market. The changes we are making to the newspaper/broadcast and radio/television cross-ownership rules restrict any such combination in all markets with three or fewer television stations, and allow for limited combinations in mid-sized markets. Our new cross-media limits recognize that broadcast television and radio and newspapers continue to be the primary sources of local news and information, and the rules restrict ownership accordingly.

With respect to the national television cap, the record in this case supported raising it to 45 percent. I believe this level will preserve the affiliate/network relationship and help ensure that television programming reflects the tastes and values of local communities. Allowing networks to increase their reach to 45 percent of the national audience, moreover, compared to 35 percent or proposals of 40 percent, translates into an increase of their presence in only a handful of markets.[1]

Despite the significant degree of structural regulation that we are retaining, I realize that some people will oppose our decision on the ground that the four major networks air the programming that is chosen by approximately 75 percent of viewers during prime time. To me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other pipelines into the home. This means that Americans are watching these providers because they prefer their content, not because they lack alternatives.

New Initiatives

The defining characteristic our biennial review decision is balance. We have undertaken affirmative steps to retain limits on ownership where they can be shown by actual evidence to promote competition, localism, and diversity. In the process of reaching this balance, we have also taken some additional steps.

First, I was concerned that allowing an entity to own more than one television station in a market could decrease the amount of children's educational and informational programming available to families in those communities. I did not want to see the amount and diversity of such programming diminished if stations that are commonly owned in the same market simply re-run the same shows on each

[1] Moreover, the percentage of commercial stations that the networks own is very small: CBS owns 2.9 percent; Fox, 2.8 percent, NBC, 2.2 percent, and ABC, 0.8 percent. Even if these companies increased their national reach to 45 percent, these percentages will only increase modestly.

station. Accordingly, I was pleased that we clarified in the order that commonly owned stations must air distinct children's programming to comply with our rules.

Second, our decision also leads the Commission down a path of providing more opportunities for small businesses, many of which are minority- and woman-owned businesses. The order restricts transfers of most existing combinations that fall out of compliance with our new rules unless the purchaser is a small broadcaster. In doing so, we are creating new opportunities for participation in broadcasting without threatening diversity or competition in these markets.

Third, I also am pleased that, as part of this decision, we decided to issue a Further Notice of Proposed Rulemaking to explore opportunities to advance ownership by minorities and women in broadcasting. Furthermore, I commend Chairman Powell on his formation of a Federal Advisory Committee to assist the agency in creating new opportunities for minorities and women in the communications sector.

Conclusion

It goes without saying that *none* of us wants to see media ownership concentrated in the hands of a few. While reasonable minds can differ about which particular restrictions might best promote this goal—national ownership caps that vary by only 5 percentage points, a minimum of six versus eight owners of local television stations in a market, and so forth—we should recognize that these are in fact issues on which reasonable people may disagree. For me, given the rules the Commission adopted Monday, the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers' homes, it is simply not possible to monopolize the flow of information in today's world.

The net result of our Order is *balance*: We have preserved core values by maintaining safeguards to protect against undue concentration, we have altered rules as necessary to respond to the dramatic changes that have occurred in the marketplace since the adoption of our media ownership rules many years ago, and we have provided a rigorous justification with an exhaustive study based on the record. Sometimes the facts have led us to strengthen former restrictions; sometimes they have led us to relax them in part. But in all cases our decisions were based on facts rather than fears. That is what the Communications Act requires, that is what the courts require, and that is what the First Amendment requires.

The CHAIRMAN. Thank you.

Commissioner Copps?

STATEMENT OF HON. MICHAEL J. COPPS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Dr. COPPS. Mr. Chairman, Senator Hollings, Members of the Committee, it's always an honor for me to return to the nurturing womb of the Russell Senate Office Building where I spent so many formative and happy years working for my valiant mentor and friend, Senator Hollings. Thank you for inviting us to be here today. Thank you, Mr. Chairman, for the concern and the leadership you have shown on the main issue before the Committee today, media concentration.

Eight days ago, I participated in one of the most unique and inspiring events of all my years in Washington. Representatives of more than two-dozen organizations came to talk with Commissioner Adelstein and me, about their concerns regarding the media proceeding, which was then racing toward its culmination. Imagine seeing the National Organization for Women, the Parents Television Council, Common Cause, the Family Research Council, the Conference of Catholic Bishops, plus many, many more, bins and bins of postcards from the National Rifle Association were on tables behind us, and tens of thousands of other petitions were presented at that meeting. The people who came were from the political left and the political right, Republican and Democrat, rural and urban, young and old, North and South, creative artists, businessmen, women, labor organizations, educators, parents concerned about in-

decency and excessive violence on the airwaves, journalists, and civil-rights groups.

My friend, Brent Bozell, of the Parents Television Council, looking around the room, had perhaps the best line of the day when he observed, "When all of us are united on an issue, then one of two things has happened. Either the earth has spun off its access and we have all lost our minds"——

[Laughter.]

Dr. COPPS.—"or there is universal support for a concept." He and I both understood immediately that it was the concept.

On Monday, I strongly dissented to the decision that was taken at the FCC. I dissented on grounds of substance. I dissented on grounds of process. I dissented because I believe the Commission's actions empower too few media giants with unacceptable levels of influence over the ideas and information upon which our society and our democracy depend.

I believe we are surrendering to them enhanced gatekeeper control over the civil dialogue of our country, more content control over our music, entertainment, and information, and veto power over the majority of what our families watch, hear, and read.

I believe our approach was flawed. We should have begun by examining the law. What does the law tell us? The Communications Act tells us to use our rules to promote localism, competition, diversity. It reminds us that the airwaves belong to the American people, and that no broadcast station, no company, no single individual owns an airwave in the United States of America. The airwaves belong to all of the people.

The law tells us that the last time Congress legislated on this topic—and keep in mind this was only 7 years ago now; not in the 1940s or the 1960s or sometime back in the medieval past. It was in 1996. And Congress thought then that restrictions on how large a single media corporation could get and how much power one company could amass were still important and still necessary.

The Supreme Court has upheld media protections, stating that, quote, "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail rather than to countenance monopolization of that market, whether it be by the government or a private licensee," end quote.

Speaking of jurisprudence, I'm often reminded of Judge Learned Hand's admonition when he said, "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country." Those words come down through the years with shining clarity and continuing relevance.

Remember also that court decisions since then have kept open the way, not only for us to keep, but even to strengthen most of our ownership limits, provided that we justify them with deeper analysis and better data.

I wanted us to look more deeply at the world of experience, what practical real-world lessons could we draw from the massive radio consolidation that followed 1996? What does it mean that in 2003 we have 34 percent fewer radio-station owners than we had in 1996? How much has diversity of programming suffered? Did more homogenized music and standardized programming get played, crowding out local and regional artists and performers? How wide-

spread were local newsroom cutbacks in the wake of station takeovers?

I wanted us to seek out the counsel and wisdom of the American people, believing, as I do, that the Commission has a serious public-interest obligation to reach out and inform the American people when it is dealing with matters like these, not through a Federal register notice read mostly by Washington insiders, but through public outreach that can be heard by all Americans.

And in the end, I wanted these proposed rules published and circulated, with 60 or 90 days, or some period of time, at least, for public comment. It was not to be. Commissioners received the item on the last day possible if we were to vote on June 2, and the public received it not at all. Indeed, the actual text of the final rules didn't come into my office until late last week.

I believe that the animating spirit of a notice-and-comment procedure is to make sure our citizens know as much as possible about the specifics of what is being proposed. It makes for better laws. It makes for better democracy. After all, even this independent agency is part of a democratic system of government. And when there is such an overwhelming response on the part of the American people and from their representatives in Congress assembled, we ought to have taken notice, we ought to have taken action. This is not a business-as-usual affair.

I also happen to believe that putting the proposed rules out for comment would have enhanced their prospects for successful scrutiny by the courts. Wouldn't we be better able to defend, say, the new 45-percent cap if we subjected it to some analysis and comments, so we could tell the court we had consulted the real world? Instead, we open ourselves to the argument that 45 percent might just be an arbitrary Commission number. I, frankly, doubt the courts are going to be impressed.

And I agree with what Senator McCain said at the outset, even an expert agency can't predict all the consequences of an action like this. I am still reading the papers and the comments every morning to try to ascertain the thoughts of groups who are taking issue with one facet or another of this agreement, because there's no way that we can do all of that.

Even with incomplete information, the public reaction against the proposed changes has been unlike anything the FCC has ever experienced, as Commissioner Adelstein noted. Over three-quarters of a million comments we have received, 99 percent, 99.9 percent of them saying, "Think again."

I believe the Commission's majority chose radical deregulation 2 days ago. Perhaps not quite so radical as originally intended a year ago, before Americans found out what was going on and began to speak out, but radical, nevertheless.

This decision allows a corporation to control three television stations in a single city. Why does any company need to control three television stations in any city?

The decision allows the giant media companies to buy up the remaining local newspaper and exert massive influence over a community by wielding three television stations, eight radio stations, the cable operator, plus the already monopolistic newspaper.

The decision further allows the already massive television networks to buy up even more local TV stations so that they could control up to an unbelievable 90 percent of the national television audience.

This is not localism, diversity, and competition. It is centralization, uniformity, and oligopoly, or worse.

The vaunted 500-channel universe of cable TV is not going to save us. Ninety percent of the top cable channels are owned by the same giants that own the TV networks and the cable goliaths. Nor is the Internet going to be our salvation, given the track that it's presently on. The 20 top Internet news sources are controlled by the very same media giants who control radio, TV, newspapers, and cable.

Some would have us believe that this was merely an ordinary examination of our rules that we conduct every 2 years. Let's not——

The CHAIRMAN. Commissioner Copps, you are exceeding my generous offer.

Dr. COPPS. OK. Can I have a minute and a half to finish up?

The CHAIRMAN. That would be fine.

Dr. COPPS. OK. This was, I think, the granddaddy of all reviews. It sets the direction for how the next review is going to go.

I did not carry the Commission vote on Monday. Was I disappointed? Of course I was. Am I discouraged? No, I am not. I am encouraged. I am encouraged that this Committee is following up so quickly with urgent oversight of Monday's vote. I am encouraged by the increased attention that this issue is receiving throughout the Congress. I'm encouraged that judicial avenues of redress remain open, even administrative redress through reconsideration petitions at the Commission, although I'm not betting my house on this latter one. But I do hope my colleagues will listen anew in the weeks and months ahead.

Finally, the people understand this issue, because it goes to the values and virtues of democracy. It goes beyond statistics about the boundaries of radio markets or the formulas of diversity indexes or the precise mix of properties. It goes to protecting freedom and openness of our media, diversity of entertainment and information and ownership and viewpoint, and it goes to keeping as much of this local as we possibly can.

What animates the people's concern is clear. These citizens want us to settle this issue of who will control our media and for what purposes, now. And they want to resolve it in favor of airwaves of, by, and for the people.

Mr. Chairman, Senator Hollings, Members of the Committee, I look forward to working with you to make that happen.

[The prepared statement of Commissioner Copps follows:]

PREPARED STATEMENT OF HON. MICHAEL J. COPPS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman, Senator Hollings, Members of the Committee, I am honored to appear before you today and to participate in this discussion of the most important issue before the Commission this year—media concentration. So much rides on the outcome of this issue and, in light of the Commission's action Monday, dealing with it as soon as possible becomes critical. I look forward to our discussion and to receiving the guidance of the Committee. In these opening remarks, I will limit myself

to discussing Monday's decision to dismantle most of our media concentration protections.

I strongly dissented to this decision. I dissented on grounds of substance. I dissented on grounds of process. I dissented because I believe the Commission's actions empower America's new Media Elite with unacceptable levels of influence over the ideas and information upon which our society and our democracy so heavily depend.

We *are* at a crossroads—for television, radio and newspapers and for the American people. The decision the FCC made on Monday will recast our entire media landscape for years to come. At issue is whether a few corporations will be ceded enhanced gatekeeper control over the civil dialogue of our country; more content control over our music, entertainment and information; and veto power over the majority of what our families watch, hear and read.

Two very divergent paths beckoned us.

Down one road is a reaffirmation of America's commitment to local control of our media, diversity in news and editorial viewpoint, and the importance of competition. This path implores us not to abandon core values going to the heart of what the media mean in our country. On this path we reaffirm that FCC licensees have been given very special privileges and that they have very special responsibilities to serve the public interest.

Down the other road is more media control by ever fewer corporate giants. This path surrenders to a handful of corporations awesome powers over our news, information and entertainment. On this path we endanger time-honored safeguards and time-proven values that have strengthened the country as well as the media.

So the stakes are high—higher than they have been for any decision the five people sitting before you today have ever made at this Commission. How should we have decided which path to choose?

We should have begun by examining the law. What does the law tell us? The Communications Act tells us to use our rules to promote localism, diversity and competition. It reminds us that the airwaves belong to the American people, and that no broadcast station, no company, no single individual owns an airwave in America. The airwaves belong to all the people. The law tells us that the last time Congress legislated on this topic—and keep in mind this was only 7 years ago, not in the 1940s or the 1960s, but in 1996—it thought that restrictions on how large a single media corporation could get and how much power one company could amass were important and necessary. And the Supreme Court has upheld media protections, stating that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Speaking of jurisprudence, I am often reminded of Judge Learned Hand's admonition that "The hand that rules the press, the radio, the screen, and the far-spread magazine, rules the country." Those words come down through the years with shining clarity and continuing relevance.

We should then have looked deeply at the world of experience. What practical, real world experience do we have to guide us? Radio deregulation gives us powerful and relevant lessons. When Congress and the Commission removed radio concentration protections, we experienced massive, and largely unforeseen, consolidation. We saw a 34 percent reduction in the number of radio station owners. Diversity of programming suffered. Homogenized music and standardized programming crowded out local and regional talent. Creative local artists found it evermore difficult to obtain play time. Editorial opinion polarized. Competition in many towns became nonexistent as a few companies bought up virtually every station in the market. This experience should *terrify* us as we consider visiting upon television and newspapers what we have inflicted upon radio. "Clear Channelization" of the rest of the American media will harm our country.

We should, finally, have sought out the counsel and wisdom of the American people. Commissioner Adelstein and I have attended public hearings across the country with conservatives and liberals, broadcasters and creative artists, concerned parents and civil rights activists, church leaders and educators. Our Commission has seen close to three quarters of a million people register their views—more than for any proceeding in Commission history. And in a nation that can be deeply divided on important issues, these citizens are uniquely unanimous on the question of whether this Commission should allow further media concentration. They are *screaming* that we should protect local broadcasting, diversity of programming and opinion, and the ability to compete with the huge companies. We should heed their conservatism—their urgent call to refrain from abandoning time-honored protections when so much is at stake and so much is unknown about the consequences of what we are doing here today.

The majority instead chose radical deregulation—perhaps not quite so radical as originally intended a year ago before Americans found out what was going on and began to speak out—but radical nevertheless. This decision allows a corporation to control three television stations in a single city. *Why does any company need to control three television stations anywhere?* The decision allows the giant media companies to buy up the remaining local newspaper and exert massive influence over a community by wielding three TV stations, eight radio stations, the cable operator, plus the already monopolistic newspaper. The decision further allows the already massive television networks to buy up even more local TV stations, so that they could control up to an unbelievable 90 percent of the national television audience. Where are the blessings of localism, diversity and competition here? *I see centralization, not localism; I see uniformity, not diversity; I see monopoly and oligopoly, not competition.*

Will the vaunted 500-channel universe of cable TV save us? Well, 90 percent of the top cable channels are owned by the same giants that own the TV networks and the cable systems. More channels are great. But when they're all owned by the same people, cable doesn't advance localism, editorial diversity or competition. And those who believe the Internet alone will save us from this fate should realize that the dominating Internet news sources are controlled by the same media giants who control radio, TV, newspapers and cable.

Some would have us believe that this was merely an ordinary examination of our rules that we conduct every 2 years. Let's not kid ourselves. This was the granddaddy of all reviews. It sets the direction for how the next review will get done and for how the media will look for many years to come. I have seen the concern, the deep feeling and outright alarm on the faces of people who have come out to talk to Commissioner Adelstein and me all across this country. Are they emotional? You bet. And I think they are going to stay that way until we get this right.

Why did the Commission get this so wrong? Good, sustainable rules are the result of an open administrative process and a serious attempt to gather all the relevant facts. Bad rules and legal vulnerability result from an opaque regulatory process and inadequate data. Unfortunately, today's rules fall into the latter camp. This proceeding has been run as a classic inside-the-Beltway process with too little outreach from the Commission and too little attention paid to the public. This is the way the Commission usually does business, we are told. Well, I submit this is too important to be treated on a business-as-usual basis. So Commissioner Adelstein and I traveled across the country to attend as many hearings and forums as we could.

I am also troubled that the Commission refused to publicly disclose the rules before voting on them. What possible harm can come from transparency? How can telling Congress and the public what we plan to do possibly be bad? Isn't the animating spirit of our "notice and comment" procedure to make sure our people know as much as possible about the specifics of what is being proposed?

Even with incomplete information, the public reaction against the proposed changes has been unlike anything the FCC has ever experienced. Of the nearly three quarters of a million comments we have received, nearly all oppose increased media consolidation—over 99.9 percent.

We've heard bipartisan concern from more than 150 Members of Congress, including a majority of this Committee, as well as the Congressional Black Caucus, the Congressional Hispanic Caucus and the Congressional Asian Pacific American Caucus, asking us to slow down and put these proposals out for public comment before we vote.

Dozens of organizations have weighed in with their concerns about media concentration. Among others, we have heard from Children Now, the Writers Guild of America, the Parents Television Council, the Communications Workers of America, AFTRA. the National Association of Hispanic Journalists, the National Association of Black Journalists, the Conference of Catholic Bishops, the Center for the Creative Community, Common Cause, the American Civil Liberties Union, the National Rifle Association, the American Civil Liberties Union, the National Organization for Women, the Family Research Council, the National Association of Black Owned Broadcasters, Rainbow Push, the Media Access Project, Consumers Union, the Consumer Federation of America, Move On, the Center for Digital Democracy, United Church of Christ, the Minority and Media Telecommunications Council, the Leadership Conference on Civil Rights, and many, many more across a broad political and geographic spectrum. City councils across this country in such places as Chicago, Seattle, Philadelphia, San Francisco, Atlanta, and Buffalo, as well as a whole state—Vermont—have gone on record against media concentration. Note, please, that several of these are cities where Big Media would have us believe that all is well with the consolidation they have introduced.

As Brent Bozell of the Parents Television Council so aptly put it, "When all of us are united on an issue, then one of two things has happened. Either the Earth has spun off its axis and we have all lost our minds or there is universal support for a concept." Well, it's the concept—a transcending, nationwide concept.

The FCC is not, of course, a public opinion survey agency. Nor should we make our decisions by weighing the letters, cards and e-mails "for" and the letters, cards and e-mails "against" and awarding the victory to the side that tips the scale. But even this independent agency is part of our democratic system of government. And when there is such an overwhelming response on the part of the American people and their representatives in Congress assembled, we ought to take notice. Here the right call is to take these proposals, put them out for comment and then—only then—call the vote. The spirit underlying the "notice and comment" procedure of independent agencies is that important proposed changes need to be seen and vetted before they are voted. We haven't been true to that spirit.

And what did we vote on? The majority allows TV networks to control up to 45 percent of the national audience—up to 90 percent once the strange decision to keep the UHF discount is considered. This decision is made without an adequate explanation for why 45 percent is not just an arbitrary number pulled out of a hat, and despite exhaustive and largely uncontested evidence supporting the existing cap by local broadcasters. I frankly doubt the courts will be impressed.

Merrill Lynch predicts this decision will result in a "Gold Rush" where the national networks buy up the remaining local broadcasters. The newspapers, on the morning after Monday's vote, were filled with speculation of what kinds of deals, mergers and swaps would now take place.

Some have argued that free over-the-air television is doomed unless we allow more concentration. The facts tell a different story. The networks not only reach consumers over the air through their own highly profitable stations and through affiliates, but they are also guaranteed carriage to cable subscribers. Indeed, they own much of cable. The networks command an enormous advertising premium, recently receiving a record $9.4 billion in up-front prime-time advertising for the next season. They have ownership in most of their profitable programs, and these are subsequently put into syndication or "repurposed"—the fancy new term for a re-run. This argument that the only way for the poor among us to continue receiving free, over-the-air television is to allow already powerful networks to grow more powerful would have been better left unsaid.

The majority inexplicably, maintains the UHF Discount. Under the UHF Discount, UHF TV stations are considered to reach only 50 percent of the households that VHF TV stations reach for purposes of determining whether a company has exceeded the national cap. Once upon a time, that was warranted. The Commission found that over-the-air UHF stations reached fewer viewers than VHF stations because their signals were different. But UHF and VHF stations reach an identical number of viewers when delivered over cable TV facilities. Today, over 85 percent of consumers receive their signal from cable and DBS. Program carriage requirements ensure that cable consumers receive the UHF signal, and DBS operators are required to carry all UHF stations in any market where they carry any local channel.

With 85 percent of Americans experiencing no difference between UHF and VHF stations, the discount no longer makes sense. Eliminating the entire discount may be warranted, but at a minimum it requires replacement with a number that reflects the reality of today's technology and marketplace.

The more you dig into this Order, the worse things get. The Order finds:

- That further concentration in already highly-concentrated markets is acceptable.
- That in a town with only four TV stations, it is acceptable for the top-rated television station to buy the only daily newspaper.
- That consolidation going forward will enhance news programming, despite considerable record evidence showing that increased concentration more often than not reduces quality news.

There are other things this order could have done. Commenters addressed the need to require more independent programming on our airwaves so that a few conglomerates do not act anti-competitively to control all of the creative entertainment that we see. These proposals should have received the serious attention they deserve in *this* decision. Over the past decade, we have witnessed a substantial increase in the amount of programming owned by the networks. In addition to the obvious loss of diversity, this has also entailed the loss of thousands of jobs, including creative artists, technicians and many, many others. Years ago, we had protections against

this kind of program ownership. Now that the majority is loosening outlet ownership rules, we ought to be looking at the consequences of having no limits on who owns the programming.

The Order could have addressed having a legitimate license renewal process to partially protect against the risks of further consolidation. The system has degenerated into one of basically post-card license renewal. Unless there is a major complaint pending against a station, its license is almost automatically renewed. A real, honest-to-goodness license renewal process, predicated on advancing the public interest, might do more for broadcasting than all these our other rules put together.

The Order could have considered the impact of media concentration on local broadcasters. As I have traveled across the country, I have spoken to local broadcasters. We should recognize and reaffirm the proud heritage of local broadcasters, most of who are strongly committed to serving the public interest. Unfortunately, consolidation has already meant that broadcasters are less and less captains of their own fate and more and more captives to Wall Street and Madison Avenue expectations. Increasing consolidation threatens their very survival. Media analysts expect that the only option for local broadcasters will now be to sell. They conclude that those that want to remain will face an extremely tough road. During our hearings, we heard from small broadcasters that had already been squeezed out of the market. These rule changes can only accelerate this trend. Yet, we have failed even to consider the impact on these independent broadcasters.

The Order could have analyzed the impact of media concentration on indecent and excessively violent programming. Some have suggested that there may be a link between increasing consolidation and increasing indecency on our airwaves. The Commission fails to address this issue in its analysis. It seems plausible that there is such a connection. I don't know the answer to this question. I do know this: we have no business voting until we take a serious look at the matter and amass at least a credible body of evidence.

The Order could have addressed the impact of media concentration on women and minority groups. We know that there are substantially fewer radio station owners today than there were before the rules were changed in 1996. People of color now make up less than 4 percent of radio and television owners. The National Association of Black Owned Broadcasters tells us that the number of minority owners of broadcast facilities has dropped by 14 percent since 1997.

We have not even attempted to understand what further consolidation means in terms of providing Hispanic Americans and African Americans and Asian-Pacific Americans and Native Americans and women and other groups the kinds of programs and access and viewpoint diversity and career opportunities and even advertising information about products and services that they need. America's strength is, after all, its diversity. *And our media need to reflect this diversity and to nourish it.*

Today's Order puts most such questions off into the future, with the exception of a curious plan to allow a small business, perhaps a minority firm, to buy a consolidated block of outlets from an incumbent who exceeds the limits. That would require deeper pockets than most such firms could afford. I would prefer to look for real opportunities for small entrepreneurs instead of encouraging them to buy large consolidated properties.

All this means that I am deeply saddened by the Commission's actions. Some have characterized the fight against this seemingly pre-ordained decision as Quixotic and destined to defeat. But I think, instead, that we'll look back at this 3–2 vote as a Pyrrhic victory.

This Commission's drive to loosen the rules and its reluctance to share its proposals with the people before we voted awoke a sleeping giant. American citizens are standing up in never-before-seen numbers to reclaim their airwaves and to call on those who are entrusted to use them to serve the public interest. In these times when many issues divide us, groups from right to left, Republicans and Democrats, concerned parents and creative artists, religious leaders, civil rights activists, and labor organizations have united to fight together on this issue. Senators and Congressmen from both parties and from all parts of the Country have called on the Commission to reconsider. The media concentration debate will never be the same. The obscurity of this issue that many have relied upon in the past, where only a few dozen inside-the-Beltway lobbyists understood the issue, is gone forever.

I didn't carry that Commission vote on Monday. Was I disappointed? Sure, of course. Am I discouraged? Not a bit. I am *encouraged*. Let me tell you why. I am encouraged that this Committee is following up so quickly with urgent oversight of Monday's vote. I am encouraged by the increased attention this issue is receiving throughout the Congress. I am encouraged that judicial avenues of redress remain open to our people, and even administrative redress through reconsideration peti-

tions at the Commission. I'm not putting all my bets on this latter one, but I do urge my colleagues to listen anew in the weeks and months ahead.

But far more than any of this, I am encouraged by my fellow citizens. After traveling almost the length and breadth of this land and talking with thousands of people of every size, stripe and persuasion, I am convinced that the vast majority of them want, deserve, and are increasingly demanding a renewed discussion of how their airwaves are being used and how to ensure that their public property is serving the public interest. I congratulate the hundreds of thousands of people who have attended hearings, filed comments, written letters to the editor, and contacted the Commission. They have made a difference. And I believe they will stay the course, looking to you, their representatives, to tackle what I am convinced is a great emerging grassroots issue. The people understand the issue, because it goes to values and virtues that are part of democracy's soul. It goes so far beyond statistics about the boundaries of radio markets, or the formulas behind diversity indexes, or the precise mix of properties one company can own in various sized media markets. It goes to protecting the freedom and openness of their media; encouraging diversity of entertainment, diversity of information, diversity of ownership and diversity of viewpoint; and keeping a large chunk of the media local, making it available to new entrants, preserving its competitiveness. Taking only a little license, I think the concern underlying all those cards, letters and e-mails that have come into the Commission can be summed up this way:

> *Dear Commissioner: I understand you're messing around with the people's airwaves. I don't think I like what you're doing. I know I don't like the way you're doing it. I'm a citizen and I expect to be told what your plans are before you do it. Get a grip. Straighten out your priorities. Thank you.*
>
> *Yours truly,*

What animates this concern is clear: these good citizens want us to settle this issue of who will control our media and for what purposes *now*, and they want to resolve it in favor of airwaves of, by and for the people. Mr. Chairman, Senator Hollings, Members of the Committee, I look forward to working with you to make it happen.

The CHAIRMAN. Thank you, Commissioner Copps.

Commissioner Martin?

STATEMENT OF HON. KEVIN J. MARTIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Commissioner MARTIN. Thank you, Mr. Chairman, Senator Hollings.

The CHAIRMAN. Could I just mention to the audience, we don't want any displays of approval or disapproval during the Committee hearings. We'd appreciate that. Thank you.

Commissioner Martin?

Commissioner MARTIN. Thank you, Mr. Chairman, Senator Hollings, for the invitation to be with you this morning. I look forward to listening to your comments and to answering any questions you may have. And I would like to reiterate at the start what I have said to this Committee before, that I recognize the Federal Communications Commission is a creature of Congress. As a member of the Commission, my job is to implement the laws you pass, and I appreciate the opportunity to hear directly from you about the concerns that you may have.

We've been asked this morning to focus our statements on our review of the broadcast-ownership rules. But before I begin, I think it's important to commend Chairman Powell for his leadership on these issues. The Chairman has long advocated his vision for a new media-ownership framework. Through his hard work and dedication, we were able to conclude the most comprehensive review of

our broadcast-ownership rules since the biennial review provision was enacted in 1996.

I also want to commend my Democratic colleagues, Commissioner Copps and Adelstein, for their tireless efforts to reach out to the public and encourage participation in this process. While I ultimately disagreed with them on the course of action the Commission should take, I appreciate and respect the contribution they have made to this debate.

This proceeding required each of us to make decisions that were as difficult as they were critical. The media touches almost every aspect of our lives. We are dependent on it for our news, our information, and our entertainment. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy. In fact, I agree with many of the concerns about consolidation and diversity that were expressed by my colleagues and by Members of this Committee.

I am also aware, however, that the FCC must respond to Congressional and judicial calls to update our rules for the 21st century. As you know, the 1996 act significantly changed the rules governing broadcast ownership. As a part of that process, the act created a continuing obligation to review and modify the Commission's media regulations.

In Section 202(h), the Congress instructed the Commission to review each of the Commission's media-ownership rules every 2 years. The Commission is under a legal mandate to review our broadcast-ownership rules and determine whether they are still necessary. If they are not necessary, we must repeal or modify the rules.

The courts have interpreted this provision as placing a substantial burden on the Commission. In fact, since 1996 the courts have repeatedly found the Commission's reasoning insufficient to justify retaining these media-ownership regulations. In these decisions, the D.C. Circuit concluded that the act placed an exceedingly demanding burden on the Commission.

Particularly after these court admonitions, I believe our statutory obligation requires that we review our rules in light of the current media landscape. The media marketplace is not stagnant. Factors such as rapidly improving technology and innovation have contributed to a media environment that is continually evolving, and this environment is considerably different from the one that existed when most of the broadcast-ownership rules were first adopted.

Indeed, we have seen a significant change from a world in which consumers received their news and their entertainment from a few television stations, a handful of radio stations, and a local newspaper. The number of broadcast networks has doubled. We now have cable networks that regularly rival the broadcast networks in audience share. Over 85 percent of households now receive their video programming via satellite or cable. Consumers today can choose from hundreds of television channels for their news and entertainment, often including a channel devoted entirely to local news. There are more radio stations and more weekly newspapers.

In addition, the growth of the Internet has dramatically changed how people receive and distribute information. The Internet represents a significant outlet for diverse views, as well as an impor-

tant source of news and information. As a result, people today have access to more information than at any other time in history.

The existing media-ownership rules were adopted to promote three principles: competition, localism, and diversity. Since that time, the media marketplace has changed significantly. Yet what has not changed is the importance of these core values. Fundamentally, our rules must still promote competition, localism, and diversity to nourish a vibrant media marketplace.

The order we adopted on Monday was our best attempt to respond to the court's admonitions and our Congressional mandate. In so doing, we recognize the availability of new media outlets, evaluated their impact on our core goals, and modified our rules as appropriate.

Again, thank you for inviting me to be here with you this morning. I look forward to answering your questions.

[The prepared statement of Commissioner Martin follows:]

PREPARED STATEMENT OF HON. KEVIN J. MARTIN, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION

Thank you for this invitation to be here with you this morning. I look forward to listening to your comments and to answering any questions you may have. And I reiterate what I have said in testimony to this Committee before: I recognize that the Federal Communications Commission is a creature of Congress. As a member of the Commission, my job is to implement the laws you pass, and I appreciate the opportunity to hear directly from you about your concerns.

While I understand this hearing is one of general oversight, we have been asked to focus our testimony on our recent Order concluding the 2002 biennial review of our broadcast ownership rules. First, I think it is important to commend Chairman Powell for his leadership on these issues. Chairman Powell has long advocated his vision for a new media ownership framework. Through his hard work and dedication, we were able to conclude on Monday the most comprehensive review of our broadcast ownership rules since the biennial review provision was enacted in 1996.

I also want to commend my Democratic colleagues, Commissioners Copps and Adelstein, for their tireless efforts in reaching out to the public, informing people of the issues, and encouraging participation in this process. While I ultimately disagreed with them on the course of action the Commission must take, I appreciate and deeply respect the contribution they made to this debate.

This proceeding required each of us to make decisions that were as difficult as they were critical. The media touches almost every aspect of our lives. We are dependent on it for our news, our information, and our entertainment. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy. In fact, I agreed with many of the concerns about consolidation and preservation of diversity that were expressed by my colleagues on the Commission and by Members of this Committee.

I am also aware, however, that the FCC must respond to congressional and judicial calls to update our rules for the 21st century. As you know, the Telecommunications Act of 1996 significantly changed the rules governing broadcast ownership. As part of that process, the 1996 Act created a continuing obligation to review and modify the Commission's media regulations. In section 202(h) of the Act, Congress instructed the Commission to review each of the Commission's media ownership rules every 2 years. Specifically, the statute states:

> § 202(h) Further Commission Review.—The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

In sum, the Commission is under a legal mandate to review our broadcast ownership rules and determine whether they are still necessary in today's marketplace. If they are not, we must repeal or modify the rules.

The courts have interpreted this provision as placing a substantial burden on the Commission. In fact, since 1996, the courts repeatedly have found the Commission's

reasoning insufficient to justify retaining its media ownership regulations. In these decisions, the D.C. Circuit concluded that section 202(h) places an exceedingly demanding burden on the Commission: "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules. . . . [T]he Commission may retain a rule only if it reasonably determines that the rule is 'necessary in the public interest.'" [1]

Particularly after the courts' specific admonitions, I believe our statutory obligation requires that we review our rules in light of the current media landscape. The media marketplace is not stagnant. Factors such as rapidly improving technology and innovation have contributed to a media environment that is continually evolving—and considerably different from the one when most of the broadcast ownership rules in which first adopted.

For instance, I recall having extremely limited choices on our family television set when I was growing up. There was no cable. There was no satellite. Even with our roof antenna, we received just five channels—the three major networks, one independent, and one public television station. Our national news was delivered to us by the three networks for one-half hour, straight from New York City, at the same time every evening. No CNN, FOX, MSNBC, or CNBC. Local news was broadcast by the local stations just once at 6 and once at 11. And at that time, news from 24 hour local cable channels was far off on the horizon. While my parents still live in the same house, they now have access to seven broadcast networks, hundreds of digital cable channels (including a local cable news channel), many more radio stations, and thousands of sites on the Internet.

Indeed, we have progressed far from a world in which consumers received their news and entertainment from 3 or 4 television stations, a handful of radio stations, and a local newspaper. The number of broadcast networks has doubled, and we now have cable networks that regularly rival the broadcast networks in audience share. Indeed, over 85 percent of households receive their video programming via satellite or cable. Consumers today can choose from hundreds of televisions stations for their news and entertainment, often including a channel devoted entirely to local news. There also are more radio stations and more local weekly newspapers. In addition, the growth and popularization of the Internet has dramatically changed how people receive and distribute information. The Internet represents a significant outlet for diverse views, as well as an important source of news and information to consumers. As a result, people today have access to more information than at any time in our history.

It is important to appreciate, however, that while the media landscape has changed significantly, the three principles our original rules were intended to promote—competition, localism, and diversity—remain critical. Fundamentally, I believe our rules must continue to promote competition, localism, and diversity to nourish a vibrant media marketplace that functions in the public interest.

The Order we adopted on Monday was our best attempt to respond to the courts' admonitions and our Congressional mandate by recognizing the availability of new media outlets, evaluating their impact on these core goals, and modifying our rules as appropriate.

The CHAIRMAN. Thank you very much.

Could I say to my colleagues, we appreciate, obviously, the very large participation of Members of the Committee. If it's agreeable, we will have a 6-minute period for questioning, and then we will have as many rounds as the Members desire to have. I will also hope that we could try to observe that 6 minutes. I know it's difficult, when you have questions for each member of the Commission, but so that everyone would have an opportunity to pose their questions, I hope we would observe that, and we will have additional rounds. I thank my colleagues.

I thank the Commissioners for being here today, and I appreciate not only the importance of your decision, but the enormous amount of interest and concern this issue has raised, because I think, in the view of all of us, some of the fundamental aspects of our democracy are at stake here.

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[1] *Fox Television Stations, Inc.* v. *FCC,* 280 F.3d 1027, 1048 (D.C. Cir. 2002).

Let me say that, from my standpoint—and I think I reflect the view of some of my colleagues—it's very difficult for us to know what the right standard is—25 percent, 35 percent, 45 percent? It's very difficult. And what's a large market and what's a small market, what's a medium-sized market?

We all are in agreement that too much concentration is unhealthy. At the same time, what is that level of concentration? And it is complicated by the fact that there's not only an issue of horizontal integration, but vertical integration. And vertical integration sometimes can be as dangerous as horizontal integration.

The miner's canary for this Committee was the hearing we had on Clear Channel that I had at the request of several of my colleagues, when we had a case, as occurred in Minot, North Dakota, where all six stations were owned—or six of the seven stations, whatever it is—were owned by one entity, and there was an emergency and there was nobody there—raised alarm. And then as we got into it, we found out that this same entity owned promotions, ticket sales, what was alleged to be a form of payola, which they have now abandoned, and various artists were arguing that they were being excluded from having their products on that network because of the fact that they weren't doing business with it. Those allegations were not substantiated, but they were raised by credible witnesses before this Committee.

So my question is, to the members of the Commission, one, do you believe that the Telecommunications Act allows you to re-regulate, as well as deregulate the media? And does that—and if you don't, does that law need to be changed?

My second question is, a couple of the Commissioners have said that these should be judged on a case-by-case basis. I don't think it's right—it's been raised several times—when one major entity owns three TV stations, eight radio stations, the cable station, the major newspaper, and the major Internet provider. Most people would say, "Hey, that's too much" in a small market, Great Falls, Montana, the cable station, TV station, the major newspaper, and many radio stations. But, again, it's very simple—very complicated. You don't know how much of the market it is, what—and so we're talking about everybody's in agreement, localization, competition, and diversification is our goal. The questions is how we get there.

So my questions to the Commissioners are, one, Does the law allow you to re-regulate, if you feel it is necessary to do so, as part of the mandated, by the Telecommunications Act, biennial review? And, two, would a case-by-case scrutiny of these various aspects of media consolidation, including the aspect of vertical integration as well as horizontal integration, be an effective way to—I have read that, but there seems to be some difference of opinion amongst the—Senator Stevens just pointed out the statute to me, but I—there seems to be some disagreement amongst the Commissioners, I am told, on that issue. Thank you.

We'll begin with you, Mr. Powell. And, if it's OK, we'll got Mr. Adelstein, Ms. Abernathy, Mr. Copps, and you last, since you're the youngest, Mr. Martin.

[Laughter.]

Chairman POWELL. Thank you, Mr. Chairman.

I think, from the text of the statute, it doesn't look like there is a limitation for regulating or deregulating. But I think that what we have come to be concerned about is the way that the court has interpreted the provision as having a deregulatory bias as a continuation of a deregulatory Congressional process. We have concerns that the court would interpret it as a floor from which you can—a ceiling from which you can come down, but not a floor to which you can come up. So I think that, as you stated at the outset, that's really the central question. We can wait and find out or the Congress can act to make that clear.

I would note, we did, arguably, strengthen the radio rule on maintaining the Congressional cap, so that question may be presented with respect to at least that provision. But I think the text doesn't speak to it one way or the other, but the court cases are where the worry lies.

As to case-by-case, I am normally a huge fan of case-by-case. I'm an antitrust attorney and often have argued vigorously that we ought to do things in a case-specific way. More and more mergers and transactions at the FCC, we have revitalized as a case-specific method. In spectrum, when we removed the spectrum cap, we set up a regime to review case by case.

The problem is, you still have to have standards. You still have to know what it is you're reviewing and what are you going to use to review it. And that's not as easy as it might seem.

And then, finally, the administrative burden must be considered. You could have many, many transactions taking much, much, much time to complete as a consequence of that process.

The CHAIRMAN. Mr. Adelstein?

Mr. ADELSTEIN. Mr. Chairman, in terms of whether or not we have the authority to re-regulate, the Sinclair Court did say that we could tighten the rules if it were in the public interest. But, as the Chairman noted, there is some lack of clarity in the court decisions about whether there is a deregulatory bias. And, therefore, I think it would be helpful if the Congress could provide some clarification here, as you indicated you maybe interested in doing, in your opening statement.

With regard to case-by-case, I think that it's very difficult, as you noted, to draw those lines and to say, "Is it 45 percent, 35 percent? Should 95 percent of the country let duopolies occur?" That's why I think case-by-case is such a useful approach. I think that—I was hoping to get my chairman on that, since he has such an antitrust background and such an interest in that approach. But the beauty of it is that you can set standards and then go case by case. You can look at individual markets. You can look at Great Falls and see what—or you can look at cities and see what kind of concentration already exists there, and based on the determination, according to broad rules of what the level of concentration is in a particular market, you could then apply that to an individual merger. This is something that could be done very easily.

You can have—administrative burden on the agency is something that the Chairman noted that's of concern. I would note that our statutory obligation is to the public interest, convenience, and necessity, and not the convenience of the Federal Communications Commission. If we are to pursue our statutory obligation and do

what's in the public interest and convenience, then we need to go through the effort necessary to evaluate these mergers on an individual basis to ensure that they are, in fact, in the public interest, and not shirk our statutory mandate because it is more convenient for the agency.

The CHAIRMAN. Ms. Abernathy?

Commissioner ABERNATHY. Thank you, Mr. Chairman.

Can we re-regulate? Probably, assuming we that we can surmount the statutory hurdle that shows a preference for deregulation. As the statute's been interpreted today, we're supposed to be looking at the minimum number of voices needed to promote diversity and competition and localism, not the most, or not what's nice, or not what we might like to see. That's the direction the statute takes us. We can probably re-regulate, however, if we pass that burden and show that we guessed wrong, that what we did actually hurt the public interest, and, therefore, we're going to head in the opposite direction.

With regard to case-by-case, fundamentally I think we're still there, in the sense that every merger that comes before us is inherently fact-specific and is put out in front of us for a review. There can still be petitions to deny filed. Parties can still come in with waiver applications to deal with some of the smaller market issues that arise where you may have only three stations in a market, and normally we will not allow consolidation; but if one of them is going under and does no news, and we think it might be in the public interest for an acquisition, we can consider that.

So it's fine-tuning, you know, whether you call it "case-by-case" or whether you call it the "review process" that takes place today anyway, by virtue of the fact that every single merger has to pass muster in front of the FCC, as far as serving the public interest.

The CHAIRMAN. Commissioner Copps?

Dr. COPPS. Yes, I believe we have both the legislative authorization and the judicial approval to re-regulate. Would I like to see additional clarity added? Sure, so we could avoid some of these debates and spend less time on this particular matter.

One of the reasons I object to what we did on Monday is that I think we have too much emphasis here on bright-light—bright-line rules and too little on the case-by-case. We are talking about diversity and encouraging diversity. There are examples where stations may have gone dark and communities be deprived of service, save for the fact that somebody took the station over. So consolidation has its benefits as well as its detriments. We have to balance that off.

And a final comment on what you said about vertical integration. That shouldn't have been part and parcel of this deliberation. We're loosening the horizontal controls here, or limitations that we had. Long ago, the financial syndication rules of vertical integration was gone, so there's precious little left. And we're putting an awfully big load on just these bright-line structural rules to serve the public interest and deliver the kind of media that the American people need to have.

Commissioner MARTIN. Senator, I think that Section 202(h) does provide us the ability to modify our rules, which would include making them more restrictive or, in that sense, re-regulating it.

But I think that it would be, obviously, helpful to clarify that, as others have talked about.

I'm not sure that it would provide us independent authority, without some other authority in the act, to adopt completely new rules or regulations. For example, limiting some of the other vertical-integration concerns that you've expressed or some of the other rules or regulations that some people would like us to impose. I think we might have to have other independent authority within the act to do that.

On the subject of case-by-case, every license or transaction still must be approved by the Commission and found to be in the public interest. I think that what we've attempted to do is try to provide some standards for those considerations.

Thank you.

The CHAIRMAN. Senator Hollings?

Senator HOLLINGS. Thank you very much, Mr. Chairman.

Commenting on the question about "too much," that's why we put in the record the holdings of the five giants. It's already too much, obviously. If you look at ten pages of holdings here of Viacom, and going right on down the list from not only the stations, but the publishing and the production of the programs, the radio, the TV, the cable, everything; similarly, ten pages more of news corporations—that's why we made that record.

With respect to the statute itself, the answer is yes, you can deregulate or you can re-regulate. We provided, in 1996—I'm not a telecommunications expert, but I'm intimate to the development of it over the last 36, going on 37, years now that I've been here—and you can ask Chairman Bliley and myself, we tried to maintain the 25-percent cap. The majority of the conference committee was for 25 percent. We knew it was working. But they already were in violation. And there was a small minority holding us up, and we wanted an overwhelming acceptance to this updating and deregulation of telecommunications. Otherwise—that's why we gave in to go to the 35 percent. Yes, we maintained a lot of—as Commissioner Abernathy says that all kind of—well, the amount of concerns—I've got a quote here—but, otherwise, I can tell you, we maintained a lot of deregulation, but we maintained the 35 percent.

And there is no question—I take exception one more time, and I'll show the record, and that's why I put it in, the FOX decision—that there is, until day before yesterday, a 35-percent cap. The FOX decision did not remove the cap. They removed the cap with respect to cable television, but not with respect to this ownership proposition.

Now, Commissioner Abernathy said that that was so much concern that—said "no issue has raised such concern," and then the "divergent views." I don't find a divergence. Honestly. I mean, I've been trying to find—I've been following the result of the Commission's ruling, and you can see, going down the list of media giants, hint that they might be expanding. Then a chance for big media to get even bigger. Then Merrill Lynch putting out, The Gold Rush Begins. "That's Merrill Lynch in the stock market. The creators of shows—shows' creators say television will suffer. And another headline—I could keep on going—" FCC pulverizing the public interest and feeding it to media barons. I looked for some affirmative

comment, and I found one letter, I think it was, from my friend, Secretary Don Evans, of Commerce, who knows oil and contributions.

[Laughter.]

Senator HOLLINGS. I found out that he, sadly, went along with the public. And the Congressional interest—the Congressional interest was 150 of us. We've been trying to get hearings.

Chairman Powell, where in the world do you find the grounds for a 45-percent cap? Where was the record built? I know you can get study—I've been a chairman, and I can tell the staff, "Find this for me and give me a report," and you can get consultants to find anything. But where did you find the public comment? You resisted public comment on the thing. You'd only agree—you come now and talk about all the hearings we had. Oh, no, you opposed there—you went to one in Richmond and you wouldn't give them the money, the minority there, to even hold the hearings. They had to go all over the country on a shoestring. You wouldn't even give them the 30-day extension. It's been a rather arbitrary thing from the get-go, since the first of the year when you said you'd made up your mind. Where did you get the support for 45 percent? Why wasn't it 40? Why wasn't it 50?

Chairman POWELL. Well, Senator, first of all, I never said that, at the beginning of the year, I had made up my mind. We used the record to make up our mind, and I continue to believe that there has been an extraordinary amount of public comment on this specific rule. But we will have to disagree on that.

The proposition starts with the fact that the record wouldn't defend 35 or 40. The record wouldn't defend 35 percent or 40, because our theory about whether that rule promoted localism was found deficient in the court, because it said there wasn't evidence on the record that supported the proposition that the cap was necessary to allow local affiliates to reject programming.

We set out to find if that record were able to be developed. One of the things we found is that, on the record, we couldn't demonstrate that the 35 percent, in fact, had that effect. Why? First of all, because the majority of the networks are nowhere near the 35 percent in the first place. Only two are, and they're over it. They're actually close to 40 percent. But when we looked at the relationship between networks and affiliates, what we found is even networks that were at 40 percent, those affiliated stations still had excess amounts of preemption available to them at the end of each year, which means that each year, even though they were allowed to preempt and use that authority to promote local programming, they, in fact, had not done that to the extent that they were permitted by their contracts.

So our belief was, we had a rule that we did not have a record for that would support 35. We believed the record wouldn't support 40, because there's already 40 existing in the market. But we did believe there was harm to protect against, that there was a network-affiliate relation, balance-of-power problem. So we believed that we wanted to provide a national cap limit. So we provided a modification, one of the only two choices Congress gives us, to modify or eliminate, and we modified it modestly, five more percent, from that that existed in the market and tried to argue that we be-

lieved that was a fair balance in order to maintain the balance of power.

Finally, we're going to use a lot of court cases these days, and I'm glad—you concede that I'm a decent lawyer. The court, in Sinclair, stated something very specific: Where issues involve elusive and not easily defined areas, such as broadcasting diversity in broadcasting, review is considerably more deferential than usual, according to broad leeway to the line-drawing determinations of the Federal Communications Commission.

Our believe was if we could strengthen the rationale and demonstrate, on the record, the benefits of the rule, that we could modify it and get deference on the line that we drew.

My time is up.

The CHAIRMAN. Senator Stevens has to leave. He'd like to make a brief comment.

STATEMENT OF HON. TED STEVENS,
U.S. SENATOR FROM ALASKA

Senator STEVENS. Mr. Chairman, I thank you, and Members. I wish to make a short statement myself.

I think we've got a strange situation caused by the Act, itself. It's my understanding that the Commission used 20 months to review, as required on a biennial basis. If the Commission and the staff is spending the majority of its time for 20 months out of every 24, it just doesn't make sense. I think that mandated review should be done less frequently.

But, beyond that, I think we should increase your flexibility in order to make exceptions, and spend some of this time you're currently spending reviewing every 20 months what you're mandated to do, to deal with the exceptions that are really the things that are brought to this table, as those people who are denied exceptions are—or their exceptions are not acted on within a reasonable period of time, they come to us for relief.

I think we should look at this Act, Mr. Chairman, and stretch out the time for this review and increase the flexibility of the Commission to deal with exceptions, and try to see if they can do the governance, instead of having all these things brought to us.

I appreciate your courtesy, and I congratulate you for this review, but I do think that we have to take a look at the 35 percent. Both Senators are right. The difficulty was we didn't put the 35 percent in the Act. We should have put it there, and we wouldn't have this problem today. I'm sure you've been getting the same e-mails as all of us have.

The difference, by the way, in terms of the number of contacts we've had, has the increased viability of technology. We're all getting more messages now.

So I'm not affected by the fact that we're overwhelmed with messages. I'm affected by the fact that we're overwhelmed with reviews instead of action within the regulations and the law, as we contemplate it.

Thank you very much.

The CHAIRMAN. Thank you.

In our adherence to fairness and balance, Senator Inouye entered before all Members had finished their opening comments. Senator Inouye, do you have any opening—any comment?

STATEMENT OF HON. DANIEL K. INOUYE,
U.S. SENATOR FROM HAWAII

Senator INOUYE. I thank you very much, Mr. Chairman. I now request that my statement be made part of the record.

The CHAIRMAN. Without objection.

[The prepared statement of Senator Inouye follows:]

PREPARED STATEMENT OF HON. DANIEL K. INOUYE, U.S. SENATOR FROM HAWAII

I want to thank Chairman McCain for holding today's hearing on media ownership. While I am pleased that the FCC Commissioners are before us this morning, I want to express my deep regret that this Committee did not have the opportunity to hear from the FCC before the final vote was taken on this monumental decision. I look forward to a candid discussion as you explain and defend Monday's decision, which I fear will do much to line the pockets of media conglomerates, but nothing to advance the public interest.

The FCC's decision to raise the national ownership cap is particularly troubling. Only after long debate and much consideration did Congress raise the cap from 25 percent to 35 percent in the 1996 Act. The national cap is essential to maintaining a balance of power between the national networks and the local affiliates, which underpins our unique system of broadcasting. We are the only nation with a local system of broadcasters charged with serving their diverse local communities. The FCC's own data show that affiliates provide higher quality news to their markets than network owned stations, and yet the new rule would allow networks to buy more stations across the country and effectively freeze out the entities that have served their local communities so well. Ted Turner recently stated that "[t]he climate after Monday's decision will encourage even more consolidation and be even more inhospitable to smaller businesses." Small local broadcasters and the citizens they serve are likely to fare the worst under this decision as they face the choice between selling their stations to large conglomerates or losing their affiliation and with it their livelihood.

The potential harm in raising the national ownership cap to 45 percent is exacerbated by the UHF discount, which discounts a company's actual ownership reach by 50 percent for its UHF stations compared with VHF stations. In reality, the FCC has created a national rule that allows the largest station owners to reach 90 percent of the country. The FCC's failure to address the UHF discount is inconsistent with the FCC's stated rationale for these rule changes. The FCC has stated that the media rules must be updated to reflect the modern media marketplace. Yet, the decision to retain the cap fails to account for the increase in cable and satellite penetration, which has all but eliminated the need for special treatment of UHF stations. The UHF discount needs to be addressed now, not after television broadcast stations transition from analog to digital service. The 35 percent national television cap preserves a delicate balance in the network/affiliate relationship, which is not contingent on whether the broadcast is done in digital or analog.

Broadcasters were made trustees of the public spectrum, which was given to them for free. With this privilege came the responsibility to fulfill the public interest and to serve their local communities. The FCC also was given a responsibility to implement and enforce rules that further the public interest. Instead, this Commission has granted waivers allowing networks to exceed the national ownership cap and then altered the rule validating this behavior. I am a proud co-sponsor of legislation introduced by Senator Hollings and Stevens among others on this Committee that would permanently set the national cap at 35 percent. The bipartisan support for this legislation demonstrates that this is not a partisan issue but an issue concerning all Americans.

Hundreds of thousands of Americans from diverse backgrounds opposed further relaxation of the rules. I and many of my colleagues asked the FCC to delay its decision so that there would be an opportunity for meaningful public comment on any proposed rule changes. Without a moment's delay, the FCC has now initiated the "gold rush" expectantly predicted by Merrill Lynch for wealthy media companies at the expense of the American public.

I urge the Committee to take up this legislation to re-implement the 35 percent cap at the earliest possible time. Thank you Mr. Chairman.

Senator INOUYE. Mr. Chairman, the State of Hawaii has a very unique situation, with two newspapers of any consequence, and one person can buy that paper, one of them. We have five stations, TV stations, that control about half of the air time, one cable station that handles about half of the other air time. And, as a result, one person can come in, buy one paper, buy the cable station, buy another top-four station, and he controls Hawaii. Now, that's the way I look at it.

Don't you think this is a bit too much concentration for one state? I'm not speaking of a city. I'm speaking of a state.

Chairman POWELL. It could be. As a market of five, if you add the possibility of purchasing some of the properties you listed, like the cable company, that transaction would have to come to the Commission for a special public-interest review and would only be approved if it was found affirmatively in the public interest.

So I'd like to emphasize there are still case-specific reviews made possible. In some ways, the rules take certain of those—that discretion off the table, but some of the combinations in your hypothetical would, in fact, have to require a specific public-interest review. And so if I saw the actual transaction, I might agree with you, or I might not. But I would need to review the specifics in a case-specific format.

Senator INOUYE. So your rules permit that, won't it?

Chairman POWELL. The rules don't automatically permit, for example, a cable company to own another company. There's not a rule that says you never can, but they don't have a rule that guarantees them safe harbor, either. So any transaction of that sort would require a public-interest review by the Commission.

Senator INOUYE. Isn't it safe to assume that—reading the transcript of your hearings and the way it was carried out, that it would be approved?

Chairman POWELL. I wouldn't say that at all. I happen to have led a Commission that has been the first Commission in 60 years to block a major public-interest transfer, in the case of Echostar. I happen to believe very strongly if you're going to do case-by-case, it only works if you have the courage to shoot. I think at least this Commission has demonstrated that courage, not only in that merger, but as being the only Commission that has blocked radio mergers in 50 years.

Senator INOUYE. So you feel that Hawaii can have two voices, instead of just one.

Thank you very much.

The CHAIRMAN. Senator Burns?

Senator BURNS. Thank you, Mr. Chairman.

I guess my only concern in this thing is—I think I want to make a point that hasn't been made around this Committee this morning, as far as the increasing of this cap.

Manhattan, New York, is a little bit different than Manhattan, Montana. Now, the way I see—Commissioner Adelstein, the way this thing's run, I think Great Falls is not a good example of what we're concerned about.

I would say this. I was in the broadcast business. I was also in the network business. And I have a fairly good feel of what happens when a rule like this is changed or we see an avenue of more concentration, and that concerns me.

We can talk about the First Amendment and democracy all you want to. This is market muscle. This is a small operator trying to operate in a rural state, trying to expand and grow his business and cannot do it to amass or in capital formation to even take care of the mandatory rules and regulations that's being put on the broadcast business now through the introduction of new technologies. That concerns me a lot. We said we've seen a growth in voices and a growth in outlets. We have seen that under present rules. So my first inclination would say, "Why change?"

But there's also another growing factor that's in the background of this. We've seen an alarming reduction in the number of independent production companies, which is down 85 percent, over the last 10 years, to somewhere between 15 and 20 percent today. This trend occurred over the same period that we permitted an increase in ownership cap from 25 to 35 percent, and that being done under the Telco Act.

So I'm concerned about programming and production companies in that concern, and I'm afraid if we go to more concentration, that this number, too, will continue to decrease.

We brought it out in the Chairman's hearing on radio ownership. We found one owner that not only owned a lot of radio stations, but also in the marketing division of entertainment, ticket sales, arenas, but he also owned one other thing that was very important. They also owned the only outdoor advertising outlet that they had in some of those markets. And I think we tend to forget about that.

I'd like some comment under this, that if the present rules—if we've increased the voices and increased the outlets, when we see a decrease in programming and production work, why that shouldn't concern us. And I will tell you, everybody's missed the market around here. I've gone down the road and sold advertising. I've sold air time, as much as probably anybody in this room. And I will tell you, market muscle, when you're trying to survive in a small market, is darn tough, because they influence agencies and agency buyers to the point where they can freeze you out, and you cannot amass capital for the transition to new technologies.

I'd just like a comment on that, especially on the programming side, because programming is the voice. If I can get a comment on that.

Other than that, I've got 17 other questions.

[Laughter.]

Mr. ADELSTEIN. I'd like to respond on the Great Falls issue, because I come from a city almost exactly the same size, of Rapid City, South Dakota, about 55,000, ourselves. And our experience has been, for example, that we have one of the great broadcasters, one of the old-line broadcasters named Bill Duhamel, and he is a classic. He's a good citizen, he's a good member of the community. He cares about it. He lives there. I went to school with his kids. And we grew up together. And he really is committed, just as the broadcasters always have been, to trying to cover what happens in the local community.

And in rural areas like that, I'm afraid if we lift this 35-percent cap, he's going to come under enormous pressure to sell out. He's already having difficulty, for a lot of the reasons you said. And the massive muscle that you indicated that will be brought to bear upon him and on other small broadcasters, community-based broadcasters, people who live in the community, people who care about their community, they're going to get squeezed out. Those local voices are going to get squeezed out, and they're going to be replaced by national media conglomerates that are going to pump in the programming through the same type of homogenized, lowest-common-denominator programming to the stations all over the country, and we're going to lose that old-line broadcaster. We're going to lose that sense of commitment to the community that has so long characterized everything that we hold sacred about broadcasting.

Senator BURNS. Chairman Powell?

Chairman POWELL. Senator, one of the things I think will be important to do today is to try to deal with some of the facts that the record reveals that we had to rely on. For example, the evidence submitted in the record shows, with respect to your point about programming, that 26 different independent producers were responsible, in whole or in part, for two thirds, 59 out of 90 of the shows aired, during the prime time of the top-four broadcast networks during 2002/2003 season. Recent data indicates that there is a comparable number of separate producers for prime time in the 2003/2004 season. So I'm not entirely clear that I could concede that independent producers do not continue to provide a substantial amount of the programming available to citizens in prime time.

Second, with your question about local television markets and the cap, the 35-percent ownership cap, which is only a cap that says the potential audience you can speak to, not the number of stations—in fact, the number of stations that any of these networks owns, consistent with the rule, is less than 3 percent of the total stations in the United States. So I'm not sure what the "swallowing up" language is coming from. I think that's a far cry from swallowing up local stations in the United States.

But, more importantly, under your judgment of 25 percent or 35 percent, it didn't say where those networks might buy those stations. They're free to buy them in any market in the United States, no matter what the limit is. And, indeed, what we've seen among the networks, consistently, for decades now, is an interest in owning stations mostly in very large markets. Indeed, even under the existing 35-percent rule, most of the networks haven't even approached the limit, by any means, and they've been permitted to. So it's clear that in their self interest or in their strategies, "swallowing up" local stations all over the country just doesn't seem to be borne out by the record and the evidence.

Dr. COPPS. Senator Burns, can I make a quick comment? Among the many victims of this wrecking ball of media concentration—and there are many, many victims—are the small broadcasters. I could not agree with you more. I have talked to a lot of them over the course of the last year. I went out and talked to the Montana broadcasters. Their concern was loud and clear, that they cannot survive with rule changes like this.

A lot of these people are really still strongly motivated by a desire to do a good job and to serve the public interest and to do news when they can, and to do all these other wonderful things. But less and less, in the direction we are headed, are they captains of their own fate. And more and more are they driven by this big, you know, consolidated bottom-line expectations of the analysts and all. And that's where we've got to get a hand on all of this. And I think these media consolidation rules are one way to do it, but I don't think we can put all of the burden on them.

We've got to get back to looking at what companies are going to get in return for—or what the public is going to get in return for allowing this consolidation. Where are the public-interest expectations? Why don't we have a license-renewal process? Why don't we go back to being explicit about what companies are expected to do in return for using the people's spectrum?

This is just an enormous problem, and I'm delighted we're having this hearing today. I hope it's first of many, because we need to get in and wrap our hands around this once and for all.

Chairman POWELL. Senator, do you want me to yield to the next——

The CHAIRMAN. Go ahead.

Chairman POWELL. I think there's an extremely important point that I want to bring to the attention of the Committee, because I think it does present an important question for the country and the public that needs to be understood.

The public-interest obligations of the use of the free airwaves or the public's property is a legal model, a policy model, that only applies to over-the-air broadcast television and radio. Eighty-seven percent of our citizens now watch television over medium that is not subject to that model or those legal restrictions. There are no public airwaves being used on cable channels or cable properties. There are no First Amendment special circumstances under Red Lion for cable ownership.

What makes most of the companies big that we're all talking about that are causing the greatest public anxiety and concern, their bigness doesn't come from them as broadcasters. Their bigness comes from them as content providers who own channels on large multi-media paid platforms. That is not a public-interest model platform.

So I think the question for the country, which is going to be with or without deregulation, I think, is going to be a problem, because that's where technology and our citizens are going, is going to be, What is the notion of the public interest in an increasingly paid-platform model that isn't subject to the historical public-interest perspective?

The CHAIRMAN. We will be reviewing that issue, with your help.

Senator Wyden?

Senator WYDEN. Thank you, Mr. Chairman.

Chairman Powell, I was struck by your characterization that the changes, in your view, were modest, and you said they reflect caution. And I'd like to ask you specifically about a couple of examples on that point.

On the newspaper/broadcast cross-ownership rule, before your decision, as a general proposition, you couldn't have a merger be-

tween a TV station and a newspaper in the same town. Now, after this rule change, the merger would be allowed in about 200 markets, where about 98 percent of the American people live. My question to you is, How does that become a modest rule change?

Chairman POWELL. I'd be the first to concede that I think the most significant rule change is the cross-ownership limitation. But I'd also say that it's important to note that we start from the proposition of the statute having to demonstrate that a complete ban or prohibition is necessary.

What we've found is that because there have been a substantial number of grandfathered transactions, we had a lot of evidence before us that we had to deal with. Some of that evidence demonstrated enormous public-interest benefit in newspaper cross-ownership for consumers. One thing, for example, we found that newspaper-owned television stations produced 50 percent more local news than non-newspaper-owned stations. We also found, when we looked at quality awards for excellence in the news industry—RTNDA, the Project for Journalistic Excellence—that newspaper-owned stations often produced the highest-quality news product of a local market. So we felt we couldn't defend an outright prohibition. And then it became a balancing act of how much ownership you might allow.

One of the things that people urged consistently is some of the greatest value of these combinations were in smaller and more medium-sized markets where you find a larger number of television stations that don't do news at all, or do shopping network, or QVC affiliates, who have an increasingly difficult time funding the extraordinarily high cost of modern news.

And so we believed we attempted to try to weight the degree to which consumers rely on these sources, and draw reasonable limits. I'll accept they can be disagreed with, but that's the way we did it.

Senator WYDEN. All right. On the caution concept, 15 Members of the U.S. Senate, many Members of this Committee, asked you to give the public a chance to comment on specific rule changes, not just on the general concepts. You declined to give the public the opportunity to comment on specific changes. Wouldn't it have been the cautious thing to do to let the United States people, the people of this country, comment on specific rule changes?

Chairman POWELL. First of all, in my view, I think there's an amazing tension here between talking about the extraordinary amount of comment received and news coverage and input, and then simultaneously say the public hasn't had an opportunity to comment on it.

I think that our process has been extremely open. I think it's provided enormous opportunity for comment. And I think that's demonstrated by the breadth of the record and the amount of comment that we've received.

Second, I would say that I have read, for 45 to 50 days, the specifics of what we were going to do, and I think we've received extraordinary amount of public comment from those news and television-production coverage of our likely actions.

Candidly, with respect to actually putting out the rules, I don't say this as a defense, only to say that the Commission has never

done that, as far as I know. In the 6-years I've been in the Commission, I've never seen it put out the very specific rules.

One of the reasons is, it takes the same effort to put them out as it does to adopt them. Notices of proposed rule-making, in order to have comment that I could rely on on the record, would require a vote of the full Commission. We would have fought over what the specific rules we were putting out in order to get them out. Indeed, we didn't know the final specifics of this rule til the eve of our vote.

My concern was, if we put a notice of proposed rule-making, we would go through the same effort to get the rules adopted, we would release them, and I wouldn't be able to complete the biennial til close to the end of the year, backing up into the next one.

Senator WYDEN. Chairman Powell——

Chairman POWELL. So, in my judgment, I thought that was the best course.

Senator WYDEN. Chairman Powell, there's obviously bitter disagreement in the FCC on the decision. Are you comfortable with the fact that a decision of this magnitude was made on a three-to-two vote? And what kind of effort did you make, particularly with the two dissenters, to try to come up with a compromise position?

Chairman POWELL. I am always regretful that you can't command the full Commission, but I also know, on the most difficult and controversial items, it often splits, because people have genuinely held and sharp and distinct differences, and that was the case in many of the issues involved in this particular decision.

I think we opened this process up among commissions to the greatest degree ever seen. One of the things I did at the end of the triennial, which was also, I would note, a three-to-two decision, with me in the dissent. I cleared the decks between that proceeding and this proceeding. We had other major proceedings scheduled in order that we could focus on nothing but this proceeding. I instructed my bureau to be prepared to brief every Commissioner once or twice or three times a week, if necessary, to keep them abreast of what the developing options were. I had meetings with most Commissioners on a weekly or biweekly basis.

And then, finally, I would say I think there are parts of the final order that, candidly, I'm surprised aren't unanimous. We decided, for example, to continue the prohibition against networks merging with each other, yet I have two dissenting colleagues, and I'm not entirely sure why. The radio rule actually is further restricting than the old rule, but we still have a dissent. So I think those things, in my mind, were intended to seek unanimity, but, for some reason, they failed to do so.

Senator WYDEN. Commissioner Copps and Adelstein, what efforts were made in the Commission to try to find some common ground? And I'd like the two of you to tell us about those efforts.

Dr. COPPS. Well, I think we had—from the day one, I think the first conversation Chairman Powell and I ever had when I joined the Commission was on the broad parameters of media ownership, and I think we knew of one another's interests and generally where we were coming from.

The problem here is that it was not until 3 weeks before that we actually saw the reasoning, saw the conclusions and some of the proposals we were headed toward. Within a week we had digested

that as best we could, and I had gone back with some specific suggestions regarding the context I would like to see, some of the proposals, some of the things I would like to see included, like financial syndication, vertical integration, some of those things we talked about, maybe even looking at what you can use as a supplement to not put the whole burden on these structural rules, but how do you service the cause of localism, competition, and diversity through some other approaches which I think were relevant here. And those were not acceptable to the majority of the colleagues.

So I think there was that kind of a conversation, but I think the process was less than an ideal one. But not so much for the Commissioners, but mostly for the people of the United States.

Senator WYDEN. Commissioner Adelstein?

Mr. ADELSTEIN. There were regular conversations that the Chairman and I and the other Commissioners had, and we—I tried my best to try to find common ground. And the reason we couldn't, I don't think dealt so much with the process as it was that we just simply couldn't agree on the substance of the issues. We had some good discussions.

But I'd like to respond to just a couple of the questions of the Chairman about claiming that I had dissented on things that I would support, and take issue with that. I made very clear in my dissent why I dissented from those provisions, including the dual-network rule. I dissented on that—I've made very clear—because it made no effort to judge whether or not Spanish language is a separate market, in terms of media. There's a huge rise of Spanish-language media in this country. We supposedly, under this order, are trying to determine what changes in the marketplace have been taking place, and try to update our rules to take those into account. The fastest-growing minority, it has the fastest-growing minority media infrastructure, and yet now we could allow two Hispanic networks to merge, with no consideration whatsoever. I can't vote for that.

He said that radio rules were tightened up, and there were some beneficial provisions within the radio rules. But, in fact, there was a big weakening, a giant hole, in the middle of the radio rules that allowed—that got rid of the current procedure, where FCC flags applications where one owner would end up with 50 percent of the radio advertising-revenue share, where the top two owners are 70 percent. This is a very important protection to make sure that competition remains in radio markets. And yet in an order that supposedly is designed to protect competition in the radio markets, we completely gutted that. Now, how can I vote for that? I mean, these are good reasons not to.

And on the question of whether or not this is a moderate or an extreme proposal, just to comment on the fact that you made, I think it's hard to characterize it as moderate when you take newspaper broadcasting and allow it to apply to 95 percent of the population. That's extreme, in my view. It's dramatic.

And, yes, there may be circumstances where that is warranted, where a newspaper could actually help raise the caliber of a local TV station. But in other cases, in every case, it eliminates a voice in a community. And those need to be balanced against each other. And the nature of that local market needs to be evaluated on a

case-by-case basis to determine whether or not there are sufficient voices in that community left over after you eliminate that voice.

The CHAIRMAN. Thank you, Commissioner Adelstein, for that wide-ranging response to Senator Wyden's comment, and we'll let Commissioner Powell respond with the next round, if necessary.

Thank you, Senator Wyden. Thank you all.

Senator Sununu?

Senator SUNUNU. Thank you.

Commissioner Copps, you said that the process was—well, first, in your opening statement, you said that you "object" to the process. Then, in a more recent statement, you said it was "less than ideal." And I'm certainly willing to concede a process as complex as this, it almost certainly be less than ideal. I don't know if you can have an ideal process. But according to all the information we've seen, it was a 20-month process. We've heard a discussion that maybe we should spread this out further because of the scope of the 20 months, the time, the 20 months. Tens of thousands of comments, five periods, notice periods, and publications of proposed rulemakings, and what was described as the most thorough record ever—may or may not be the most thorough record. But it seems like a pretty comprehensive process to me. Like anyone else, I've been reading about the substance and the specifics of the rules for a couple of months now.

I guess my question is, What about the process did you deem to be unfair? Not less than ideal. I mean, I would like to be specific, because if the rules for this process were violated, I certainly want to know about it, as a policymaker. What about it was unfair? Or what about it violated the norms and standards of the FCC proceedings?

Dr. COPPS. I'll be specific. In my reference to "less than ideal," I think, was trying to talk about the internal dialogue, which was the specific question that was asked among Commissioners. I think the overall process was grossly violative of the spirit and intent of how an agency should proceed on notice and comment when issues of large public moment are being considered. And I don't know of any issues of larger public moment are being considered.

This was not the most comprehensive record that's ever been compiled. We did not put out for comment what would be the projected effects of changing the number from 35 to 45 percent. We did not ask any questions about what's the effect on small business, what's the effect on advertisers, especially mom and pop advertisers, on a consolidated media environment. We did not ask the effect of minorities. We did not raise the question about the relationship between media consolidation and the increasing wave of indecency and violence on television.

Is there a connection? I don't know if there's a connection. I think a good argument can be made that there is. I don't think we have any business voting on this until we at least try to put that question out and compile a halfway credible body of evidence so the people know we had looked at it. These things are germane to ownership matters. Ownership affects all of these things.

I think, you know, we have studies down there, a dozen studies, and that got the dialogue going. But to rely on those for all of the

conclusions when groups came in and said, "You haven't asked this question, this question, this question"——

Senator SUNUNU. It seems to me that every one of those issues you just mentioned, as important as they may be, are issues of substance. My question was a question regarding process—the public notice, the public hearings, ten public hearings, the rulemaking process and informing members, and obviously soliciting comments. So I just want to make sure——

Dr. COPPS. All right. OK.

Senator SUNUNU.—that the Chairman didn't violate the outlines and the requirements of putting forward this rule.

Dr. COPPS. I have not charged a specific violation. I do think it is process if you don't ask the questions that should be asked. I do think there are problems with the process when a couple of Commissioners want to go out and hold hearings and they are prohibited or strongly precluded from doing so. I do think there were process questions when the spirit of notice and comment in a democratic society is to try to tell the people as much as you can before you make a decision and you don't do that.

Now, yes, you can wiggle through and look at the text of the Administrative Procedures Act. That's why I don't charge a specific violation. But I think we have a responsibility as an independent agency to go beyond the letter and go to the spirit.

Senator SUNUNU. Mr. Chairman?

Chairman POWELL. Well, Senator, let me just say a few things. I would be more than happy to provide a detailed chronology of the kind of briefings made available to Commissioners and the extraordinary lengths we went to make sure the internal process was effective. I reject, with every fiber of my being, that anybody was foreclosed from an opportunity to inform themselves about the proceeding, or that anything internally about it was decisional.

I don't think "wiggling through the Administrative Procedure Act," disparaging as that sounds, is a trivial point. The Administrative Procedures Act is the law of this Congress that guides our processes. And as is conceded, nothing about that is being argued as deficient.

I also—the suggestion that we prohibited or precluded people from conducting public-interest hearings—I apparently failed. There were ten of them held by these two individuals, and apparently I didn't succeed in prohibiting or precluding. If the idea is give money, well, I'd be happy if the Congress wanted to give us money to fund something like that. The one hearing we conducted in Richmond cost $20,000. And, as I explained to the Commissioner and others who asked me about that, I just don't see the resources or the funds to have the 10 to 15 to 20 hearings outside of the Washington area that would involve the Commission, but that I welcomed that any individual commissioner could expend their personal travel budget to attend such hearings. And each Commissioner was forced to make a judgment about how to use their limited allotted set of resources under the appropriations statute.

Senator SUNUNU. With regard to substance, Chairman Powell, you talked about the prevalence of independently produced programming that—I don't know what the exact percentage was that you gave, a significant percentage last year and this year, of the

top-rated programs produced independently. What did the record show about localism on network-owned TV stations, those network-owned TV stations that you looked at—to what degree are they producing local news? We heard about a small local broadcaster and—I mean, sometimes you have big, sometimes you have small, but I think where the Commission is concerned, it's that local news, that localism, that really should drive your decisionmaking. What did the record show about that issue?

Chairman POWELL. I know it would seem, to some, counterintuitive, but what the record showed is that network-owned stations in local markets actually produced more local ownership, on average, than non-network-owned stations and affiliated stations, not by a huge order or magnitude, but certainly not less than. So that's what the record reflected with respect to local news and ownership.

Senator SUNUNU. Thank you.

The CHAIRMAN. Senator Dorgan?

Senator DORGAN. Thank you very much.

Chairman Powell, I regret to be so hard on the Commission on this decision, because I like you, personally. But you know, from what I have said, I just think this is a decision by a regulatory agency that appears toothless to me. In the shadow of the largest corporate scandals in the history of this country, the last thing we need is to have regulators with no teeth. I want regulators to be tigers on behalf of the public interest, and it looks, for all the world, to me, and I think it looks, for all the world, to the rest of the American people, like the majority of the FCC could not or would not stand up against the interests of the big business here.

Now, let me describe a couple of things that I see in this process where I really believe you're wrong. You say this was an open process. One hearing in Richmond, Virginia. Sure, you got a lot of comments, but there's no substitute for going around the country and holding open hearings.

You say they're modest changes. Clearly, they're not modest changes when, in nearly 200 cities, newspapers will be able to buy the television station.

You say that it'll promote more competition. Nonsense. The evidence suggests that is simply not the case.

You say that there will be few mergers and acquisitions. Of course, that stands logic on its head.

And you say, "The court made us do it." The court didn't make you do it.

I mean, this is the old joke in the movie, "Who are you going to believe, me or your own eyes?"

[Laughter.]

Senator DORGAN. Look, the evidence is in on all of these issues, Mr. Chairman. And, I guess, let me ask this question this way, because I believe it appears to me so evident that the big interests were served here, at the expense of the public interest. Would you not agree with me that today those who most aggressively celebrate your decision are the biggest economic interests in broadcasting in this country? Are they not the ones that are celebrating your decision?

Chairman POWELL. I have no idea who's celebrating our decision.

Senator DORGAN. You really don't? Are you kidding me?

Chairman POWELL. Senator, I also know that there's a——

Senator DORGAN. Wait, let me state—but are you kidding me? You really don't know who's celebrating that decision?

Chairman POWELL. I'll tell you what, me and the staff are celebrating being completed with the decision.

Senator DORGAN. All right, fair enough, but——

[Laughter.]

Senator DORGAN. Well, let me just refer you then to the major newspapers in the country and refer you to the stories following your decision. It's quite clear, Mr. Chairman, that the big public interests were served here—the big economic interests, I should say, were served, and the public interest, in my judgment, was disserved.

But let me also ask what's the basis, especially given what we now know about concentration and mergers in radio and television—what's the basis for suggesting this substantial change in the rules will not lead to greater concentration? I've heard you suggest, "Well, this may not lead to greater concentration at all." What's the basis for your belief in that?

Chairman POWELL. Well, Senator, if you don't mind, I—with respect to which market, or which sets——

Senator DORGAN. Radio, television. Do you believe that, as a result of what you have done, there will be greater concentration in television broadcasting companies?

Chairman POWELL. I think there will be an increase in mergers. I think there will be not an extensive increase in concentration to the levels which would cause great public-policy concern, because we did draw significant and meaningful limits. In the context of radio, which you mentioned at first, we still essentially retain the limits that Congress imposed in 1996, and have not altered them one bit. We have, indeed—you know, when I first talked to you, 2 years ago, as chairman, we had a good conversation about Minot. I didn't know how much more I'd hear about it for the next two-and-a-half years. But we endeavored mightily to try to fix that problem, that anomaly, and I think we have. So I think that rule is tighter. And so in the area of radio, we've improved it.

Again, facts again, there are 3,400 owners of radio; 3,300 of them own ten or fewer stations in the United States. I think, under the rules, that kind of robustness will continue.

With respect to the national ownership cap, I think it's important to point out, again, that while 35 and 45 percent sound like big numbers when you look at them in terms of station ownerships, it's less than 3 percent of the stations in the United States. When you also consider that of the seven networks—there are only two of them under the old rule completely free to rise up to 35 percent—are nowhere near the cap and haven't chosen that strategy. There are only a limited number of networks who could be a class of buyers, and I think there are very few of them actually interested in an extraordinary amount of national ownership of local television properties. So I think that rule is reasonable.

I think, in the local context, finally, one of the most important things we did is, we continued to prohibit the ownership of the mergers of the top four stations in any market. By the way, those top four stations are usually the network-owned or affiliated sta-

tions. So that means they don't have nearly as much opportunity as would be suggested for buying in local markets, because they could never combine the top four stations, under the rule, in that market.

Senator DORGAN. Mr. Chairman—let me ask Commissioner Abernathy. You said that the Congress—took a swipe at those of us in Congress saying that we were acting out of irrational fear instead of hard facts with respect to the issue of consolidation. Is there any evidence that you see with respect to consolidation, particularly with respect to radio in recent years, and also television, that would suggest that we have an irrational fear of consolidation?

Commissioner ABERNATHY. I would never call Congress irrational. I think that what you have to balance here is, you have to balance the First Amendment rights of the licensees against the rights of all the public to have diversity, localism, and competition. And when we're looking at a statue that drives us to say, "What's the minimum number of voices needed to promote competition," it's not a statute that says "maximize the number of choices." That's just not how it's been interpreted by the courts. And so when I look at that statute and I look at what our choices are, I think that we are creating an environment where there's going to be choice in all of the markets. The top four can't combine. We're going to have a multiplicity of voices. Whereas, in the radio business, we saw, in some markets, excessive concentration, which we addressed in this order. That was—there are different rules in that market than we have in the television market, where, for example, the top four can't combine; where, for example, in certain markets, the newspapers cannot be acquired. We put solid protections in place to ensure that there are multiple voices out there for consumers.

Senator DORGAN. Now, just as an observer, in my final moments, I think diversity, localism, and competition are fast expiring here. I mean, I think it's time to press our black suits for a funeral for those issues. I think the decision that was made by the FCC is one that really goes against the grain of localism and diversity, and I would just ask—I guess I'm out of time. I was going to—let me just make a comment.

Mr. Chairman, you mentioned that, "Well, the 35 percent is not so relevant." You've got a couple of station groups that are now over that, but some of them are not up to it. If it's not relevant because some have not reached it, as you've suggested a couple of times, why increase it?

Chairman POWELL. Well, that's actually an argument for eliminating it, which was one of our greatest——

Senator DORGAN. Well—I'm sorry. I didn't mean to interrupt you.

Chairman POWELL. It is an argument for eliminating it if you can't demonstrate its need. What we tried to do is find evidence that it was—a national cap of some sort was still extremely important. We do believe that the balance of power between networks and affiliates is something to balance. But if we couldn't prove the existing number did what we claimed it did, as couldn't the Commission that preceded me and had the rule remanded, then we thought by modifying it into a range that the court would give us deference on would help save the preservation of a national cap.

Senator DORGAN. But there's no evidence the public interest would ever be served by eliminating this standard, and I'm surprised a regulator would say that. But that——

Chairman POWELL. It might not, Senator, but I think it's absolutely important to continue to point out that the way the court has interpreted this statute is—what you have to prove is that you need the rule, not prove that it'll serve the public interest for eliminating it, which is one of the problems with the standard of this biennial review.

Senator DORGAN. And our disagreement is that we believe you could have approved the need for the existing rules, and, instead, you chose to go with more generalized liberalized rules that would result in more concentration.

Chairman POWELL. That might be fair, yes.

Senator DORGAN. Mr. Chairman, thank you.

The CHAIRMAN. Senator Snowe?

Senator SNOWE. Thank you, Mr. Chairman. Thank you.

Chairman Powell and other members of the Commission, there's no question that, obviously, you've invested a considerable time and effort in this type of decision, and a decision of great importance and significance to the underpinnings of democracy and the objectivity of reporting. And, obviously, you're reached very divergent views.

I happen to believe that abiding public concern is a matter of public interest, and incorporating public feedback and developing rules or modifying or repealing, or whatever, with respect to withstanding judicial scrutiny, are not mutually exclusive goals.

And so it concerns me, Commissioner Abernathy, when you're saying we have to separate fear from facts. I mean, I think the fact is that if there is broad public concern that could ultimately undermine the confidence in the decision that's reached by the FCC, that is a matter of high public interest.

And I'm concerned also about the divergent views, in terms of whether or not the statute had a regulatory bias, deregulatory bias, whether this was all driven by congressional biennial review requirements, as well as the court remands, and all of that, I think, could have been addressed. If those were legitimate concerns on your part and you're concerned about the direction, then clearly it should have gotten the attention of the Congress.

But the Congress nor the courts ultimately forced the ultimate decision that you made. The court essentially asked the Commission to justify, with a solid, factual data base, how you reached a decision with respect to these rules and whether or not they were necessary in the public interest. And in the court opinion, it indicated, in sum, "We cannot say it's unlikely the Commission will be able to justify a future decision to retain the rule."

So I'm interested in hearing from each of you with respect to this rationale, because I think—first of all, I think it's clear that, you know, you could have gotten our attention on the biennial review. That was a timetable—it wasn't a mandate—for reaching the conclusions you did today. Now, you could say that the statute had a regulatory bias, a deregulatory bias. Irrespective, obviously, there's a difference of opinion. But, again, that could have come back to Congress.

The court asked the Commission to justify the existence of these rules. You could have justified the existence of the existing rules. And so, you know, maybe I'm viewing it very differently, but I'd be interested in knowing, especially from you, Chairman Powell, because you were here in the last biennial review, what occurred now that's so different than in the past where you're saying that you were unable to accept the current rules, that was not a viable option? I mean, what did you do now that you didn't do in the past? And couldn't you have justified the existing rules?

Chairman POWELL. Let me be clear about what courts do and don't. They don't write the rules for you. They tell you what's wrong with the rules you've written. To the extent that the court doesn't tell you, you couldn't possibly—by the way, they really said that you couldn't—"We don't concede that you couldn't justify a national ownership rule." Well, we have tried to justify a national ownership rule.

But one of the things you have to take from the court case is, number one, their interpretation of the law. With due respect to my prior colleagues and Commissioners and Chairman Kennard, he didn't have the benefit of the court interpretation of the statute. He attempted to interpret it in a manner that allowed sustainment of the rules based on the record evidence that we had at the time.

When the case got to court, the court gave us two sets of guidance. They gave us guidance about how to properly interpret the statute. And if it's not as Congress or this body wishes, I would urge you, for me and for future Commissions, it's going to need to be changed. There's no question that the court insisted that there is a presumption of deregulation. It discussed the history of the Congress's deregulation. But, more importantly, what it did is, it told us what was factually deficient about justifying the 35-percent rule. It told us about the kind of record it would expect to see to justify any kind of rule, and that was a really rigorous and extensive kind of record that didn't even come close in the last biennial.

What did we do different? We started a Media Ownership Working Group 20 months in advance. We've commissioned 12 empirical studies to go out and survey the market at a depth never before done in broadcast ownership review, so that we had that tangible data and record evidence the court said "you'd better have when you walk back into this place." We surveyed consumers for the first time and say, "What is your principal reliance on the media? How do you use it?" And then we tried to weight those in the context of our decision.

It was a massive proceeding in which we did all the rules comprehensively. One of the criticisms of the court were that the rules were not coherent. You'd count something in one and not the other. Well, my decision to put the rules together in one massive proceeding, which drew all this attention—perhaps I shouldn't have done that—what it did is allow more coherency across the rules.

It's our hope that that, all put together, is something much more palatable in the mind of the court. But the notion that the court didn't tell you you couldn't keep the 35-percent rule, I would agree with, but they also told you what you'd better have to do it. And when we got the record, we believed that we didn't have the evidence to support the rule at 35 percent, and we had some doubts

about supporting the rule at all. But we believed that we had an opportunity, if we modified, as the statute required, to save a national cap. And so, you know, that's what we did. We'll see if we're successful. This is a rule I'm quite concerned about in the court, and I think there's serious reason to believe it'll be reviewed quite critically.

Senator SNOWE. Mr. Copps?

Dr. COPPS. Can I make just two comments?

There was never any question in my mind, from the day I go in the Commission, about the direction that this proceeding was going. It was obviously in the direction of further deregulation, and it was not undertaken with the idea, "Let's really do a super job to see if we can strengthen the regulations that exist or justify the ones that we have."

Which leads us to my second point about the legislative context in which we operate. I don't have any problem with saying that the Telecommunications Act of 1996 is a broadly deregulatory act. In the context of telecommunications, that means to me that you deregulate incrementally once you have provided the basis of competition.

With regard to the context for proceeding on media, it means, yes, you can deregulate once you have made sure that you are protecting localism, competition, and diversity, and protected the public interest. I don't think there's any question about that.

Senator SNOWE. Uh-huh.

Mr. Adelstein?

Mr. ADELSTEIN. The public-interest standard is one of the broadest, if not the broadest, that we operate under at the Commission, with the least, I think, guidance from Congress as to what it is. The public interest ultimately becomes what three of the five of us think it is, which is a real problem and a real reason that I would seek further guidance from Congress on this.

But I'd go back to the legislative history of this. The great Senator Clarence Dill, who was on this Committee in the 1920s and was one of the creators of the act, said that the charm of the public-interest standard was its vagueness and its breadth. He said, quote, "It covers just about everything."

I'm afraid what we've done here is make it so it covers just about nothing. We've had this broad authority granted to us to try to do what's right for the American people, and perhaps you can justify what the Chairman did. He makes very eloquent arguments for it. You can justify it there. You can justify it at 35, at 45, at 65. You can make a case for anything. Whatever we say it is, if you get it upheld in the court, that's OK.

The question, for me, is, Did we do the best we could to promote the public interest? Is it OK to say that in 95 percent of the country you can have a duopoly without asking anything of the broadcaster that's able to merge to make sure they provide better service to the consumer? You can allow a newspaper to buy a television station in virtually anywhere in the country but a few small towns. Sometimes that's in the public interest, sometimes it's not.

We should make a determination whether it is or whether it isn't. We have that authority. But, instead, we just made the broad assumption that it's always in the public interest, no matter what,

for these things to happen. For those voices to be lost in those communities is always in the public interest. That's the assumption underlying this order. I don't think it was a vigorous interpretation of the broad authority that Senator Dill expected us to utilize.

Chairman POWELL. Senator Snowe, because this Committee is so interested in possible legislation, I do have to continue to emphasize how dangerous the court case is. We just heard the talk about, "We should take a slower, more incremental approach." And here's the quote from the quote, on page 1043. "The Commission answers that it's properly followed the lead of Congress in taking an incremental approach to the deregulation of broadcast ownership. We are not convinced Congress required such an approach. The mandate of 202(h) may be better likened to Farragut's order at the Battle of Mobile Bay, 'Damn the torpedoes—full speed ahead.'" This is what we're operating under.

Senator SNOWE. So if we codified these ownership rules in statute, would the court look at it very differently?

Chairman POWELL. Oh, substantially differently. The only limits on this institution are the Constitution of the United States. The problem is, I'm not a legislator; I'm a regulator. I'm obligated to follow the delegated authority that you provide. I'm restricted by that, and I'm under the strict oversight of the courts.

Senator SNOWE. Just one followup. But if you were troubled by that direction—and obviously you're not—but if you were troubled by that direction, couldn't the Commission come to the Congress and say, "You know, this is the situation and the circumstances, and it really will require, you know, input and changes by Congress with respect to the 1996 statute?"

Chairman POWELL. Yes, ma'am. I mean, I think I have had many conversations with legislators about the challenge associated. The FOX case was quite a long time ago. We've been working for 18 to 20 months to implement it. I think that I've, personally, had many discussions. You and I had the benefit of a long 3-hour session not too long ago in which we tried to work out some of the understandings about the statutory limitations. But we felt our first duty, in the limited time we were given, was to try to craft rules that were consistent with it. I do think the rules that we did were.

Senator SNOWE. Uh-huh. Well, you know, I just hope, in the future, that we can work in sync on some of the issues where we feel that there is a profound public obligation because of the magnitude and the enormity of the impact. And somehow, I think, obviously, that has, you know, affected these proceedings, and obviously we're going to have to correct that.

The CHAIRMAN. Senator Lautenberg?

Senator LAUTENBERG. Thank you, Mr. Chairman.

Mr. Chairman—and I address Chairman Powell—the question persists as to what the data were that were used to come to the conclusion that you did. And there is a challenge—you hear it throughout, I think, this Committee—as to whether or not there was sufficient recognition of the access to communicate with the public or to have the public communicate with the Commission. And it seems to me that there are several areas of challenge.

One was, was it a coincidence that there were so many reliable forecasts as to the outcome of what this decision would make? Was

it leaked somehow or other from the Commission? Was it a public statement that perhaps I missed along the way that said this is the way this is going to come out? Because I didn't hear anybody say that it was going to be any different than expanding the caps.

Chairman POWELL. You know, I don't—you know, it's a mystery to me how all these things get out. The Commission has this, sort of, long and ignoble history of having almost anything it does get out. I've rarely worked on a proceeding in which, at some point early in the process, it's fairly well known out in the public and among the newspapers what we're doing.

I can tell you I didn't undertake a conscious effort to leak the specifics that I saw in the newspapers. I also made a conscious effort not to try to refute them when I was on talk shows, television shows, and newspaper interviews.

Senator LAUTENBERG. OK, then that raises the question. Because how could they have been so accurate in their prediction, unless somebody had a sense it was pretty darn good? And I would like to look at, kind of, three areas to raise the question about access by all the commissioners to the same opportunity to hear public communications. So I want to look at hearings. I want to look at the "outings," if I can call them that, these numerous trips that took place. And I'd like to ask a couple of questions about the volume of comment that came in.

Now, there's a debate whether it's 500,000 or 750,000 comments that came in from the public. And what was the evaluation of that data? Was the data a factor in making a decision, or was it not? I heard the response that you earlier made, but that kind of volume of commentary is pretty overwhelming, in terms of the need to consider it.

Chairman POWELL. Yes, sir. There was an effort to take into account the volume of content. Indeed, in my statement on the day that we announced the decision, I talked very specifically about the fact that I think that that strong public response introduced a sense of caution in the choices we make. You've heard some suggest this was going to be a lot worse until this happened. Well, if that's true, then it had an impact.

Senator LAUTENBERG. Could these be considered also in the nature of the public's vote? I mean, I'm sure most of them said, "Hey, you ought to do this, you ought to do that, but I favor this way, I favored not expanding the caps, or I do." And did anybody go through those and say, well, there was 500,000 who said that we ought not to expand the caps or anything of that nature?

Chairman POWELL. There was no one official who did that, although they were all gone through. There have been a lot of claimed surveys of what the percentage is of for and against. But one of the things I'd like to emphasize—for example, of the 500,000, 300,000 of them are postcards from the NRA. Every single postcard largely says the same thing. It's pretty easy to quickly get through a generalized commentary.

And one of the problems I had with some of the—not problems I had, but the little assistance it provided—is a lot of them would say, "I'm against more big media consolidation." Well, Mike Powell is against unfettered consolidation, too. But our specific task in determining percentages of ownership, duopoly relief, diversity index,

the myriad of expert judgments we're expected to make, those kinds of comments introduce caution and care, but they don't necessarily provide the kind of record evidence that leads to very specific decisions. That's one of the problems with them.

Senator LAUTENBERG. Then I'd like to take the liberty of asking your colleagues who had a dissenting view on the outcome.

Mr. Copps, did you have a chance to look at these comments that came in?

Dr. COPPS. We've had a chance to look at a lot of them, not to go through all of them. Other organizations have. I think they're running about 99.9 percent, as I said earlier, against the direction the committee is going.

But Commissioner Adelstein and I had the opportunity to get a little bit more granular evidence in going out in these hearings and talking to the American people. And you get away from the idea that these are just bland postcards or something like that. What I saw out there, and we couldn't afford to advance these hearings and do all that, four, five, six-hundred people would come out, and they were not only concerned; there was alarm on their faces. There is serious disenchantment in this country with the results, already, of media consolidation. Put aside the question of whether we're going to have more. It's a grassroots issue. There's serious disenchantment. I think radio listenership is on the rapid decline.

Senator LAUTENBERG. I hate to be the timekeeper, but the big timekeeper—is gone?

[Laughter.]

Senator LAUTENBERG. Well, let's talk fast, before he gets back.

[Laughter.]

Senator LAUTENBERG. Mr. Adelstein, what do you have to say about that?

Mr. ADELSTEIN. I saw the same thing at these hearings across the country, a virtual unanimous chorus against this. And we had all these hundreds of thousands of people that wrote in, and they weren't just postcards. They weren't just "stop consolidation." There was a lot more depth.

This probably the best expert witness in the world, the American people, because the 750,000 people that contacted us watch billions of hours of television and radio and read the newspapers, and they had something to say.

I mean, here's an example of a letter from one of your constituents, Senator Boxer, from California, just to give you an example of whether these are just postcards. I mean, this person said, from Cupertino, that, "It's been demonstrated in California, where consolidation media has resulted in local content being cut, low-quality news and journalism, and ethnicity not being representative. The radio waves are now programmed with mainstream commercial-laden content from some corporate headquarters of the other side of the country." And then they go on to make a bunch of specific recommendations as to what we should do about it, "Achieving diversity will require explicit restrictions on a number of items. Ownership of media by a single company in a region, maybe it should be limited to 25 percent or less. Ownership of different types of media, a single company should not be allowed to control multiple media outlets"——

Senator LAUTENBERG. Let me cut you short because the hot breath of time use is, I feel coming, and I want to anticipate that.

[Laughter.]

Senator LAUTENBERG. So can I ask you this? And I heard the distinguished Chairman, and he is a distinguished Chairman and very articulate—just happens to be wrong——

[Laughter.]

Senator LAUTENBERG.—but in terms of the hearings, Chairman Powell said that because of the costs, there were limitations. I would ask you this. I wonder if those hearings would have cost more than $2.8 million. Why do I pick that figure? Because that's what was spent on the 2500 trips that took people to Las Vegas and other interesting historic places.

[Laughter.]

Senator LAUTENBERG. And so were either of you satisfied? Because, obviously, there is—if not an implicit direction to the Chairman's comments, that the Commissioners who weren't satisfied—I understand there was only one—correct me if I'm wrong, Chairman Powell—there was only one hearing at which all five Commissioners attended. Is that correct?

Mr. ADELSTEIN. That's right.

Senator LAUTENBERG. OK. Were there attempts by your part to hold more hearings?

Dr. COPPS. Yes, we did hold more hearings. We held a couple——

Senator LAUTENBERG. Who attended those?

Dr. COPPS. We tried to have a balanced representation. We invited business. We invited the broadcasters——

Senator LAUTENBERG. I'm talking about among the Commissioners.

Dr. COPPS.—a cross-section. And we did—you know, he said there was—that one hearing cost $20,000—we didn't have that kind money, and I think the 12 or 14 that we attended, and some of these were sponsored by other people, a grand total of that was less than $20,000. They were on a shoestring. They weren't the kind of things I would like to do. But as between no hearings at all and a hearing on a shoestring, I'll take the hearing on a shoestring every time.

Senator LAUTENBERG. How many of your colleagues were at those hearings that——

Dr. COPPS. Commissioner Adelstein and I were at the hearings.

Senator LAUTENBERG. Did you give notice that you wanted to do this and that it was going to be held at a specific date?

Dr. COPPS. We invited all of our colleagues.

Senator LAUTENBERG. Forgive me, Mr. Chairman, but—and I will stop with this, I promise—and that is that there is a lopsided process of interview and data accumulation that, frankly, is—I'll speak for myself, but I sense it coming from my colleagues on both sides of the aisle. Why wasn't the public paid more attention to? What was it? We know who the sponsors were of the outings, the trips. So many of them. It's hard to imagine being able to get away that often. But the fact of the matter is that it has a kind of a taint, Chairman Powell. And I think it was Senator Hollings who talked about "Why the rush?" And I think that's a good question. Maybe you ought to—I don't know whether it can be considered

now, but I think it was a hasty decision, and it looks, based on the advanced notice and the dismissal of data that came in, that it was a hasty—and I know you were required by rule, by law, to get something done, but I assume that postponements were not unusual.

And I thank you very much. Thanks, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Lautenberg.

Senator Breaux?

Senator BREAUX. Thank you very much, Mr. Chairman. Thank all the Commission members.

After hearing all of your testimony, I cannot imagine how much fun it must be to be on the FCC.

[Laughter.]

Senator BREAUX. I'm talking about lack of diversity in the media. We certainly don't have lack of diversity in the FCC.

[Laughter.]

Senator BREAUX. I think that it's an incorrect argument for us to be debating whether a 35-percent national TV ownership cap is correct, or whether a 45-percent national TV ownership cap is appropriate. I happen to personally believe that we shouldn't have media concentration. There should be some measurement of media concentration. But I would argue that the current rule that you follow because of the act, Mr. Chairman, is the incorrect standard by which to judge whether an owner has media concentration in a given market.

For example, it seems to me that you could have a single owner of a TV station in each one of our largest cities in the country that would exceed the 35- or 45-percent cap, even though no one watches those stations in each one of those large cities, because the cap is based not on the media dominance, but rather where the station is located in the population of the city.

You, for instance, could also, on the opposite extreme, say to an owner who is the only station, for instance, in 200 small towns around the country, that that person, who is the only TV outlet in those 200 cities, in fact, would not come anywhere close to reaching the 35- or 45-percent cap because of the size of the cities.

If you look at the studies that have been undertaken on the media networks, as far as the percentage of the population that watches these outlets during prime time, NBC has 13 stations, and their prime-time audience share is 1.6 percent; ABC, ten stations, 1.2 percent of the population watching it during prime time; FOX, 34 stations, but 2.7 percent of the population watching the station during prime time.

The question I ask for you, and others can comment on it—I'm for some type of a national cap. I just think that the standard we use is totally irrelevant when it comes to media dominance in a particular area. And I'd like to have your comment on that, Mr. Chairman.

Chairman POWELL. Well, Senator, I think you're actually quite correct. It's a big problem with the way that the national cap has worked historically and what it purports to defend. My statistics are similar to yours, that the actual audience reach of the four networks is only 3 to 4 percent of the country because of this household measurement model.

One of the reasons that we were not able to conclude that the rule is necessary on competition grounds is for the reasons that you just cited. And the court was very skeptical of whether you would defend it on competition grounds.

What we have attempted to do is defend a cap purely on diversity grounds, and specifically localism grounds. The idea of a national owner having a certain amount of power in the owner-affiliated relationship might coerce or prohibit or limit a local station owner's ability to preempt national programming, the vertical-integration issue Senator McCain's concerned about. This helps prevent that local station from feeling limited or coerced in its ability to preempt national programming.

So what we've done is defend the rule, only on diversity grounds, not competition grounds, and on localism grounds specifically. And, just to repeat, the problem we've found is there are a lot of inconvenient facts about how well it works, because I think while the affiliates, for example, are, by the way, a monied interest that are not particularly happy about me raising this rule, one of the things, you know, that is difficult to explain is that they have preemptions that they are permitted to use to provide local programming. But yet, at the end of the programming year, they haven't exercised them, and we thought that that was going to be a very unfortunate——

Senator BREAUX. Let me ask a question. Is there not a better standard that could be drafted in order to measure media dominance by individual owners around the country than what we have? I mean, what we have now is based on the size of the city, not the number of people that watch and get their information just from that outlet. I mean, does anybody have ideas about perhaps a better way?

Mr. Adelstein?

Mr. ADELSTEIN. Yes, sir. One idea for that is using what's called the HHI, which is a measure used by the Justice Department to determine the level of competition in a particular market. We use the HHI in this order in order to determine a diversity index, but we don't apply it to individual markets. The problem is, we could have used that kind of a determination to judge the level of concentration in a particular market, like New Orleans, and say, "What's it like there? How many owners are there in this particular area? How concentrated is this market?"

Can we permit an additional merger in that city, permit a newspaper to buy a TV, or a TV to buy another TV in that city given the level of concentration that exists there, based on that market analysis done under an HHI? That would be a very creative way to do it. It's one that was contemplated by the Commission, but unfortunately one that was not adopted.

Senator BREAUX. Mr. Chairman?

Chairman POWELL. Senator, as an antitrust lawyer, you have to let me come back in on this. If we use HHI, station groups that own 3 to 4 percent of the country are going to be so dramatically below any level of concentration you can defend. These stations could own hundreds more stations.

If you're saying that the only relevant market is the local market, then the only rules of relevance are our local caps and re-

straints, the ones that prevent—only allow duopoly or triopoly in certain markets, and the ones that prevent the top four stations from merging, that's a very compelling argument for no national cap whatsoever.

Senator BREAUX. Well, what would be your recommendation on the way to measure media and market dominance? I mean, I just happen to think—I guess the 35-percent national population relation is because Congress said that's what should be used. So what would, in your opinion, be a better measurement of market dominance in order to regulate media ownership?

Chairman POWELL. Well, this would require a lot more considered opinion, but sometimes I think we should not be trying to regulate that kind of problems through, sort of, three cushion shots through ownership structure. If what we're saying is we want nondiscriminatory principles in the provision of content, if what we're saying is a certain amount of capacity should be reserved for localism, I would much prefer we more clearly and honestly have a rule like that than attempt to get it added through a secondary effect of ownership. In fact, in some ways that's kind of the wisdom Congress expressed with respect to cable, which this very Commission reaffirmed, the notion of. Well, if a cable company owns this much capacity, a percentage of it, program access, requires other programmers to be on it.

You can debate whether you like that kind of regulation, but at least it's cleaner, clearer, and more obvious. And this very Commission has reaffirmed regulations like that and they've been upheld in court.

Senator BREAUX. Well, I think—I'm out of time, as well—but I just think that we need to look at—number one, I think that a concentration of media ownership can get to a point where it is not in the public interest, and it should be regulated by the Commission. The question I have is that the standards we use, and you use because Congress said that was the standard, is an inappropriate measurement of market dominance. It only says that station owners are operating in large cities. It doesn't have anything to do with whether anyone's watching them in those cities.

Dr. COPPS. Can I make a 10-second comment? I think one of the things you could be looking at, in terms of radio, for example, is audience share. I think you were driving at that. We used to look—until we did this proceeding the other day, we would flag radio concentration if one company had over 50 percent of the advertising revenues or two had over 70 percent. That's gone.

Senator BREAUX. Thank you.

The CHAIRMAN. Thank you.

Senator Boxer?

Senator BOXER. Thank you very much, Mr. Chairman.

First, let me say I served on a board once with five people. It was a board of supervisors. And I know it's hard to be split like this. It's really hard. But I just want to say to each and every one of you, the important thing here is the public interest, not the personal relationships. They'll live through it. And I just appreciate the fact that if you really believe what you're doing, fine.

I, however, am very frosted by something that Commissioner Abernathy has sort of hung her hat on in making this decision, and

that's the fact-versus-fear theory, which I have now read throughout your statement that you put out to the press, and a whole section is called "Fact versus Fear," and so on and so on. And today you used the word "alarmist cries."

Now, I've learned something. I've been in elected life for a very long time. It's a very humbling experience, I can assure you. And just because you sit behind a microphone does not make you smarter than other people. And to dismiss their points of view by saying they're fearful is an insult to them, and it is an insult to the people of my state.

Now, I'm going to give you an example of some of the letters you got which you dismissed as being fearful, they're acting on fear. Here's a lady from Massachusetts. I don't know her. Here's what she wrote. "I'm opposed to further media consolidation in this country. I no longer feel able to listen to AM radio because of its poor content. Musicians no longer are given ample air exposure if they're not a proven product or backed by some corporate sponsor. We, the people on this country, deserve unbiased news coverage."

Fear? I don't think so, Commissioner. I think it's fact. You can't tell her that she is wrong to believe that she's not getting good music anymore. You can't tell her that she has no right to expect diversity and unbiased news. You have no right to do that. As a matter of fact, it goes against what you're supposed to do.

Here's another one. Here's one from Roanoke, Virginia. "I urge you not to relax cross-ownership rules. Yet if you do, I urge you to put safeguards in place to prevent corporations, or any other conceivable entity, from having whole control over information in the free airwaves. Of course, people will be able to continue getting alternative sources via the Internet, but it will not help those who cannot afford the Internet."

Fear or fact? Is it a fact that some people can't afford the Internet? Yes, it's a fact. And it goes on.

How about this one? This is really based on fear. This is a comment from Bridgehampton, New York. "Delay your June 2 proposed decision. This important decision needs more public input."

So you have dismissed the people. And it is very irritating to me, because, in my opinion, and this is—you have every right to disagree with the people and say, "I don't agree with their conclusion. I don't agree with those woman. We don't need more time." But you don't do that. You use this, "Oh"—and your comment here today, "Oh, I would never find Congress irrational." It's the same tone about it. And it bothers me, because there are only five of you looking out for this diversity and this competition.

And I'm going to bring up another point here, which goes along the same line. There's an article——

The CHAIRMAN. Senator Boxer, would you like to have Commissioner——

Senator BOXER. Yes, but I want to——

The CHAIRMAN.—Abernathy respond to that one?

Senator BOXER. Yes, once I do the second——

The CHAIRMAN. All right.

Senator BOXER.—because this builds on it.

And this is the second point that feeds into the same thing, with who has really been given attention and who has really been given

the respect in this debate. And I want to make sure it's right, because we know we've got problems with accuracy in the media. So I want to make sure this article in the *New York Times* is right.

[Laughter.]

Senator BOXER. It says that "media lobbyist, Dick Wiley, whose clients"—I don't know the man. He's probably out there.—"whose clients include numerous large media companies and partners at his firm, held at least 34 meetings with FCC officials, according to the record, the open record at the FCC." So we have 34 meetings with a lobbyist and his partners, and you all went to, all five of you, one meeting.

So the point I'm making is, do you understand why the people out there are upset? They're upset because they do not feel that this decision was made with their best interests in mind, because they hear comments that dismiss what they say as fear, and they see these things, 34 meetings with one lobbyist, and they had one meeting.

So if Ms. Abernathy could—if each of you could react to this, I'd appreciate it. And that's what I have to say.

Commissioner ABERNATHY. Thank you, Senator. And if the impression has been given that we didn't, or I didn't, taken into account all of the concerns of the citizens, that's absolutely wrong.

Senator BOXER. I didn't say that. I said you dismissed it as being fear. I didn't say you didn't take it into account. I said you categorized their comments as being fearful.

Commissioner ABERNATHY. And it was based on fear. It was based on, "What if the FCC gets rid of all its rules? What if the FCC allows the top four stations in all the markets to merge? What if the FCC doesn't maintain a cap on affiliate ownership? What if we are willing to sanction two or three media moguls providing all the information to consumers?" I would never do that. I would hope that none of my colleagues would ever do that.

What we tried to do, what I felt was critically important in this instance, was not to adopt rules that I might personally like to see, not to adopt rules that I thought would make me feel more comfortable, personally, about what we would do, but to look at the facts in the record that demonstrated all the choices that consumers have, to look at the number of options we would be protecting consumers by virtue of having restrictions, as far as newspaper ownership, maintaining restrictions, and, in fact, improving the radio and——

Senator BOXER. Well, you're not answering the question I asked you. I asked you, can you see why people might be upset looking at your comment dismissing what they say as being based on fear, having 34 meetings with a top lobbyist—I'm assuming it's accurate, because it was gotten from your records at the Commission.

Commissioner ABERNATHY. Uh-huh.

Senator BOXER. And the other point is only two commissioners went out across the country. You know, you—I'm out of time, but it's—your answer is very nice to listen to, but it's not getting to the heart of my point. And I hope that you'll listen to what I'm saying to you, because I'm just trying to say to you, in the future you ought to consider more what the people feel. I don't think you did.

Commissioner ABERNATHY. Thank you, Senator, and I'll be happy to talk with you further and understand your concerns and the concerns of the citizens. But certainly that was not my intent, nor was it the intent of the Commission.

The CHAIRMAN. Our dear and beloved Morris Udall said, "The politician's prayer is, 'May the words we utter today be tender and sweet, because tomorrow I may have to eat them.'"

[Laughter.]

Senator BOXER. Would you pass a little sugar over here?

[Laughter.]

The CHAIRMAN. May I ask my friends, Senator Fitzgerald and Ensign, who prefers to go first? Senator Ensign was here first. Senator Fitzgerald has been here for awhile.

Senator Ensign?

STATEMENT OF HON. JOHN ENSIGN,
U.S. SENATOR FROM NEVADA

Senator ENSIGN. With that lead-in about possibly having to eat words, I will attempt to go forward.

Mr. Chairman, I think it's very appropriate that you had this hearing so quickly after the decision was made. I think it an incredibly difficult decision that you all have undertaken, simply because of the complexities. Anybody that sits on this Committee understands that the issues that we deal with here, we have no idea sometimes what the consequences are going to be of the decisions that we make.

The 1996 telecom law, I think, is a perfect example of that. The biggest laws that were passed that year were the law of intended and unintended consequences of that law. And depending on who looks at it, depending on the court, depending on the regulator, it can vary widely in how it is implemented. And I think that we're seeing, in so many different areas of that law, we're seeing perhaps things that the originators of the law didn't intend and other things that maybe went farther or not as far as the originators of the law had intended.

The part that still amazes me in this whole debate, though, is the rules looking back, compared to technology. It doesn't seem that those same rules could possibly apply to today as what applied in the past because the landscape has changed so dramatically. I think—and I appreciate the comments by all the Commissioners about not wanting anybody in America to control so much thought because of so much information coming into a home that they can dominate thought. I mean, we know how dangerous that can be.

But the evidence that I've looked at through the hearings that we've had, through a lot of the reading that I've done, through media reports, through looking at both sides of this issue as much as I can, it doesn't seem to me possible to control, based on this minor tinkering of the law that you all have done, to control thought in America. It just doesn't seem possible. And it seems like that there are safeguards built in, as you all have mentioned today, about some of the case-by-cases that can be done that still are protected in law.

If there are exceptional circumstances, they can go either way, as Ms. Abernathy talked about, if it would be beneficial that more

consolidation happen because one news station in a small market may go off the air, that may be beneficial to the public interest to allow consolidation in that case. In other cases, it may be detrimental, and you still have the rights, from what I understand, to block some of those things from happening.

And I'd be curious to hear from Mr. Adelstein or Mr. Copps. I've read your testimonies and—but it doesn't seem—let me try to pose the question this way. When we're looking at market share—because that's one of the arguments, is that popularity in market share—it seems to me that we shouldn't be regulating popularity. In other words, if there are 200 stations or whatever out there, and a certain percentage of the companies are controlling based on their market share because they've been able to attract people to their stations, that doesn't seem to me to be what we want to control. We want to be able to control the ability for people to have diversity. But if they can attract people to their stations because they have better content, we shouldn't be in the business of saying, "No, you have too much market share. You have too much ownership of what goes into the households," simply because they're better, whether that's radio, television, or whatever it is.

Mr. ADELSTEIN. When these media giants get as large as they have, they control vertically integrated programming and distribution. Their size becomes so large that it becomes very difficult for new entrants to enter or to compete to get the number of eyeballs that those companies have with their vast access to capital and their ability to control what goes out over such a large number of the stations.

I think the best argument for the Chairman's position is that there has been a real change in the marketplace. And, in fact, there has. And we need to take that into account in these rules and update them to take that into account.

I'd just like to say there are three major things that haven't changed. You know, one thing is that five companies control about 75 percent of what people see, hear, and read over the media. Five big media conglomerates.

Senator ENSIGN. That's what the choose to see, not what it available to see.

Mr. ADELSTEIN. That's right, but that's partially because of the vertical integration that these companies enjoy.

The other thing that hasn't changed is that people still get their local news and local information from local television stations and their local newspaper, and those are exactly the entities that we are allowing the most leverage to merge and to eliminate local voices under this rule that the Commission adopted.

The third thing that hasn't changed is that TV and radio licenses are still as scarce as ever. In fact, their value is going up. There's not a great array of them that are being created. We're not giving out a lot of new licenses, if any.

And so those are—as the market dictates their value goes up, that indicates the incredible value that is in those licenses, and those are the ones that we're allowing one person to own two or three or four licenses, depending if it's radio or TV. But we're not giving out new ones to other people. And so it's going to be horded by this small group that are going to control where people get their

local news and their local information, and that's one of the core values that the Commission has always striven to uphold. And I'm afraid that we've dramatically weakened it in this order.

Senator ENSIGN. Well, just coming from somebody who's been involved—I have been involved now in—before this last year, in four straight election cycles. You know, my one comment on local news, providing that localism, that localism angle, as far as politics are concerned, because that's—you know, general feedback—they're really no difference, anyway. It seems like they almost cover less politics than the national news does anymore because they're so concerned about sensationalism that the news content anymore, based on—you know, that was part of the public good, supposed to be, of localism, was that they were going to cover, you know, local races and things like that and try to get something—there are a few responsible stations out there in our area, but certainly my experience has not been that fantastic, and I've been a vocal critic to our local broadcasters. And things have improved a little bit.

But, I mean, I know that that's our laudatory goal, that—you know, for the localism, but I also see some of that just does not happen. I mean, it just doesn't.

Mr. ADELSTEIN. That's right. The study showed that 74 seconds is all that is allotted every night to Federal, state, and local elections. People are getting their information from paid political advertising, and then they don't show up to the polls, because they're so turned off.

That's why I'm so concerned about media concentration. I think——

Senator ENSIGN. But what I'm saying is I don't think that what the Commission has done is going to change any of that. I mean, I just don't. I guess I haven't been convinced of the arguments. I don't know. Chairman Powell, if you want to, you know, comment on that participation thing or the question that I had about attracting people and, therefore, controlling because of the people you can attract to your—on the percentages.

Chairman POWELL. Yes, Senator. I do think it's an important point, because I think what's so complicated about this debate, it's easy to, sort of, murk up and muddle a number of different concerns. You know, these big media companies, the big moguls, the big, huge companies we keep talking about, the famous five, most of them are big-content companies, and a lot of them own very little distribution. I mean, Disney-ABC owns .8 percent of television stations in the United States and doesn't own a cable network anywhere. The vast majority of them don't own any cable systems anywhere. Their big news is coming from there.

The issue about localism, well, if local stations that are not owned by large networks are still not providing localism, the argument that ownership is a proxy for localism is just demonstrated as much weaker than we profess it to be. I mean, I think there are a lot of—you know, this question—I would just end with this—the question about popularity, I think, is awful important to get straight. And let me just repeat for you again the actual statistics. Five large companies in the United States own 25 percent of the channel capacity of the United States. Five percent each. They happen to be 80 percent to 90 percent popular. That is, they are the

channels that are chosen by our citizens out of the choices they have available to them. I'm very concerned when I hear that that's a basis to restrict their flexibility.

Similarly, "Oh, well, the Internet is owned by five guys." Well, you know, when I sit down at the Internet, I can go anywhere I choose. And if I go to Googlenews, right now, today, *Googlenews.com,* if nobody knows about it, you will have 4,000 sources of news aggregated for you from every corner of the country and the Nation. Now, that's available to me. But does that mean—80 percent go to *msnbc.com* because they prefer to.

And so we have to make some rigorous distinction between preferences and words like "owned, controlled, swallowed," which I think are loaded to intend that there is no flexible choice permitted to consumers.

Dr. COPPS. Can I give you a little granular evidence?

Senator ENSIGN. It's up to the Chairman. I don't want to cutoff Commissioner Copps, but it's up to the Chairman. My time's expired. So——

Dr. COPPS. Just give me—I'll give you a little granular evidence on the difference of coverage between consolidated news and local news, and we'll use our hearings as an example. I can't tell you, you know, how many cities we went where there was a consolidated newspaper. We'd have—or a consolidated-owned television—and we'd have four, five, six-hundred people, maybe a Congressman, a lot of important people from the city. You never read about it in the consolidated newspaper or the big—the network television. But that locally owned independent television station would, more often than not, be there.

I'll give you one other example. There was a former mayor out west who testified before us, and he said, "You know, when we used to have two newspapers in this city, people used to just fall through the door, the reporters, trying to hear what was going on on the City Council. Now we've got one. There is no local coverage, there is no local interest." And I've seen that time and again.

The CHAIRMAN. Senator Rockefeller?

Senator ROCKEFELLER. Thank you, Mr. Chairman.

I think all this talk about rules is interesting and important. And I was late in getting here but—I don't know if this has been discussed, but, to me, the most important aspect of all of this is to what degree is the quality of news and information that is going to be available to Americans going to be affected by the decision which has been made? You know, and this is all about democracy.

The polls show that the American people are not particularly concerned about the problem—the discovery or lack of discovery of weapons of mass destruction in Iraq. The policy consequences of that are fascinating. If one is living under something called a "doctrine of preemption"—and that means that if a country is deemed to be imminently dangerous to the United States, that the United States then should go ahead and do something forceful about that—that means, therefore, that the intelligence which is available is incredibly important. The intelligence has to be really good.

Now, that's not the kind of thing that appears in newspapers particularly much—it does these days, and it will, I think, for some time to come—or on television, but it makes the point I'm trying

to make, that the level of knowledge in a world which has grown so complex, where I think I read a number of years ago and, therefore, am probably out of date, that the average American read something like 11 inches of news a day, and that may be wrong or it may be right, but we don't read a lot of news. We don't watch a lot of news. We tend to go to the popular programs, which are the contests or the soaps or this or that or the other thing. And I don't pass any judgment on that. But there is a profound importance in a new era, not just post-9/11, but in a new, highly complex era in this world where we've become not 191 Nations, but one world in the sense that we're all of help or of danger to each other, or neutral, that people know that the level of information that is available to people and the way in which they use it or decide not to use it is an important consideration. To me, it's the most important consideration from this judgment that you all have made.

Ms. Abernathy, I wasn't here to hear it, but my understanding is that you indicated in a press release that you felt that that kind of comment was elitist. And, Commissioner Copps, my understanding is that you have had concerns that this matter of quality, of the quality of the product—forget the rules, but the quality of the product and how that is affected by what the FCC has done, that you have a rather different view about it.

And I would like to ask any of you who wish to comment on this what your thoughts are about the effect of your decision on this FCC—not on the rules, but on the effect of what it is that the American people are likely to be learning—hopefully, more about what is going on in this world, in their country, in their communities.

Dr. COPPS. I think the effect, with regard to the news, is just about disastrous. And I know Chairman Powell has studies and we have the FCC study concluding one thing, the Project for Excellence in Journalism, a little different conclusion. We don't really have a conclusive answer. We need do more research on this.

But I can tell you, from going around this country and talking to people—not just in local news, but I've talked to a lot of people who work in the networks, too—there is an enormous dissatisfaction with the constraints that are put upon news people in the United States about what stories they can cover and what stories they can't cover. And, you know, I've heard from people who say, you know, "We've got license to do a lot of things, but we don't have license to talk about media concentration." I think that's a serious, serious problem.

And, yes, finally, the networks, who have done such an abysmally poor job of teeing up this issue for the American people in the last week or so, got more active. But I don't think that that gives them a passing grade for how they have dealt with this issue.

If we're going to give a green light to consolidation and let a company control all this stuff, why don't we just say, "Well, we're going to really monitor this, and we're going to look if you provide more localism and more local news. And don't expect to get your license renewed if you don't. Give us the commitments what you're going to do in the public interest, then maybe we'll look at this, see how you do, study it on a case-by-case analysis, and see if you're serving the public." That's the approach I'd like to see.

Commissioner ABERNATHY. Senator, I guess what I'd say about local news, it's probably the best of times and the worst of time all at the same time, partly because we have tremendous choices today that we've never had in the past, both for children, for adults, education, 24-hour news channels, the ability to learn almost anything we want to learn about certain subjects if we can tap into it. The worst of times in the sense that the economics of having so many channels brought into your home means that all of the providers are competing for eyeballs. And when you compete for eyeballs, and when you're so susceptible to the economy when you're a broadcaster that has to go out and get advertising to support you, that means that you need to ensure that people will turn to you instead of the 150 other choices that they have. And so sometimes that leads to the kind of programming that I don't particularly enjoy and that I'm sure you don't enjoy.

Senator ROCKEFELLER. Well, does that, therefore, abrogate you of a responsibility toward that? In other words, I've heard this argument so many times, that you have 500 channels to choose from, but, on the other hand, sometimes you can turn to those channels, and five of them will be giving you the same news broadcast from five different cities given by the same person. And so it's not local.

And so regardless of the argument that people have choice—and in America, choice is a good thing—but in American also, in order to support and buttress a democracy in a particularly difficult era, which I think is going to last for quite a long time, and I'm not just talking about terrorism, but the complexity of life, people have to—it strikes me that there's not an absence of relationship between the FCC's interests and the interests of a media entity which is helping to inform the American people and increase their knowledge of what is of importance to them. Is that something that you are all detached from?

Commissioner ABERNATHY. No, I agree that that's part of our obligation, which why, again—and I think when you look at the broadcasters, one of our obligations is to review and to make sure that they are serving the public interest. And one of the reason why we worked so hard to try and come up with the right numbers so that they would continue to be responsive to local needs and the local community and local elections and politics and the school board, is how we came up with the protections around the numbers of consolidation that we're going to allow. I hope we chose right, because I do think it's very, very important.

Most local news comes from television—not from cable, but television and newspapers—and that's one of the ways, when we looked at all the data, we tried to figure out what amount of consolidation is appropriate and which amount would be harmful.

Senator ROCKEFELLER. My time is up.

The CHAIRMAN. Senator Fitzgerald?

STATEMENT OF HON. PETER G. FITZGERALD,
U.S. SENATOR FROM ILLINOIS

Senator FITZGERALD. Thank you, Mr. Chairman.

Members of the Commission, I want to congratulate you, at least those on the majority side. I thought you did a pretty good job of modernizing our rules. I think, in particular, that ending the—or

modifying the cross-ownership ban just brings us up to date. I think that, as has been pointed out with the numerous cable channels available in practically every market, the ability of someone, Joe Schmoe, to just form essentially an Internet newspaper with very little capital and compete with established newsprint organizations has made it very difficult to monopolize the news in any market.

And I think of my city, Chicago, in particular. The *Chicago Tribune* has been exempt from the cross-ownership ban, or grandfathered, because back in the 1940s they formed WGN Television. WGN stands for World's Greatest Newspaper, which used to be the motto of the *Chicago Tribune.* And, certainly, they have not had a monopoly on points of view in Chicago, even though the *Tribune* owns both the main newspaper and a significant television station. I think, a good example. *Tribune* has historically been a Republican paper with ties dating back to Abraham Lincoln. They endorsed President Bush in the last election. But, nonetheless, Chicago almost always votes about 80 percent Democratic. And I think that, right there, is just an example of there not being any harm in your relaxing the cross-ownership ban.

And I'm just wondering, Chairman Powell, could you explain to us how the Commission decided upon the specific combinations that you would permit under the new rule? You're very specific on what is allowed and what isn't allowed. How did you go about deciding on exactly what you would allow, with respect to the cross-ownership rule?

Chairman POWELL. Indeed, it was difficult, but this is the area where the creation of the diversity-index tool that you've heard about comes into play. What we did was start with trying to survey and come to an understanding of the way our citizens use the media. So we used Nielsen survey data that told us that consumers use newspapers as their primary source X-percentage of the time, television X-percentage of the time.

Then we basically did something relatively simple in terms of assigning weights to different medium based on those consumer preferences. So a newspaper in a community would have a given weight, a television station in a community would have a given weight, and those weights would reflect what the citizenry told us about how much important that particular source is as a viewpoint.

And then we ran many, many combinations, both real ones and hypothetical ones, all over the country to see what the data would show us by various kinds of combinations. If the only newspaper, or the only this and the only that, what would be the resulting index number taken from the antitrust methods of HHI?

And then we tried to look for patterns of where we saw the greatest harm. And what we saw was three really clear bands no matter how many times we ran this, that with markets with less than four stations, there really were serious dangers on the diversity measure. So we walled those markets off as at-risk, because we believed that the impact on diversity would be too great to even consider.

Senator FITZGERALD. How big would cities be, typically, that have four or less stations? Would you have an idea?

Chairman POWELL. I wouldn't know in terms of population, but they certainly are the smallest percentage of the 200 television-station markets. I could get you a sense of them.

The middle bands were, sort of, four to nine stations, and we looked at those and we saw that that was another clear band in the data, and so we permitted some cross-ownership purchases, but not as many as we would permit in the larger markets, where we believed diversity was preserved.

So in some ways, we came up with this method of quantifying consumer preferences, ran it out, and saw what the data told us, and we saw that that gave us a pretty consistent and fair indication of where we thought the greatest harms would lie.

Senator FITZGERALD. Well, it sounds like you were very scientific and disciplined in your approach. And I think that the dangers of your ruling that they could lead to are somewhat overstated. I think you can always go back and change. And you had significant court pressure to make the modernizations that you did, too. And so I think, on balance, you've done a pretty good job, and I'd want to commend you and thank you all for being here today.

Chairman POWELL. Thank you, Senator.

The CHAIRMAN. Do the Commissioners agree or disagree that there has been, at least in some markets, too much consolidation and, therefore, a reduction in localism, competition, and diversity in radio? We'll begin with you, Mr. Copps.

Dr. COPPS. I think in many markets there has been too much reduction. I've heard too many stories about cutbacks in the local newsroom or emerging news or bringing news in from outside. So I think the danger is here and now, and we need to do a better job of understanding just how concentrated we already are before we flash the green lights to further concentration.

The CHAIRMAN. Mr. Adelstein?

Mr. ADELSTEIN. Yes, I do think there's too much concentration in some markets. We heard from people across the country that one of their number-one concerns was radio.

The CHAIRMAN. Chairman Powell?

Chairman POWELL. Yes, sir, I do. I think some markets, but not necessarily most markets. That's why we kept—we restricted the radio rules further.

Commissioner ABERNATHY. Yes, Mr. Chairman, I agree there was too much concentration in some of the radio markets, and that information informed us as we looked at what rules we needed to incorporate into our television ownership rules.

Commissioner MARTIN. Yes, Senator, that's the reason why we modified our market definitions to try to take into account that some small markets were being treated like larger markets.

The CHAIRMAN. Of course, the question is, Are those rule changes going to be sufficient? The reason why I asked that question is that I am—as I mentioned in my opening remarks, is that radio can be this—at least in the view of some, the miner's canary of what might happen in television. So one of the things I've gotten out of this—and I appreciate your patience; you've been here for over 3 hours now—is that no matter how the Commission came down, you're not really satisfied with the process, and that is, in large part, due to perhaps some anomalies in the 1996 act or other regu-

lations or court decisions that have been laid down. So I'd like to ask, starting with you, Commissioner Powell, what changes or what actions should the Congress take legislatively, would you recommend, in order to enable to do your job of ensuring localism, competition, and diversity and satisfying the Supreme Court's admonition in promoting the widespread dissemination of information from a multiplicity of sources?

Chairman POWELL. Yes, sir. I think the first thing I would potentially recommend and possibly endorse is to look at whether having rules reviewed every 2 years, as intensely as that process is, is merited, in hindsight, that it's very destabilizing to the market, it creates an extraordinary amount of pressure on resources in the Commission, and I think that it destabilizes the choices, making it sort of very difficult to ever get an understanding of whether what we've done proves, for better or worse, before you have to do it again.

I do think that some review period probably is still warranted, thought. I would probably recommend something like 5 years, instead of two.

I also think that the standard is the most critical question here. If the Congress is displeased with the kind of results that they've seen, then they need to take a very hard look at the kind of standard the court has insisted Congress laid out in the statute. If that standard prevails, I would submit to you future Commissions and future Chairmen will have to do similar things or they're likely to be overturned if they don't. That's another thing that I'd considered seriously.

Finally, my recommendation would be that, you know, this is the people's institution, much more dramatically than the Federal Communications Commission is. It's very difficult to aggregate the diverse points of view of 250 million Americans. But this institution is much more capable of doing so, with its 535 members. If there are rules that should be inviolate that are so important to our sense of democracy, then my strong belief is they should be statutory rules. They should not be rules conferred to a regulatory body with three to five unelected officials making those determinations, if they are so integral to democracy, as many of us believe, with respect to some of them. So that would be my recommendation.

The CHAIRMAN. What should the standard be?

Chairman POWELL. Well, I think it's a very different question, and I don't if I'm prepared to answer, because I think the standard is going to have to take into account major changes in the way consumers are getting media. Because if we look at this as a broadcast problem, we're going to miss the train. This is really a move to media in a paid-platform model that doesn't apply most of the historical beliefs that we have about the public interest.

So, yes, the standard should always be the public interest. But what that means and how it's applied as media transforms itself from just free over-the-air TV to the other things, I don't know the answer to today, but I think that's probably the most important set of questions to debate.

The CHAIRMAN. Commissioner Adelstein?

Mr. ADELSTEIN. I would agree with the Chairman on a number of his recommendations, particularly the one that is the broadest, which is that I think that this entire proceeding would be better handled by Congress than by the FCC, not because of any lack of quality among our membership, but because this issue goes to the heart of our democracy, and this issue is so important to the American people that it really defies the ability of five unelected officials, or three to five, to make determinations that are so profound to the future of the American media marketplace. And so I think it would be more helpful if Congress were to dictate each one of these things: how the duopoly rule is structured, how the newspaper/broadcast is done, network ownership cap, everything down the line.

Now, that's not very realistic, I don't think, having worked in the Senate for 15 years, in my humble opinion, but I wish they would.

But short of that, some more realistic ideas are what the Chairman suggested about the biennial review. I think it is somewhat destabilizing to have it every 2 years. I think that the Congress could consider codifying the national cap at 35 percent, as it contemplated during the Telecommunications Act. And maybe a standard that could be used by Congress if they wanted to leave wide discretion to the agency would be to require a case-by-case, market-by-market analysis to ensure that individual mergers that are approved are in the public interest in terms of promoting localism, diversity, and competition.

The CHAIRMAN. Commissioner Abernathy?

Commissioner ABERNATHY. Thank you, Mr. Chairman. I agree with the Chairman, that the 2-year review cycle, particularly when the 2-year review requires us to re-justify every single rule, we don't have the ability to simply say there's no change to circumstances in certain instances and some of the rules can continue. We have to affirmatively conclude that they are necessary, and that standard's been interpreted to be a pretty high hurdle by the courts.

I believe that in many instances, we're forced to look at what's the minimum number needed to promote viewpoint diversity, as opposed to looking at a preference, maybe, toward multiple voices.

And, second, again with regard to what the Chairman mentioned, the way that we receive media now, so many people receive it over satellite and cable, and the public-interest obligations are run with whether or not you have spectrum, not with whether or not you're delivering content to consumers. So, for example, children's television obligations and many of those other obligations, we may need to look more broadly across overall media obligations, as opposed to distinguishing between those that use the public airwaves and those that deliver by other technology.

The CHAIRMAN. Commissioner Copps?

Dr. COPPS. I think I agree with many of the recommendations that have been made. I agree with the Chairman on the biennial review, although since we were on the losing end of this vote, I might be happy to have another biennial review——

[Laughter.]

Dr. COPPS.—and startup immediately. But I think it does impose an undue burden on the Commission. Codifying the cap would be good.

But a couple of other things. I think the Congress needs to look seriously at the convergence of cable and broadcast and what questions that provides, and how do you protect the public interest in the larger context of that, do we have a good regulatory balance there? I think the Commission could do something on its own with re-instituting a serious honest-to-God license-renewal process, but it would be nice to have some direction on that from Congress and perhaps even replete with some public-interest obligations on what companies do in return for the new rights that they have been granted.

Finally, although it is not part of the Communications Act, per se, I wish Congress would reveal the Government in the Sunshine Act and facilitate better communications within the Commission, itself.

The CHAIRMAN. Commissioner Martin?

Commissioner MARTIN. I would agree with both the concerns that have been raised about trying to clarify what—the ability of the Commission, when they're talking about modifying our rules, to be able to re-regulate when necessary. I think that the courts could end up having some questions about our intent to do that, and I think that would be helpful for clarification.

And I also think it would be important to amend the open-meetings laws, to allow for the Commissioners, particularly on important decisions where they're going to be ultimately making them in public at a public meeting, have some opportunity to interact with each other as a group and meet and discuss some of the issues, and I think that would have helped the process in this case.

The CHAIRMAN. Well, I want to thank all of you. It's been a long morning for you, but a very important one to us. And I thank you for being here.

Senator Wyden. Mr. Chairman?

The CHAIRMAN. Yes, I was going to——

Senator WYDEN. Oh.

The CHAIRMAN. I guess—yes, go head. Senator Wyden, and then Senator Sununu had a follow up question.

Senator WYDEN. Thank you, Mr. Chairman. I have just two follow up questions that I wanted to get into.

Chairman Powell, when I asked you earlier about the cross-ownership rules, the rules with respect to newspaper and broadcast, because those rules are going to allow mergers in 98 percent of the areas where the American people, you said that's the most significant part of the decision. My question to you is, If the FCC is going to allow all of these mergers, mergers that will cover a big chunk of the country, do you think the Federal Communications Commission has an obligation to let the public know in these markets who owns what so that they can evaluate the independence and credibility of the communications in their area?

Chairman POWELL. Just in terms of an information function?

Senator WYDEN. Yes. I mean, would you put on your website, for example, these cross-ownership ties so that the public—given the fact that in the area that you've said is the most significant, people

would like to know about the independence and credibility of what they're getting, would you put that, for example, on your website so people know who owns what?

Chairman POWELL. We might, in fact, substantially already do that. I'd like to look at what we do. Because all licensed broadcasters have certain public disclosure obligations about their ownership. Most of that is on public file with the Commission. And I'm not exactly sure what we have available, Web-based, at the moment, as opposed to file-based. But let me come back to you on that. I think that we do a great deal about that. Perhaps we can strengthen and improve that to deal with your concern.

Senator WYDEN. Because I know people tell me they can't figure out who owns what in American communications. And this is the area you said was the most significant. It certainly doesn't fit my definition of a modest change, which is why I asked about it earlier. And I think, at a minimum, you ought to lay out for the American people what these cross-ownership ties are.

One last area I wanted to discuss with all of you. It looks to me like all of the arguments that the Federal Communications Commission has used against the 35-percent cap could be used against a 45-percent rule, as well. I think you could take virtually all of them and just say this would apply to 35, 45, 48, whatever. And, in fact, I was struck, Commissioner Martin, where you said this was the area that you found particularly difficult.

Wouldn't it be safer, I ask you men and women of the Commission, to just have Congress step in and set the cap now? I mean, we're not talking about trying to do everything. But wouldn't it make sense for the Congress so that we can be accountable to the people and not deal with the fact that—the arguments that I've heard today are pretty much the same for 35, 45 or 48—why not have Congress step in, as a number of us here have said ought to be done, and set those limits now?

Chairman Powell?

Chairman POWELL. I couldn't disagree at all. I think that actually bears merit, because the huge difference which we've tried to illustrate for you today is that we're bound by the provision of the biennial and the statute and standards and the court's review of it. You would be bound by none of that and only accountable to the Constitution. So to the extent that that's the will of the people, I think would—it's always more defensible if it's statutory, as opposed to regulatory.

Senator WYDEN. Do any of you disagree with that? We can save some time.

Mr. ADELSTEIN. I think it would be ideal if Congress would do it, but I would also say that—you know, agree with you that all of the arguments we used for 45 could be used for 35 or for 40. And we didn't even take into account the UHF discount, which means that really 45 percent could spill up to 90 percent. So by not dealing with the UHF discount before we did this, we let the cat out of the bag before we dealt with the whole situation, and it's really dangerous in the future. Now if we want to adjust the UHF discount, it's going to become that much more difficult to do it in a meaningful way.

Senator WYDEN. Any of the others want to add to it?

Dr. COPPS. I just hope when Congress does get involved, that it will cast even a little bit wider net than that and go beyond the national rules and look at the local rules but, more specifically, to look at some of these other suggestions that I've made today for how do you protect the public interest in these transactions?

Senator WYDEN. Well, I want to let Senator Sununu ask his questions, and it's in my interest because he and I are going to lunch.

[Laughter.]

Senator WYDEN. But I will tell you, the one thing that you have done through your work is you have really mobilized the American people. I think they get it, and I think they understand what's at stake. I mean, the reason I said that the dinner bell has rung for these big media conglomerates is that's what I heard all weekend. All weekend, when I was having town meetings, people said, where in the world is the Congress when we need somebody to stand up for them? So I have disagreed profoundly with a number of these changes you all have made, and that's why I asked those questions with respect to the question of modesty and caution.

I can tell you, Chairman Powell, the people of my home State do not see anything—they don't see a shard of modesty and caution in this. I mean, they think this is the floodgates opening up. And you have mobilized the American people, and hopefully we can get bipartisan support for Congress making some changes in these policies that really reflect the public interest rather than the private concerns.

My time is up, and I'm going to wait around for my lunch partner.

Senator SUNUNU. Thank you very much, Senator Wyden.

Let me pick up on something that hadn't been mentioned until just now. Commissioner Adelstein, you mentioned the UHF discount, and you mentioned that a lot, or I heard about that a lot in some of the written comments that I've seen, and I think I saw a telecast of the Richmond hearing. It seems to me that this really isn't that big of a deal. And I say that because if it were a big deal, we would have a lot of broadcasters out there right now with 70 percent coverage taking advantage of that enormous discount that exists today under the 35 percent rule. But, in point of fact, we really don't have anyone ever close to 70 percent, nobody that's even taken advantage of the UHF discount to get up to that level, do we?

Mr. ADELSTEIN. We do, in fact, have one. Paxson Communications would be at 67 percent if the UHF discount were eliminated.

Senator SUNUNU. But they're not one of these big five that you've been talking about. You've talked about five companies controlling 75 percent of what we see here, and read. I mean, Paxson is not one of those big five that you keep referring to.

Mr. ADELSTEIN. That's correct, but Paxson has made a business strategy of going after UHF, and this UHF discount has enabled them to pursue that.

Senator SUNUNU. But they're the closest, and they're the—I guess, not maybe the one, but certainly one of the only companies that has taken advantage. But I harken back to this issue of the

big five because we keep talking about them, but the big five have not made aggressive use of this loophole. Isn't that the case?

Mr. ADELSTEIN. They have made some use of this loophole. There are a number of UHF stations that are owned by the major national networks, and it has enabled them to get closer to the cap, and they could utilize it more now to maximize the additional 10 percent flexibility that was granted to them by this order.

Senator SUNUNU. Mr. Chairman, any disagreement on that point?

Chairman POWELL. I would only note that the major networks are 45 percent or less, if that's the way you're going to perceive it. I would also note that if the argument is that Congress spoke clearly in 1996 when they raised it to 35, they raised it with the UHF discount in place. That means the rule has been 70 percent since 1996. And so if you're going to fault us for raising it to 90, we better accept that it currently is 70.

The other thing I would say is, we still found very substantial items on the record why it mattered. A UHF station reaches 44 percent, has a signal that's 44 percent less than that of a VHF signal. UHF stations, on average, are 50 percent less popular than VHF standard, and they require 150 to 300 percent more power than a VHF station.

So we believed, honestly, that they continue to matter until the digital transition comes along.

Dr. COPPS. Can I make a quick comment on that?

Senator SUNUNU. Let me ask my question, and then you can answer both——

Dr. COPPS. All right.

Senator SUNUNU.—my next question and this point, because my next question is directed at you, Commissioner Copps.

Senator Fitzgerald described the Chicago experience with cross-ownership, certainly more than a few decades of cross-ownership in the Chicago market without a degradation in the value of the voices, certainly without negative effects and the influence that the station and TV had. That would lead me to conclude one of two things. Either you think that he mischaracterized the Chicago experience, or you think we should ignore the Chicago experience when evaluating the cross-ownership rules. Which one of those two would hold?

Dr. COPPS. OK, let me make a quick comment on the UHF thing first. I think it's interesting that we counted this as 50 percent for purposes of talking about national reach, which, if anything, I think we would all agree probably would encourage concentration, but when we talk about enabling duopolies and allowing companies to own duopolies, we count that station as one full station. It's 100 percent then, and you'd need X number of stations to get a duopoly, so now you've got it—I think the courts might wonder why we have that discrepancy.

The Chicago experience? I think we can handle cases on a case-by-case basis. I think it's interesting that the city council of Chicago passed a resolution almost unanimously warning against the evils of further consolidation, so I don't know that there's great unanimity in that city about the unfettered blessings of consolidation.

And if you look at this issue on the whole, I'm just worried if—75 years ago, we had 500 cities in the United States of America that had more than two newspapers. We had over a hundred that had more than three. Now we've got about 30 or 40 or something like that. So nobody's going to contest that that's a monopoly.

Go to the broadcast side, if you haven't got a monopoly, you've got a duopoly or an oligopoly, and I searched like the dickens through this item to see where are the blessings for localism, diversity, and competition in encouraging the monopoly and the oligopoly to get together, and I couldn't find it.

But I think we have, in the current cross-ownership laws, the ability to look, on a case-by-case basis; and if, in reality, everybody is happy in Chicago and it is serving the purposes of localism, competition, and diversity, fine, let's deal with it rather than just giving a green light to all these dozens or hundreds of other markets to go ahead and march down this same trail.

Senator SUNUNU. Commissioner Adelstein, I think perhaps you misspoke. A little bit ago, you said five firms control 75 percent of what the American public sees, hears, and reads. Now, I think the five biggest newspapers in the country are *USA Today, Wall Street Journal, Washington Post, New Times,* and the *L.A. Times.* They're obviously not controlled by any of those five companies. I think what you meant to say is that five companies control 75 percent of what is seen, what viewers choose to watch on broadcast or cable TV. Is that correct?

Mr. ADELSTEIN. It really is what they choose to watch. There are certainly more channels available.

Senator SUNUNU. Right, but it's what they watch, not what they hear, see, and read in America. I think there's an important distinction there. You know, 75 percent market share of what is seen, heard, and read is different than 75 percent of what's seen on broadcast or cable TV.

Mr. ADELSTEIN. Right, I would say that's probably correct.

Senator SUNUNU. Let's stay there just for a moment, on the broadcast/cable TV markets. In 1970, I think roughly three companies controlled three channels that were watched by 90 percent of Americans. Today, we've got five companies, the big five that you're concerned about, controlling 12 channels that are watched by 75 percent of the public. It would seem to me that, at least on the score of competition and diversity, we've seen gains since 1970. Would each of the Commissioners care to comment on that?

Mr. ADELSTEIN. Well, I'd refer to the book by Ben Bagdikian, who is the former dean of the School of Journalism at University of California at Berkeley and the former assistant editor of the *Washington Post.* He wrote a book called *The Media Monopoly* in 1983. In that book, he said there were about 50 companies that he felt controlled the bulk or the majority of what goes out over the airwaves. And each successive addition reduced the number. In 1997, it was down to much lower. And by the 2000 edition, he had it down to these five.

So his analysis showed that there was increasing competition, at least since 1983, and I think that the American public seems to feel that there has been increasing consolidation, but they are not satis-

fied with that. They would to see no further consolidation, at least from what I heard from people around the country.

Dr. COPPS. I see at least six differences in that situation you're talking about, when the three reign supreme. They didn't own all of the owned and operated stations they presently have. They operated under vertical protections of financial syndication rules. They have very explicit and affirmative public interest obligations. The industry operated under a voluntary code of broadcaster conduct—self discipline, self policing. We had a whole different mentality across this economy about what was expected of corporations. And we had a license approval process that had a little teeth in it. And I submit that makes a substantial difference in how companies can operate now compared to how they operated back then.

Senator SUNUNU. I understand that there are differences today. There are different rules, different regulations, different Federal statutes. But you go from three companies, three channels, 90-percent viewership, to five companies, 12 channels, 75-percent viewership. It would seem to me that in what people are watching on television, there is greater diversity, greater competition.

Any other Commissioners care to add?

Commissioner MARTIN. Just that I think it's self-evident that there seems like that there is more. And in your example, there is more competition, and that's what I think that the Commission was trying to take into account by modernizing and modifying its rules.

Chairman POWELL. Senator, I'd just say one thing, since this debate will continue. We have to distinguish between bigness and concentration. They're not the same thing. I think a lot of what I have come to believe is the average citizen's perception of concern is the increase in, sort of, very large, big media institutions. I think that concern might be there if there were a hundred of them if they felt there was a certain, sort of, size dimension, corporate dimension to who they were.

And I think that's why this gets a little difficult and a little slippery. Sometimes I think we're talking about bigness, as opposed to the term of art and the technical view of what actually is concentration, which is a very, very different concept than just a company as big or large or successful. And I think as the debate goes forward, keeping that distinction in mind is useful.

Senator SUNUNU. I appreciate that.

Commissioner, did you want to add something?

Commissioner ABERNATHY. Just a quick follow-up, that what's always been important to me is not the five stations, 75 or 80 percent of the people are watching what they put on, but that they have 75 percent other choices. They may continue to watch what some of these five companies are putting on because they like what they're putting on. But as long as I know there are all these other pipes into their home to give consumers alternative choice, that's what's always of most concern to me.

Senator SUNUNU. I think that's a very important distinction, because there was some discussion about whether you use viewership as a proxy for power or whether you use the number of homes that you can broadcast into as a proxy for power for concentration. And while I appreciate that, a station that 90 percent of the people is

watching is much more powerful than one that only 5 percent of the people are watching, if we start to try to regulate on the basis of what viewers are choosing to watch, I think we're on a very slippery slope to regulating what people can and can't choose to see through television.

So what seems to me to be most important is that we do the best we can to ensure diversity and competition among channels that compete fairly and equitably and have an equal opportunity of gaining, winning a viewer in the marketplace.

Let me just say thank you to all of the Commissioners. These are some pretty sharp disagreements, but I think they have been, you have been, very thoughtful and substantive and extremely professional in the way you presented it. I find that very, very helpful, because these are very complex issues.

It was pointed out that, you know, the 1996 act is driving a lot of this, and I know Chairman McCain and I are maybe two of the only members of the committee than can disavow responsibility for the 1996 act.

[Laughter.]

Senator SUNUNU. But it is clear that these are a set of issues that we're going to have to continue to deal with. And your professionalism has been very helpful. And in that regard, I don't think that Congress should be legislating all of these rules and regulations, because we don't have the expertise and the capability that you all have. If there are things that we can do to modify the restraints that you operate under to make you—to enable you to share information and work more effectively together, I'd be very interested in pursuing that.

Thank you very much. The hearing is adjourned.

[Whereupon, at 1:10 p.m., the hearing was adjourned.]

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