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STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
DISSENTING

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

This is a sad day for me, and I think for the country. I'm afraid a dark storm cloud is now looming over the future of the American media. This is the most sweeping and destructive rollback of consumer protection rules in the history of American broadcasting.

The public stands little to gain and everything to lose by slashing the protections that have served them for decades. This plan is likely to damage the media landscape for generations to come. It threatens to degrade civil discourse and the quality of our society's intellectual, cultural and political life. I dissent, finding today's Order poor public policy, indefensible under the law, and inimical to the public interest and the health of our democracy.

In the end, this Order simply makes it easier for existing media giants to gobble up more outlets and fortify their already massive market power. It capitulates too many of the longstanding demands of the media companies we oversee.

This approach shatters most of the last vestiges of the consumer protections that weren't eliminated in the 1980's. This decision pulls the teeth out of the remaining rules, leaving the FCC a toothless tiger. As big media companies get bigger, they're likely to broadcast even more homogenized programming that increasingly appeals to the lowest common denominator. If this is the toaster with pictures, soon only Wonder Bread will pop out.

It may take a while for the public to feel the full effects of today's decision. Consolidation in the media markets could take place over a number of years, just as it did in radio. But people will notice every time a new merger goes through that eliminates a voice in a community. Their anger will flash as they surf through their channels only to find more sensationalism, commercialism, crassness, violence, homogenization and noticeably less serious coverage of news and local events, just as many Americans warned me they expected to happen if we allowed further consolidation.

It didn't have to turn out this way. Congress and the courts forced a massive review. They did not force massive deregulation. We had a choice. The courts required us to justify our rules, not to gut them or replace them with pale substitutes. Certainly, the media markets have changed, and our rules must keep pace. But the majority chose to go much further than Congress or the courts required. They chose to pursue gratuitous deregulation. This is by far the most dramatic weakening of our media ownership rules this country has ever seen.

This has turned out to be a painful process. I had hoped for a better outcome I could support, or at least oppose less strenuously. The Commission undertook the most comprehensive review of its rules ever. It was designed as an effort to produce a judicially-sustainable, intellectually-coherent framework. But those good intentions and good faith efforts didn't pan out. The comprehensive framework never materialized. An effort begun with serious intellectual aspirations descended into an incoherent, outcome-driven political document, the likes of which the Commission has too often seen and sought to avoid.

A new regime for a new era never materialized. Instead, we're left with a muddled patchwork of meager protections. The only consistent elements are market-driven philosophies and deregulatory outcomes. The Order is rife with references to market efficiencies but virtually devoid of references to consumers.

It's been difficult for me to watch a group of colleagues whom I genuinely respect, like and admire move in a direction with which I so strongly disagree. I feel compelled to speak out, but take no joy in taking such strong exception.

The majority implies that Congress and the courts forced this outcome. I disagree. We had much wider latitude than this suggests. The biennial review 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 Congress's statutory guidance is two words – public interest. The American citizenry should benefit from each decision. All American citizens must benefit, including minorities, women, and non-English speaking citizens.

In the context of media ownership, no matter what others think the Circuit Court may have implied, the FCC still has a special duty to protect what the Supreme Court referred to as an "uninhibited marketplace of ideas."

I'm afraid this decision departs dramatically from our statutory mandate, which is to establish rules in the "public convenience, interest or necessity." Let me explain why today I think we fail to meet even that flexible, broad standard.

Judging from our record, public opposition is nearly unanimous, from ultra-conservatives to ultra-liberals, and virtually everyone in between. We have received about three-quarters of a million comments from the public in opposition to relaxing our ownership rules, a new record, and only a handful in support. Of the hundreds of citizens I heard from directly at field hearings

across the country, not one stood up to call for relaxing the rules. Of the thousands of e-mails I personally received, I saw only one 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 we can't make this decision by polls or by weighing postcards. Fair enough.

But the statute doesn't let us simply dismiss the public's views with a passing reference in one paragraph, as this item currently does. The public apparently has no interest in further media concentration. Does the majority really know what's better for the public than the three quarters of a million citizens who are motivated enough to contact the Commission or attend field hearings? We should not assume that those people who took the time to alert us to their deep-seated concerns, with 99.9 percent in opposition, are wrong unless there is overwhelming evidence proving it. Here, just the opposite is true. There is plenty of evidence the people are right.

The public is joined by bipartisan chorus of caution from over 150 Members of Congress. Organizations from nearly every political stripe, from the National Rifle Association to the National Organization for Women, expressed grave doubt about the wisdom of allowing greater consolidation. We heard from artists, academics, media moguls -- Republicans, and Democrats.

It has been said that the public comments we received are too simple and offer no substantive basis from which to make our decision. I beg to differ. I have read a lot of their comments, and I've listened to hundreds of people firsthand in city halls, schools churches and meeting rooms.

Let me tell you, the Americans we heard from know what they're talking about. This is the media they view every day. They take it very personally, and they are very articulate and substantive in what they say.

We have heard from people who have collectively spent billions of hours watching TV, listening to the radio and reading newspapers. There is no better expert witness than the American people. There is no more objective jury.

But today's decision overrides their better judgment. It instead relies on the reasoning of a handful of powerful media companies who have a vested financial interest. Those who stand to benefit by buying and selling the public airwaves won out over the public.

Anyone who questions whether consolidation can cause harm need only look to the experience of radio. The most constant refrain I heard from coast to coast was complaints about the homogenization and loss of news coverage on the radio dial since 1996. People begged us not to let happen to television what happened to radio. But the majority did not heed this concern. By ignoring this history, we may be destined to repeat it. Radio is a very sick canary in the coal mine, and we're about to infect television with the same disease.

I suggested and would have taken another approach. This Order often equates the public interest with the economic interests of media conglomerates. It assumes that efficiencies and cost savings created by mergers will translate into benefits for the public. But it makes no effort to ensure that will actually happen.

We could have easily addressed these concerns. I share the view that given changes in the marketplace, some of these combinations may make sense. I could have supported greater flexibility to evaluate mergers on a case-by-case, market-by-market analysis. That is the only true way to determine if media mergers of this magnitude would actually benefit the public. But the only way to determine the value of a given merger is for the Commission to request companies that seek to merge to demonstrate how, in the case of those particular entities in those particular markets, any efficiencies gained by the merger would be channeled into something positive for the viewing public.

The majority rejected such an approach 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.

Their stated goal is to achieve more market certainty for entities that seek to merge. They proudly note that establishing set rules facilitates transactions, reduces costs and makes deals more attractive to the capital markets. Another stated goal is to avoid the administrative burden that a case-by-case approach would impose upon the Commission.

The Order actually makes a special effort to proclaim the Commission has no interest in the facts of particular cases since the new rules are the be-all and end-all of what's in the public interest. This implies the Order divined some sort of higher truth as to what works best in every case for the American people. It says we don't want to be bothered with facts that might point in another direction.

In its rigid insistence on fixed rules based on oftentimes arbitrary numbers, the Order ignores our statutory obligation to serve the public interest, convenience, and necessity in favor of the convenience of those who seek to maximize the money they can extract from private sale of the public airwaves. And it favors the Commission's administrative "convenience" ahead of the public interest. We are here to carry out the statute, not subvert it with the excuse that it's too much work to implement. This just won't do when our very democracy is at stake.

The majority's approach simply assumes that if we let media companies merge, they will channel the resulting efficiencies into better programming for the public. Broadcasters have a long and proud tradition of public service I know many will want to carry on. But in the absence of some other compulsion, the logic of marketplace competition and the media companies' fiduciary responsibility to shareholders will require them to maximize profits rather than serve the public interest. The record does not support the dangerous assumption that the many mergers contemplated under these rules will invariably serve the public interest.

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?

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.

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.

Despite the Order'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.

The majority completely ignores the reality that neither cable nor the Internet has changed the huge market power granted by federal license to use scarce broadcast spectrum, particularly when that license comes with the requirement to be carried on cable.

It also ignores 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.

Today's bottom line spells an open season on consolidation. In place of our once powerful cross-media limits, only 2.3 percent of the American population will now receive full diversity protection. In contrast, the markets where all remaining cross-media protections have been entirely lifted represent 72.58 percent of the population.

While I agree that some consolidation may be warranted in the very top markets, the leap from protecting 100 percent of the population with full cross-newspaper/broadcast protections to less than 30 percent is dramatic. 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 my view, it is no exaggeration to say the rules now permit the emergence of a 21st Century Citizen Kane on the local level, with perhaps a handful of Citizen Kanes on the national level.

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 this safe for democracy?

We have heard that relaxing the rules is appropriate because so many Americans can now access so many channels, the Internet and other media. But it turns out the same few vertically-integrated global media firms own the bulk of what people see. Ownership has become more concentrated. 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.

And we cannot ignore that many citizens have no access to these wonderful new options. Until every American can effectively access these outlets, this Commission should protect the diversity available in the outlets that serve their needs.

Our task, therefore, should be to encourage maximum diversity, not assure a four-voice or six-voice sliver of it. This Order, to the contrary, concludes that there is plenty of diversity already, so we can afford to sacrifice some and have enough left over.

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.

When this full document is finally made public, I expect it will be torn apart by media experts, academics, consumer groups, activists, and most of all, the American people. They will find it riddled with contradictions, inconsistencies, false assumptions and outcome-driven thinking.

I would like to recount some of the most glaring inconsistencies and flawed reasoning behind these new rules. I've got a much longer written critique I will release soon, but will spare you now by summarizing some highlights.

In perhaps the Order's most inexplicable inconsistency, the Majority decides to retain a 50 percent discount for UHF stations in the national television cap, yet fails to apply comparable treatment to the local television rule and cross-media limits. To discount some stations for one rule while failing to do so in others is arbitrary and unjustifiable. If the purpose of this exercise is to update our rules in light of technological developments, we can't ignore some just because we don't like the outcome of more stringent limits.

In perhaps the most blatant evidence of a results-driven process, the Majority goes out of its way to allow companies to seek waivers of the new bright line rules to achieve greater concentration, while it attempts to deny the statutory right of opponents of mergers to petition to deny a given transaction. It is fundamentally unfair to allow waivers for corporate interests in extenuating circumstances without the corresponding protections to the public.

The Diversity Index was a noble effort that tragically degenerated into an ill-conceived rote formula that even Merlin couldn't decipher. The Index is seemingly nothing more than economic jujitsu, an ornate castle built upon a foundation of sand at the ocean's edge.

After detailing at length the new formula and its underpinnings, the Majority stresses that the index is used only as a basis to draw bright-line rules. But the order specifically denies any person the right to apply this new magical formula to a particular market. In other words, no one can use the FCC's own new methodology to show that an application in a particular market harms the public interest.

Among its many flaws, the index distorts how it calculates the market shares of relevant providers in each local market, resulting in grossly understated measurements of the impact of any particular combination. For example in New York, it treats the Shop At Home TV station the same as the local NBC station. Similarly, with respect to newspapers, the index treats the New York Times the same as the Polish Daily News.

Despite the quest for empirical footing, the index is premised on admittedly incomplete data. Recognizing that the Nielsen study failed to ask the specific question of the source of local news, the majority marches ahead, cobbling its own data points on local news sources from selective answers to muddled questions.

Against all notions of consistency, the majority unwisely decides that even if a broadcaster is restricted from acquiring a newspaper, the broadcaster can still buy the paper and hold it until its next renewal period – a period of 8 years. This simply underscores the outcome-driven nature of this Order.

On the radio front, the retention of some local radio rules appears an acknowledgment by the majority that they couldn't stomach the fallout from the rapid consolidation of the past 7 years. And some actual improvements were made in the market definitions.

Yet, for all the talk about tightening the radio rules, in several important respects the Order actually further unleashes the industry. It eliminates the radio-TV cross ownership rule. And it eliminates the current limit on the audience or advertising share any one owner can gain through mergers in a local market. For a rule designed solely to address competitive effects of mergers, it is mystifying why the majority would cast aside such a fundamental and economically sound principle as accounting for the measure of power of combined stations. The revised rule now clears the way for mergers that previously were denied or designated for hearing due to the strong likelihood of negative competitive effects.

The Order includes a helpful provision that allows only small businesses --initially -- to buy grandfathered groups of radio clusters that no longer comply with the new market definition. While useful, it may not get used much. Small businesses will encounter great difficulty in raising the capital necessary to buy expensive, large clusters, if they ever even come on the market at all. This is especially true given that the seller could peel off one or two stations and then sell both the remaining cluster and the spin-off stations with no restrictions to an unlimited pool of potential buyers, which will limit the exclusivity of the eligible entity buyer pool.

In my view, adding an admittedly helpful provision that potentially affects a only a handful of stations, if it ever gets used at all, doesn't come close to offsetting the sad truth that small businesses, including those owned by minorities and women, are going to find it even harder in more concentrated and expensive media markets to raise capital, own outlets or have their unique voices heard.

Most alarming is that after only two years, the small business can flip the grandfathered cluster to any large radio or media conglomerate like Clear Channel. Making this approach so ripe for abuse further diminishes the likelihood that it will serve much of a useful purpose, since real disadvantaged businesses will have to bid against companies that plan to sell to well-capitalized radio giants, raising the price of clusters. The ultimate beneficiaries of this approach could be companies like Clear Channel that could add even more grandfathered clusters than it currently controls.

Today the Commission introduces a new behemoth into our media landscape: a TV triopoly. Where is the empirical evidence supporting this creation in our record? As unjustified by evidence as it may be, this leap is in only six of top TV markets.

More troubling is the leap in the number of duopolies now permitted. Duopolies are now restricted to sizable markets. But this Order expands duopolies to 162 out of 210 markets, or 95.4 percent of the population. I can't fathom why we would allow such dramatic consolidation across the board with no analysis as to how this will impact individual markets. It's a breathtaking assumption that each of these mergers, all of which will eliminate a local voice, is in the public interest. And I don't believe the record justifies it.

I do believe the record demonstrates that further concentration of power in the hands of networks justifies retention of the national network cap at the 35 percent level set by Congress.

The majority has not adequately justified the selection of a new 45 percent cap. It relies exclusively on evidence showing that the largest network station owners possess no greater bargaining power, measured by prime time preemptions, than the smallest network station. This is a thin reed on which to justify a 10-point increase. Moreover, without access to more data, this conclusion is unconvincing.

In the end, we have yet another tradeoff between efficiencies and public interest goals such as localism. Guess who wins. The social benefit of locally originated and oriented programming and program selection to me outweighs the efficiencies of further vertical integration.

Finally, let me explain why I cannot join the majority in voting for retention of the dual network rule. I disagree with the Order's conclusion that diversity no longer underpins this rule. But more importantly, a more rigorous examination of this rule must be conducted in light of the rising tide of Spanish-language broadcasting networks. Just as the rule is retained for the top-four English-language networks, so too should Spanish broadcasting be examined separately. The rapid growth of the Spanish language media in the past several years is having a significant effect on the landscape in which broadcast networks operate. I believe that these developments require us to consider whether to afford Spanish-speakers the same protections available to English-speaking television audiences.

Looking back on how we got here, I am convinced there is little else I could have done to change the outcome. In an effort to moderate the extreme proposals that emerged, I offered suggestions to my colleagues which unfortunately were not incorporated. The turning point when I realized I could not likely support this proposal was when a majority settled on the notion that bright line rules were preferable to making case-by-case determinations as to whether mergers served the public interest.

The Supreme Court has said that "promoting the widespread dissemination of information from a multiplicity of sources" is of the highest order. So safeguarding diversity should not be subject to abstract diversity scenarios or arbitrary decisions that reduce the number of voices people can hear.

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. Today's rules just don't let the big get bigger, they will effectively prevent smaller entities from breaking in. I would have relaxed the rules more incrementally and shown the public each time how it would benefit.

Since my arrival here 5 months ago, I have approached this proceeding with a constructive frame of mind. I sought to understand the various proposals and their underpinnings, and offer my views on their efficacy. Even after others closed in on an approach with which I could not get comfortable, I made reasonable attempts to moderate the proposals -- which were refused. In the end, it wasn't the process that precluded me from participating in drafting and supporting today's Order. It was the substantive direction the item took and the results-driven imposition of bottom line, bright line rules ahead of all else. I am disappointed that a majority of my colleagues could not be persuaded to take a more reasoned, conservative, case-by-case approach.

This is far from over. Congress may prove more responsive to the citizens who passionately plea 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.

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