STATEMENT OF
CHAIRMAN MICHAEL K. POWELL

Re: 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.

I. INTRODUCTION

The *Order* we adopt today represents the culmination of a twenty month process that was required by the framework Congress crafted in the 1996 Telecommunications Act.[1] In the now infamous section 202(h), Congress ordered the Commission to review its broadcast ownership regulations every two years to "determine whether any of such rules are necessary in the public interest *as a result of competition*." Further, we must "repeal or modify any regulation" we determine no longer serves the public interest in its current form.[2]

Against this statutory mandate, the Commission has been working tirelessly towards achieving three critically important goals: (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 in the *Order* we adopt today.

I must punctuate one irreducible point: Keeping the rules exactly as they are, as some so stridently suggest, was not a viable option. Without today's surgery, the rules would assuredly have met a swift death. As the only member of the Commission here during the last biennial review, I watched first hand as the Commission 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.

II. STATUTORY MANDATE AND COURT DECISIONS

Critical to understanding our actions, is an understanding of the court's view of Congress' charge to the Commission in the 1996 Telecommunications Act. In *Fox*, the D.C. Circuit held that *"Congress set in motion a process to deregulate the structure of the broadcast and cable television industries*."[3]

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[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).
[2] *Id.* at Section 202(h).
[3] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002).

It noted in support that in the 1996 Act, Congress:

- Repealed the statutory telephone/cable cross-ownership ban;
- Repealed the statutory cable/broadcast cross-ownership ban;
- Repealed the limits on cable/network cross-ownership;
- Eliminated the national ownership restrictions in radio;
- Relaxed the local ownership restrictions in radio;
- Eased the "Dual Network" rule;
- Directed the Commission to eliminate the national cap upon the number of television stations any one entity may own; and
- Directed the Commission to increase the national television ownership cap from 25 percent to 35 percent.[4]

As to the biennial review provision, the court stated clearly that the Commission was required by Congress "*to continue the process of deregulation*" by reviewing each of the Commission's ownership rules every two years.[5] It is this Congressional framework that guides the Commission's work, and it was the prior Commission's attempt to maintain rules in their current form and not heed the Congressional direction that led to so many of our broadcast rules being struck down, or remanded. As an administrative agency, the Commission is constitutionally bound to comply with Congress' direction, as expressed by the text of the statute.[6]

Recent court decisions have established a high hurdle for the Commission to maintain a given broadcast ownership regulation. As interpreted by the D. C. Circuit in the 2002 *Fox* and *Sinclair* cases, Section 202(h) requires the Commission to study and report on the *current* status of competition.[7] Indeed, the court's guidance suggests that the survival of any prospective broadcast ownership rule depends on this Commission's ability to justify those rules adequately with record evidence in light of the current competitive landscape, and to ensure that the rules are analytically consistent with each other. The implications of the court decisions were clear—failure to justify the necessity of any broadcast ownership rule will result in the rule being struck down.

Given the court's requirement that we consider the current competitive market, keeping all of the rules in their current form simply could not be justified as "*necessary in the public interest.*" Those rules failed to account for the dramatic changes in the media landscape over the last several decades, and suffered from inconsistency and incoherency that could not be squared with the statute or the court decisions without modification.

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[4] *Id.*
[5] *Id.* (emphasis added)
[6] *See Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988).
[7] See *Fox Television Stations, Inc.*, 280 F.3d 1027 (D.C. Cir. 2002); *See also Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

III. 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, which commissioned twelve studies, examining how Americans use the media for different purposes and how media markets function. This was the first time the agency actually sought out the American people to see how they access news. The group's work formed the initial foundation of our review. More importantly, those studies signaled that this review, unlike prior ones, would be rigorous, analytically consistent and based on record evidence.

For the first time, we took on the challenge of updating and reconciling years of piecemeal, decades old, ownership regulations in a rigorous and comprehensive way. We put out five *Notices of Proposed Rulemakings* and *Public Notices*[8] 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 fora were held on the subject, thanks in large measure to the efforts of Commissioners Copps and Adelstein, who could then bring those perspectives to the Commission's internal deliberations.

I am enormously pleased the public accepted our challenge. The record in this proceeding is deeper and more insightful than any I have seen in my six 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.

IV. THE MODERN MEDIA 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.

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[8] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001). 47 C.F.R. § 73.3555(a); *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001). 47 C.F.R. § 73.3555(d); *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*, 17 FCC Rcd 26294 (2002); *FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules,* 17 FCC Rcd 19140 (2002); *FCC Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Media Ownership Rules*, 17 FCC Rcd 22172 (2002).

Independent ownership of those outlets is also far more diverse, with 140 percent more owners today than in 1960.[9]

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. And local broadcasters are bringing the American public more local news than at any point in history.

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 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. Americans are clearly responding to this plethora of choice, as over 85 percent of television households now pay for either cable or direct broadcast satellite service providers.[10] This dramatic shift is evidenced by the fact that in 2000, for the first time in history, cable TV programming exceeded the prime time viewing of broadcast television, and in 2002 -- another first -- cable viewing exceeded 50 percent of the prime time audience.[11]

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 (http://news.google.com) brings information from 4,500 news sources to one's finger tips from around the world, all with the click of a mouse. 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, Slate Magazine (http://slate.msn.com), or Joe Citizen using email to let his views be known to the Commission, or the use by organizations such as MoveOn.org[12] 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. Indeed, the greatest challenge for speakers is getting the attention of an

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[9] See Scott Roberts, Jane Frenette and Dione Sterns, Federal Communications Commission (Media Ownership Working Group Study # 1), *A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000*, Sept. 2002.

[10] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 17 FCC Rcd. 26,901 (2002) at 3.

[11] *Id.* at 5.

[12] "MoveOn is a catalyst for a new kind of grassroots involvement, supporting busy but concerned citizens in finding their political voice. Our international network of more than 2,000,000 online activists is one of the most effective and responsive outlets for democratic participation available today." (visited June 18, 2003) <http://www.moveon.org/about/#s1>.

increasingly fragmented audience of viewers and listeners. This is a powerful paradigm shift in the American media system, and it is having a tremendous impact on our democracy.

V. THE PUBLIC INTEREST REMAINS PROTECTED

The marketplace changes mentioned above were only the beginning, not the end of our inquiry. In this *Order,* the Commission has, for the first time, more precisely defined our policy goals and developed metrics to actually measure market responsiveness to those goals. We adopted a more sophisticated way to measure the competitiveness of media markets; the robustness of the marketplace of ideas; and the responsiveness of broadcasters to local needs. The new broadcast ownership limits adopted today, are carefully balanced to foster a vibrant marketplace of ideas, promote vigorous competition and ensure that broadcasters continue to serve the interests of their local communities.

The most important public interest benefit, however, is that we have reinstated meaningful limits that are once again enforceable - the existing rules largely having been taken out of action, suffering from their judicially-delivered wounds. And, I believe we faithfully implemented the Congressional scheme.

A. Protecting Viewpoint Diversity

Today, we strongly reaffirm our core value of limiting broadcast ownership to promote viewpoint diversity. The Commission, recognizing that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," continues to rely on the preservation of multiple independent owners as the best way to ensure a robust exchange of news, information and ideas among Americans.[13]

As discussed in detail below, we developed a "Diversity Index" to more precisely define viewpoint diversity. The Index is "consumer centric," in that it is built on data about how Americans use different media to obtain news and information. Thus, while recognizing that viewpoint diversity is as elusive as it is cherished, we have developed this methodological tool to more coherently and systematically analyze the marketplace of ideas.

B. Enhancing Competition

Our new broadcast ownership regulations reaffirm our long standing commitment to promoting competition by ensuring pro-competitive market structures. Although the primary concern of antitrust analysis is ensuring economic efficiency through the operation of a competitive market structure, we found the Commission's public interest standard brings a closer focus to the American public. Thus, we have a public interest responsibility to ensure that broadcasting markets remain competitive so that the benefits of competition, including lower prices, innovation and improved service are made available to Americans.

To measure the competitiveness of the media market, we recognize that cable and satellite TV compete with traditional over-the-air broadcasting. We also found that pro-

[13] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663-64 (1994).

competitive ownership limits must account for the fact that broadcast TV revenue relies exclusively on advertising; whereas cable and satellite TV services have both advertising and subscription revenue streams.

C. Localism Affirmed as Important Policy Goal

We again affirm the goal of promoting localism through limits on ownership of broadcast outlets. We sought to promote localism to the greatest extent possible through broadcast ownership limits that are aligned with stations' incentives to serve the needs and interests of their local communities.

To analyze localism in broadcasting markets, we relied on two measures; local stations' selection of programming that is responsive to local needs and interests, and local news quantity and quality. Program selection is an important function of broadcast television licensees and the record contains data on how different types of station owners perform. A second measure of localism is the quantity and quality of local news and public affairs programming by different types of television station owners.

D. Importance of Promoting Minority and Female Ownership

We embrace our longstanding objective of encouraging greater ownership of broadcast stations by women and minorities. We further this objective by creating greater opportunities for new entrants in the broadcasting industry by carving out special transactional opportunities for small businesses, many of which are owned by minorities and women.

In addition, Minority Media Telecommunications Council made a number of creative and thoughtful proposals to advance minority and female ownership. These recommendations warrant a more thorough exploration; thus, I am pleased we have referred them for a Further Notice of Proposed Rule Making and to the Advisory Committee on Diversity to recommend policies that will withstand judicial scrutiny.

VI. LOCAL AND NATIONAL REGULATORY FRAMEWORK WILL PROMOTE DIVERSITY, COMPETITION, AND LOCALISM

The modified ownership rules we adopt today provide a new comprehensive national and local regulatory framework that will serve the public interest by promoting diversity, localism and competition. The local character of broadcast stations is a hallmark of the American media system. The *Order* modifies the local television ownership rule; strengthens the local radio ownership rule by modifying the local radio market definition; adopts a set of cross-media limits to replace the newspaper/broadcast and radio/television cross ownership rules; modifies the national television ownership rule; and retains the dual network rule.

A. Local TV and Radio Limits Enhance Competition and Preserve Viewpoint Diversity

Our new local television and local radio limits, for example, are both premised on well-established competition theory and are intended to preserve healthy and robust competition among broadcasters in each service. The rules rest on the antitrust principle that six independent,

equally-sized firms in a market generally will protect competition. In smaller markets, we recognize the need to strike a different balance that permits somewhat greater consolidation among radio and television stations.

We determined that our prior local television multiple ownership rule 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 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.

Because of the enduring competitive strength of the top four stations in virtually all markets, we prohibited mergers among stations ranked in the top four. Importantly, this ban will also promote viewpoint diversity by preventing mergers among those local stations that typically produce news in local markets.

We also found that our current limits on local radio ownership continue to be necessary to promote competition among local radio stations and we reaffirm 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 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 a geographic based market definition, which is a more rational means for protecting competition in local markets. For example, we fixed the vaunted case of Minot, North Dakota. The number of stations in Minot will be reduced by 65% under our reformed market definition, thereby limiting the number any single entity can own.

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 we made a limited exception to permit sales of grandfathered station combinations to small businesses, many of which are minority or female owned.

Finally, by ensuring that numerous competitors remain within each of the radio and television services, we also ensure that multiple independently owned outlets for viewpoint diversity will remain in every local market. Because local TV and radio ownership limits cannot protect against losses in diversity that might result from combinations of different media, we adopt the cross-media limits discussed below.

B. Cross Media Limits Promote Diversity and Localism

The agency's most challenging consistency issue in this proceeding was viewpoint

diversity. The *Sinclair* court criticized as facially inconsistent the Commission's two separate "voice" tests for two different broadcast ownership rules.[14] Under the Local Television Rule, the Commission considered only other television stations to be "voices," whereas the TV-Radio Cross-Ownership Rule considered television stations, radio stations, the local cable system, and each daily newspaper to be a "voice."[15] The court directed the Commission to reconcile the inconsistency between the two "voice" tests.[16]

The Commission has sought to do this by developing and applying a Diversity Index (DI) to its broadcast ownership rules. The DI is modeled on the Herfindahl-Hirschman Index (HHI) used by antitrust authorities to measure the degree of concentration in a given economic market. The DI seeks to measure concentration in local media markets using many of the same principles as the HHI – identifying market participants, assigning market shares, and squaring those market shares to arrive at a measure of concentration.

The principal shortcoming of our prior diversity analysis was the failure to capture in a reasonable way the relative importance of different outlets for purposes of viewpoint diversity. For example, the television-radio cross ownership rule considered each outlet in a city to be exactly equal, while the local TV ownership rule looked only to the number of television stations in the local market. Both formulations are clearly flawed - one equates the viewpoint impact of a small AM station in Washington, DC with the viewpoint impact of the *Washington Post*. The other blinds itself to all sources of diversity other than local broadcast television stations.

Our Diversity Index dramatically improves upon those frameworks by assigning weights to different outlet types. The weights are based on the results of an agency-commissioned survey of 3,000 Americans regarding the relative importance of different outlets for news.[17] Beyond that, the Index counts the number of each type of outlet in the market in calculating the extent of viewpoint "concentration" in a market. It does not attempt to capture the specific viewpoint impact of different outlet types by looking to the outlet's content, which can fluctuate in type and popularity from year to year. Instead it seeks only to distinguish between the relative speech power of different classes of media – radio, newspapers, broadcast television stations, the Internet, etc. In weighting different outlets according to their relative value to citizens, the DI provides the Commission with a far more consistent and rational metric for evaluating each ownership limit and, where necessary, establishing new limits.

Using the DI, we concluded that neither the blanket ban on newspaper-broadcast combinations nor the radio-television cross-ownership prohibition could be justified as necessary in the public interest in light of the abundance of diverse sources available to citizens for their news consumption. Furthermore, the clear public interest benefits of these combinations were revealed by evidence in the record. We found that greater participation by newspaper publishers in the television and radio business would actually enhance, not harm, diversity and localism. The record demonstrated that where newspaper-broadcast television combinations were allowed, those televisions stations have produced dramatically better news coverage in terms of quantity

[14] *See Sinclair Broadcast Group, Inc.*, 284 F.3d at 164.
[15] *See 1998 Biennial Regulatory Review*, Biennial Review Report, 15 FCC Rcd 11058 (2000).
[16] *See Sinclair Broadcast Group, Inc.*, 284 F.3d at 164.
[17] *See* Federal Communications Commission (Media Ownership Working Group Study # 8), *Consumer Survey on Media Usage*, Sept. 2002.

(over 50 percent more news) and quality (outpacing non-newspaper owned television stations in news awards).[18]

Therefore, we replaced the television-radio and newspaper-broadcast rules with a set of Cross-Media Limits. These limits are designed to 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 established these limits by using the DI to measure the availability of key media outlets in markets of various sizes. We concluded that there were three tiers of markets in terms of "viewpoint diversity" concentration, each warranting different regulatory treatment.

C. The Modified National Cap Protects Localism and the Dual Network Prohibition Protects Localism and Competition

We found that a national TV ownership limit on the percentage of potential TV households the networks may reach continues to be necessary to promote localism. We determined that a national ownership cap serves localism by preserving a balance of bargaining power between the networks and their affiliates; ensuring the affiliates play a meaningful role in the selection of programming that serves the interests of their local audiences. Although the record supports retention of a national ownership limit, it does not support a cap of 35 percent.

Record data showed the 35 percent limit did not have any meaningful effect on the negotiating power between individual networks and their affiliates with respect to program-by-program preemption levels. The record revealed that affiliates of the largest network-owners (CBS and Fox, at 39 percent and 38 percent national reach respectively) preempt to an equal or greater extent than do affiliates of ABC, with a national reach of only 23 percent.[19] Thus, networks with the greatest station reach possess no greater bargaining power with regard to preemption than the network with the smallest station reach.

The record also indicates that the national cap at its current level has other drawbacks as well. We found the national cap restrains the networks from serving additional communities with more local news and public affairs programming. Network owned-and-operated stations served their local communities better with respect to news production, as those stations aired more local news programming than the affiliates.[20] Furthermore, we concluded that permitting the networks a modest amount of growth will enable them to compete more effectively with cable and satellite TV operators and may reduce the migration of expensive programming to their cable networks.

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[18] See Thomas C. Spavins, Loretta Dennison, Jane Frenette and Scott Roberts, Federal Communications Commission (Media Ownership Working Group Study # 7), *The Measurement of Local Television News* and *Public Affairs Programs*, Sept. 2002.
[19] *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, National Ownership Rules*, adopted June 2, 2003 at ¶ 583.
[20] *Id.* at ¶ ¶ 565-566.

In balancing these competing interests, we concluded that the national ownership limit should be raised from 35 percent to a 45 percent limit. In reaching this decision, we attempted to balance the record evidence which demonstrates the affiliates apply positive pressure to the networks, making them more responsive on a local level, against the network owned stations' documented contribution to local news, as well as the public interest benefit of keeping high quality programming on free over the air TV. The court has recognized that setting caps is inherently a line drawing exercise and held that "the Commission 'has wide discretion to determine where to draw administrative lines,' and, therefore, the court will reverse that choice only for abuse of discretion."[21] We draw the line at 45 percent, as it approximates an equal measure of potential audience reach between networks and affiliates.

We also decided to maintain the "UHF Discount" when calculating a company's national reach because it currently serves the public interest. First, more than 40 million Americans still access only free, over-the-air television. Second, evidence in the record demonstrates that UHF stations have a smaller signal reach of approximately 44 miles; whereas VHF stations have a reach between 72 and 76 miles.[22] This has a very real impact on UHF stations' ability to compete. The VHF stations' competitive advantage is also evidenced by the fact that VHF affiliates of the top four broadcast networks have approximately 50 percent higher ratings than UHF affiliates of the top four networks.[23] Third, the UHF Discount has promoted the entry of new broadcast networks into the market. These new networks have improved consumer choice and program diversity for all Americans, including those with and without cable and satellite TV service. We concluded though, that when the transition to digital television is complete, the UHF discount will be eliminated for the stations owned by the four largest broadcast networks. We will determine, in a future biennial review, whether to include any other networks and station group owners in the UHF discount sunset. We drew this distinction to ensure that the resolution of the UHF discount issue will properly account for the goal of encouraging the formation of new, over-the-air broadcast networks.

We also found the existing dual network prohibition continues to be necessary to promote competition in the national television advertising and program acquisition markets. The rule also promotes localism by preserving the balance of negotiating power between networks and affiliates. In addition, an aspect of bargaining power is the ability of an affiliate to switch affiliation if its needs are not being met by the network. A merger of two or more networks would reduce the opportunity for affiliates to go elsewhere.

VII. CONCLUSION

[21] *Sinclair Broadcasting Group, Inc.*, 284 F.3d at 162 (citing *AT& T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000)).

[22] *2002 Biennial Regulatory Review*, *supra* note 19, ¶ 586.

[23] Letter from John Feore, Counsel for Paxson Communications Corporation, to Marlene Dortch, Secretary, FCC (May 7, 2003), Att. at 9 (stating that VHF-based affiliates received a 9.6 prime time rating compared to UHF affiliates' 6.4 rating).

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. Five years ago, at the outset of the last completed biennial review, I stated "[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."[24] This was an exceedingly difficult charge and I am proud that we have finally met this challenge head on.

I recognize, too, that by doing so we have forced an important debate about media regulation and the role of media in our society, a debate I welcome and encourage. I note, however, that much of the discussion (and hyperbole) has focused almost exclusively on content, not the structural broadcast ownership rules that are the subject of this proceeding. Much has been made about violent television, sexually explicit content, and "bland" or "coarse" programming. All of this anxiety about TV fare has been rolled into this proceeding as an indictment against media companies. Apparently, the notion seems to be that if we don't like the programming being aired, we can cure the problem by regulating the size and structure of broadcast television and radio. This, in my view, is not only a mistaken assumption, but is dangerously offensive to the principles of the First Amendment. As public officials we are not, nor should we be, empowered to adopt "must watch regulation."

It is easy to ridicule what we see on television and hear on the radio (or pine for what is absent) as the drivel dished out by corporate titans. It is less palatable to do so when one peers through this portrait and sees instead an indictment of the freely made program selections of our citizens. Put simply, a television company makes money by putting on programming that attracts the largest audience share possible. This is the inherent nature of the "mass media." We have heard much about five media companies controlling virtually everything we watch, hear and read. If this were true, I too would be alarmed. This statistic, however, has been purposely misstated to create hysteria around this proceeding. The truth is the "Big Five" control only 25 percent of the *channel capacity*, or an average of five percent each. These companies' alleged assault against the public interest is that they happen to produce the majority of programming that people like to watch. Apparently though, this is the same programming that some find objectionable and prefer we not see. In my view, popular freely chosen programming is not a policy question and the American public would undoubtedly find it deeply troubling that unelected government officials would want to make these decisions on their behalf.

The government has a legitimate interest in promoting a wide range of viewpoints from which to choose, but it strays illegitimately if it endeavors to regulate out of distaste for the viewpoints, or programs around which the populace has chosen to congregate. To urge the

[24] Separate statement from Michael Powell, *Federal Communications Commission*, regarding the *1998 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* (Mar. 12, 1998) <http://www.fcc.gov/commissioners/powell/mkp_statements_1998.html>.

Commission to do so, as many at bottom have, would re-awaken King George. This would surely disturb the slumber of our forefathers.