

KEYNOTE ADDRESS

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REGULATING MEDIA COMPETITION: THE DEVELOPMENT AND
IMPLICATIONS OF THE FCC'S NEW BROADCAST OWNERSHIP RULES

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Concentration of power over what we see in the news—even if we see a competitor's news—is a danger to democracy.

William Safire, Columnist, 2000

Television, like newspapers and radio, works best when it speaks with many voices, and as companies swallow one another, there is a frightening possibility of its speaking with one voice.

Linda Ellerbee, Broadcast Journalist, 2000

The fewer large organizations there are owning more media—in very general terms—the potential for that being worse for the media and not better is just obvious.

Peter Jennings, Broadcast Journalist, 1998

Thank you Bill, and special thanks to the American University Law Review for organizing this timely symposium on the Federal Communications Commission's embattled June 2nd Media

Ownership Rules. It is a subject that I care passionately about and, as we have seen over the past fifteen months, a subject that has captured the attention—and ire—of the American public.

As a matter of disclosure, I recently joined the board of directors of the cable television operator, Adelphia Communications Corporation. The views I express today, however, are solely my own.

I had the great privilege of serving as a member of the Federal Communications Commission (“FCC”) from 1994 until May of 2001—the height of the communications revolution. I served with three chairmen: Reed Hundt, William Kennard, and Michael Powell.

Back when I joined the FCC, Tim Berners-Lee had just created the World Wide Web, Direct Broadcast Satellite (“DBS”) service was poised to be launched, only two cellular telephone companies were licensed in each market, and the seven Baby Bells did not compete with one another for local telephone service. Today, 500 million people globally access the World Wide Web. There are twenty-five million DBS subscribers and 160 million wireless telephone subscribers in the U.S. And the remaining four Baby Bells *still* do not compete with one another for local telephone service!

In 1996, Congress passed the most sweeping revision in the sixty-two year history of the Communications Act of 1934,¹ the Telecommunications Act of 1996.² Under its new authority, the FCC introduced local telephone and multi-channel video competition, established digital television broadcast service, facilitated the development of broadband, and fueled funding for broadband connections to the classrooms. In addition, under its existing authority, it authorized satellite radio service, created the PCS service, established spectrum auctions (which have funneled billions of dollars to the U.S. Treasury), expanded the spectrum available for unlicensed technologies, and shielded the Internet from government regulation. Further, following the explicit instructions of Congress embodied in the 1996 Act, it significantly rewrote the media ownership rules. Those were exhilarating times at the FCC.

These are exasperating times at the FCC. The recent actions taken by the FCC majority to revamp media ownership reflect that sad assessment.

1. Ch. 652, 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.).

2. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

I. THE PUBLIC CARES DEEPLY ABOUT MEDIA OWNERSHIP

America cares deeply about the availability, vitality, and diversity of its media. This is not about the usual esoteric machinations of a regulatory agency. The threat of significant consolidation of media outlets provided a rude wake up call to the public.

The battle against the FCC's June 2nd Report and Order³ is being waged by an odd collection of bedfellows: from the National Rifle Association ("NRA") to the National Organization for Women ("NOW"); from Common Cause to the Catholic Bishops; and from the Screen Actors Guild to Brent Bozell's Parent's Television Council.⁴ These groups believe that the public's fundamental right to the widest possible dissemination of news and information from diverse and antagonistic sources is under siege. From conservative William Safire to liberal Ted Turner; from media mogul Barry Diller to the venerable Walter Cronkite, members of the Fifth Estate have spoken out forcefully against the trends toward outlet consolidation and content degradation in broadcasting.

On Capitol Hill, a similarly improbable, bipartisan coalition has formed to attack the FCC rules through legislation. This attack is led by Republicans Ted Stevens, Kay Bailey Hutcherson, Olympia Snowe and Trent Lott, and Democrats Byron Dorgan and Ernest Hollings in the Senate; and Republican Richard Burr, and Democrats Ed Markey and John Dingell in the House.⁵

The FCC has been deluged by more than two million letters, postcards, and emails decrying media concentration. This is the largest outpouring the FCC has ever received from the general public, far eclipsing previous campaigns by organizations affiliated with the religious right.

3. Broadcast Ownership Rules, Cross-Ownership of Broadcast Stations and Newspapers, Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets, 68 Fed. Reg. 46,286 (Aug. 5, 2003) (to be codified at 47 C.F.R. pt. 73) [hereinafter 2003 Broadcast Ownership Rules].

4. See, e.g., Comments of The National Organization For Women, In the Matter of 2002 Review of Commission's Broadcast Ownership Rules and Other Rules Adopted pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MM Docket No. 02-277 (Oct. 30, 2002); Comments of Common Cause, In the Matter of 2002 Review of Commission's Broadcast Ownership Rules and Other Rules Adopted pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MM Docket No. 02-277 (May 28, 2003); Comments of The Catholic Bishops, In the Matter of 2002 Review of Commission's Broadcast Ownership Rules and Other Rules Adopted pursuant to Section 202 of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, MM Docket No. 02-277 (Feb. 3, 2003).

5. See S.J. Res. 17, 108th Cong. (2003) (disapproving the rule submitted by the Federal Communications Commission ("FCC") with respect to broadcast media ownership).

At its core, people fear that control over what they see and hear and how it is presented will be fashioned by a small club of conglomerate gatekeepers. They distrust the media, which is seen as being driven by corporate interests rather than the public interest. They all are concerned—for different reasons—about the impact on society if the FCC's rules, temporarily stayed by the U.S. Third Circuit Court of Appeals,⁶ take effect.

For some, like the NRA, it is a perceived liberal bias of the media moguls, who might be capable of blocking the NRA's anti-gun control message.

For some, like NOW, it is fear that conservatives, such as Rupert Murdoch, might take control of the airwaves and use it to promote a right-wing agenda.

For some, like Brent Bozell, it is fear that consolidation will trample family values, as evidenced by the increasing use of sex and slime, violence and vulgarity on America's airwaves.

For some, like the Writers Guild, it is fear that media concentration will slam the door shut on independent productions and provocative themes.

For some, like William Safire, it is a profound belief that the public owns the airwaves, and we cannot allow the all-powerful media magnates and their corporate interests to control what we see and hear.

For some elected officials, it is settling old scores with state newspapers or broadcast foes that blocked the candidate's message from reaching the voters because the outlets supported the candidate's opponent.

For some on the Hill, it is helping their TV affiliate buddies battle the broadcast networks to roll back the forty-five percent national coverage cap.

Whatever the reason, the fight has grown in intensity, fueled by the FCC's political, procedural, and substantive missteps during its broadcast ownership rulemaking.

II. THE ROLE OF BROADCASTING IN SOCIETY

Before I talk about the June 2nd Report and Order, I want to reflect upon the special role of broadcasting in the American media constellation.

6. *See Prometheus Radio Project v. FCC*, No. 03-3388, 2003 WL 22052896 (3d Cir. Sept. 3, 2003) (finding that the magnitude of the rule changes and the public interest in properly resolving the matter required ordering a stay of the rules).

First, it is the only free media service that is licensed by the federal government. In many countries, the government owns and operates the broadcast networks. But Congress structured our system as a commercial service with a public service responsibility. In exchange for free and exclusive use—not ownership—of a swath of spectrum centered on a community of license and a statutory right for the analog signal to be carried on the local cable systems—radio and television broadcasters are obligated to serve “in the public interest.”⁷ However, the elements of that obligation have been emasculated over time.

Second, at least through the digital transition, the number of broadcast stations is limited due to the amount of available spectrum. There are far more people seeking broadcast licenses than there are available frequencies. In my view, the Federal government has an obligation to distribute those licenses as widely as possible to achieve one of its most fundamental goals—diversity of voices.

Third, with diversity of ownership and more independent decision-makers, the public is more likely to have access to a greater assortment of news and information sources, and individuals have a better chance of being heard.

Finally, when media is concentrated in the hands of a few powerful players, the pressure mounts for government to regulate content. As one who is deeply committed to First Amendment values, I am a strong defender of the use of prophylactic ownership limits to avoid government intrusion into content.

Over the years, the media marketplace has exploded with the growth of radio and television stations as well as alternative programming distribution channels, such as cable, DBS and, yes, the Internet. Yet, according to the Commission’s own studies, the majority of Americans get their news and information from the same sources that fed them before—broadcast television and daily newspapers. It is true that there are hundreds of channels of cable programming, and the Internet enables us to get news anytime, anyplace. But studies have found that seventy-five percent of the viewing is of networks owned by the top five media conglomerates.⁸

7. *See, e.g.*, 47 U.S.C. §§ 160, 201 (2000) (empowering the FCC with the authority to regulate broadcasters in order to ensure that broadcasters act consistently with the public interest).

8. *See* In the Matter of 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 2-2 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Report and

The same concept applies to the Internet. The twenty top news sites are owned by the major media networks and newspapers. As Senator Byron Dorgan so aptly described, it is media ventriloquism—not diversity of voices.⁹

III. THE DOWNSIDE OF MEDIA CONSOLIDATION

As media outlets have consolidated, cutbacks have followed in their wake. Radio, a service created for localism, is a perfect example. The government could have issued national licenses, but it did not. It wanted stations to remain community based. However, the 1996 Act lifted the national radio cap. Before passage, the cap imposed a forty station national limit. Today, we have a radio group that exceeds 1,200 stations.¹⁰ Further, there are thirty-four percent fewer radio station owners than just seven years ago.¹¹ And there are far fewer minority and female owners.¹²

Newsrooms have been shuttered. DJ banter is often voice-tracked to create neo-localism. Under voice-tracking, a DJ in a studio hundreds of miles away laces talk with local references to intentionally deceive the community into thinking he is right around the corner.

We now are seeing the same developments in television, with “local” newscasts central-cast in another state, reducing the cadre of on-site reporters. When a local crisis erupts, there may not be any reporters on hand to cover the news. Thus, consolidation may give us more newscasts, but less news.

Radio consolidation has also dramatically reduced the number of people who decide what gets played. For example, a powerful station

Order, 18 F.C.C.R. 13,620, 13,695 (2003) [hereinafter 2002 FCC Biennial Broadcast Review Order].

9. Press Release, Senator Byron Dorgan, Dorgan Statement at Radio ownership Consolidation Hearing—“Having an Absentee Landlord Can Have Real Consequences” (January 30, 2003) (on file with the American University Law Review).

10. See 2002 FCC Biennial Broadcast Review Order, *supra* note 8, at 13,712 (noting that Clear Channel Communications alone owns over 1,200 radio stations).

11. Statement of Commissioner Jonathan S. Adelstein, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, at 10 (June 1, 2003), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A8.pdf; Statement of Commissioner Michael J. Copps, dissenting, Regarding the 2002 Biennial Regulatory Review—Review of the Commission’s Broadcast Ownership Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, at 9 (June 1, 2003) [hereinafter Statement of Copps], available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235047A9.doc.

12. Statement of Copps, *supra* note 11, at 9.

group banned airplay of the Dixie Chicks for remarks by one band member that were critical of President Bush.¹³ Any licensee is free to make such a decision but in this new world of consolidation, millions of listeners in scores of markets were affected by one corporate decision.

Additionally, there are accusations of pay for play in radio. This occurs when a station group gets money from brokers to play a client's recordings or the program director forces a band to perform for free at the radio station's concert in order to be assured airtime.

Similarly, in television, there are reports of a new form of pay for play—companies paying a station to be featured on segments of its local morning show with a tiny disclaimer at the end of the program. Some stations are even using newscasters to do such paid segments. While blurring the line between news and advertising may feed the bottom line, it also feeds the public's lack of trust in the media.

We have seen other downsides to consolidation. I mentioned that the public interest requirements have been emasculated over the years. The one remaining requirement is one that we actually *strengthened* in 1996—the requirement that each television station serve the educational needs of children, with a safe harbor of three hours per week of qualifying programs.¹⁴ Yet, a study of the Los Angeles market showed that the number of children's series on TV had decreased nearly fifty percent since 1998—and this decrease occurred primarily on three of the four TV stations that were part of duopolies.¹⁵ It's all for the money—all for the bottom line.

IV. THE TELECOMMUNICATIONS ACT OF 1996

What prompted the current rule changes? Some will point out that the media ownership rules have been on the books for decades. I would point out that both before and after the 1996 Act, my Commission assessed each of these rules in detail in response to a rapidly changing media landscape.

In 1995, we initiated proceedings to relax some of the ownership rules and tighten attribution. Around that time we also eliminated

13. See John Schwartz & Geraldine Fabrikant, *War Puts Radio Giant on the Defensive*, N.Y. TIMES, Mar. 31, 2003, at C1 (noting that Cumulus Media banned the group's music from being played on its forty-two country music stations).

14. See 2003 Broadcast Ownership Rules, *supra* note 3, at 46,298 (agreeing with the Children Now organization that diversity of children's programming will be reduced if additional media consolidation occurs and proposing that owners of two or more stations in a market may only count the education program toward one station).

15. 2002 FCC Biennial Broadcast Review Order, *supra* note 8, at 13,690 n.394.

the prime time access rule¹⁶ and hammered the last nail into the Fin-Syn¹⁷ coffin, fundamentally altering the financial incentives of the industry.

The 1996 Act included a major overhaul of the media ownership rules. Congress hotly debated these provisions, and at one point the President threatened to veto the media ownership rules. The final compromise instructed the FCC to make the following rule changes:

- (1) Eliminate the national radio ownership cap;
- (2) Eliminate the national television station cap;
- (3) Raise the maximum national TV reach from twenty-five percent to thirty-five percent of TV households;
- (4) Allow TV duopolies in certain markets;
- (5) Raise the market radio ownership cap to eight stations in the largest markets;
- (6) Ease restrictions on radio/television cross ownership; and
- (7) Permit major networks to buy fledging TV networks.¹⁸

We made all of them. But, *mea culpa*—we blew it. The D.C. Circuit found that we had misread Section 202(h) of the Act,¹⁹ which requires the FCC to review *all* of its broadcast ownership rules every two years and “determine whether any of such rules are necessary in the public interest as a result of competition,” and to “repeal or modify any regulation it determines to be no longer in the public interest.”²⁰

We treated our 1998 biennial review as regulatory triage. We asked the public which rules needed revision or elimination, and we initiated rulemakings to address those we felt needed immediate attention. As an expert agency, we concluded that the market had not yet had a chance to digest the monumental revisions I previously outlined. Therefore, we would wait until the next biennial review before imposing more structural changes.

Well, the D.C. Circuit pounced on us. Judge Harry Edwards (the

16. The prime time access rule precluded the major networks from providing programming between the hours of seven and eight p.m. in the East and West and six and seven p.m. in the Midwest. Bill Carter, *F.C.C. Chief Urges Repeal of Network Prime-Time Limit*, N.Y. TIMES, July 17, 1995, at D8.

17. The Fin-Syn—or financial interest and syndication—rule prevented the three major broadcast networks from owning or syndicating their prime time series. Geraldine Fabrikant, *The Media Business; ABC Deal to Share Revenues*, N.Y. TIMES, Nov. 29, 1994, at D1.

18. Telecommunications Act of 1996 § 202, Pub. L. No. 104-104, 110 Stat. 56 (1996).

19. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1039 (D.C. Cir. 2002).

20. Telecommunications Act of 1996 § 202(h).

judge for whom Chairman Michael Powell had clerked) noted during oral argument that by enacting Section 202(h), Congress had ordered the FCC to do the impossible—a full rulemaking on every one of its rules every two years.²¹ As you are aware, the Court ordered the FCC to justify or modify its rules.²²

V. THE FCC'S JUNE 2ND REPORT AND ORDER

As you heard this morning, in applying the “necessary in the public interest standard,” the Powell majority, *inter alia*, authorized TV duopolies in most markets and triopolies in the top markets, raised the national TV cap to forty-five percent, and inexplicably retained the fifty percent UHF Discount; which defies marketplace realities.

I was a colleague of Michael Powell for three and a half years, the last five months of which occurred during his tenure as Chairman. He is an exceptionally bright and dedicated public servant. I do not believe that he is motivated by a desire to court favor with the media moguls, as speculated by the press. I think that he tried his best to conduct an omnibus review of the broadcast ownership rules and to present original research that would become the factual underpinning for a new set of rules capable of withstanding judicial scrutiny.

A lot of what he did was good. But, regrettably, he and the majority got much of it wrong. Chairman Powell said the June 2nd Order was responding to judicial criticisms. But, the Third Circuit Court of Appeals stayed its implementation.²³

He said that the June 2nd Order was responding to congressional imperatives. But the Senate approved a Resolution of Disapproval, and in the House, there are two hundred and five signatures on a letter asking the Speaker to allow a vote on a companion resolution.²⁴ If the Resolution passes, it would be only the second time that this “Contract with America” procedure has been used to nullify a rulemaking—and the first time that such action has been taken by a Congress led by the President’s own party. How could this happen?

First, I do not believe that the Commission was compelled by the

21. *See* Fox Television Stations, 280 F.3d at 1039 (recognizing the difficulty of reviewing the rules every two years but labeling the 1998 decision as a final agency action and open to judicial review).

22. *Id.*; *see also* Sinclair Broad. Group, Inc. v. FCC, 284 F.3d 148, 162 (D.C. Cir. 2002) (finding that while the Commission adequately explained how the local ownership rule furthered diversity, it failed to justify counting fewer “voices” in its rule and therefore ordered the Commission to defend this finding).

23. Prometheus Radio Project v. FCC, No. 03-3388, 2003 WL 22052896, *1 (3d Cir. Sept. 3, 2003).

24. S.J. Res. 17, 108th Cong. (2003).

Court to throw out the old rules in their entirety. Where appropriate, the FCC could have better justified some rules and modified or eliminated others to fulfill its obligation under the law. Second, the FCC should have been more responsive to the rising tide of public opposition to relaxation of the rules. Once consolidation takes place, it is virtually impossible to roll back the clock—as we have seen in the radio industry. Additionally, Chairman Powell was ill-advised to reject a request by two of his colleagues that the Commission conduct a series of public hearings on the rules. By so doing, he handed his opponents a procedural hook to rally around.

Also, he should not have cavalierly denied the request by two of his colleagues for a one-time delay in scheduling the Commission meeting for voting on the ownership rules. Traditionally, such a request is always granted. By riding roughshod over his two colleagues, Chairman Powell lent credence to the argument that he was ignoring the public, and gave his opponents another rallying cry.

Wasn't the FCC created to serve the public interest? Unlike most FCC proceedings, which can be characterized as expensive duels among industry titans, it was clear that the public cared about media ownership. By denying the public a forum, the resulting outcry reached Capitol Hill. Not only did people contact the Commission in record numbers, members of Congress began to speak out in record numbers.

While the Commission should not necessarily give in to such pressures, certainly this level of criticism is a flashing "GO SLOW" sign—a signal to make sure that the public it serves has every chance to comment on the specific actions under consideration by the Commission. In hindsight, Chairman Powell might have been better off publishing the June 2nd Order as a Notice of Proposed Rulemaking. This would have allowed him ultimately to address the many inconsistencies and unintended consequences that surfaced in the June 2nd document.²⁵

Instead, Chairman Powell apparently felt that it was better to press forward. Perhaps he thought that once the FCC acted, Congress and the public would lose interest over the summer recess and the new rules would be firmly in place. Now he is facing an historic rescission

25. For example, Commissioner Adelstein discovered that the FCC rules treated the tiny hamlet of Minot, North Dakota as if it had more TV broadcasters than Detroit, Michigan, the tenth largest DMA. Press Release, Federal Communications Commission, FCC Commissioner Jonathan S. Adelstein Calls on FCC to Fix Anomaly in New Media Rules Before They Take Effect: New FCC Rules Count Minot as Bigger Media Market Than Detroit (July 15, 2003), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-236569A1.pdf.

vote in Congress, riders to both House and Senate appropriations bills, and a judicial stay of the Order. The issue has not gone away; rather, it has gone awry.

I have talked about the procedural and political missteps; now for some brief comments on the Order itself. The panelists this morning have gone into much greater detail than I will in the few minutes that remain.

A. Public Interest versus Antitrust

While the item gives lip service to the importance of diversity of voices, the Order allows efficiency to trump diversity. For example, the Order fails to justify how awarding one owner three coveted television station licenses in a market could possibly be in the public interest.

For that matter, why should the public find comfort in the notion that there can be no fewer than six TV station owners in a market say, the size of New York? Maybe it works from an antitrust perspective, but aren't we talking about the underpinning of democracy and diversity of voices? Should the public not worry that in our largest markets these rules might allow one company to own not only the highest rated TV station and two other TV stations, but also the top rated newspaper, eight radio stations, and perhaps even one of the two DBS systems or maybe the local cable system and Internet portal? How can this possibly be in the public interest?

B. Small Business

Small business is the lifeblood of this country. But the rules do nothing to facilitate investment by entrepreneurs. Last year, Ted Turner wrote that he would not have been able to launch CNN or buy a UHF stand-alone station under today's level of concentration.²⁶ Media giants control both the means of distribution and the best content.

There is a token provision for small business. The grandfathering provisions permit a broadcaster to sell, intact, a nonconforming group of radio stations in a market to only small businesses.²⁷ But what small business, not to mention a female or minority owned enterprise, has the money buy such a large group? And is the small business really likely to be independent from the seller when the

26. See Ted Turner, *Monopoly or Democracy?*, WASH. POST, May 30, 2003, at A23 (discussing the concern that media consolidation will prevent further media entrepreneurship).

27. 2003 Broadcast Ownership Rules, *supra* note 3, at 46,327.

seller can buy back the non-conforming station group after three years?²⁸ Who are they kidding?

C. *Diversity Index*

The Diversity Index (or Dumb Index)²⁹ was a valiant but failed attempt to quantify an inherently elusive concept. It just does not work. While it recognizes that people get their news and information largely from TV and newspapers, the index grants the same weight to the New York Times as to a small community newspaper, and values WNBC and a home shopping channel alike.

Additionally, it is hard to measure the benefit of media diversity. How do you capture “the externalities” of a fully informed voting public? Further, even if the Diversity Index worked, you can’t use it to analyze a local market, since the FCC refused to put it out for public comment.

It reminds me of the half-built digital TV tower not far from here where the construction was halted by a lawsuit. It has a noble purpose, but is useless and an eyesore.

D. *Red Flag Process Dropped*

In the name of *efficiency*, the Order does away with Red Flagging—a small procedural step that I insisted on years ago to let the public know when a proposed acquisition would result in the combination garnering fifty percent of the market radio revenues or the top two groups having seventy percent of the market share.³⁰ This extra paragraph, added to the standard Federal Register Notice, was designed to alert people that there may be a concentration problem so that they could voice their objections.

The Order eliminates that notice. I guess the Commission doesn’t want the public to know when its bright line test permits egregious over-concentration. The Order does try to address the market definition problem that we identified in 1996. The old formula enabled far too many stations to be counted in determining the maximum number of stations a group owner could have. I applaud the Commission for attempting to tackle this topic.

28. *See id.* at 46,326.

29. *Id.* at 46,316 (defining the Diversity Index as “a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local media markets.”).

30. 2003 Broadcast Ownership Rules, *supra* note 3, at 46,291.

E. Newspaper Broadcast Cross-Ownership

A word about newspaper/broadcast cross-ownership: I believe that a modest relaxation was warranted in the absolute prohibition against owning both a broadcast station and a daily newspaper in the same market. If the Commission had not tackled the rule, it was likely that the Appeals Court would have acted.

There is a robust record supporting the contention that newspapers owning broadcast stations in the same market generally provide better news coverage than market competitors. Public benefits can flow from cross-ownership.

But, the Order cites only the potential benefits and brushes off any potential detriments. For example, newspapers historically have functioned as watchdogs over electronic media. When newspapers and television combine, where are the watchdogs?

In addition, the combination can be abused. In many cases, the editorial functions of the newspaper and television station are separate, and maybe even competitive. But, it is the unbridled accumulation of power that many rightly fear, whether or not it is exercised.

Where do you draw the line? It can be argued that large markets can afford the luxury of cross ownership because they probably have more than one daily newspaper to keep broadcasters in line. But, a merger can also have unintended consequences, even in large markets. Some suburbs in the shadow of large markets may have only a single radio station and a local newspaper covering local politics. Would the public benefit from those two combining?

It is in the smallest markets where cross-ownership may produce the most tangible benefits—and the most harm. Small markets may not generate enough revenues to justify a separate broadcast news operation.

A newspaper-television combination could make a broadcast news program feasible by distributing the cost across both outlets. Such a combination, however, could wield enormous influence over public discourse and the political process, and it may make it impossible for anyone else to compete in that market. It is not easy to strike the appropriate balance, and even more difficult to design a bright line test that governs in all situations—especially when you are the stewards of the public interest.

CONCLUSION

In conclusion, we have the FCC to thank for awakening the American public to the dangers that lie in consolidation of our Nation's media. The Commission's missteps have engendered a very healthy debate among the public, the Congress, and the Court.

Let's hope that the public foment causes the Commission to revamp its rules so that the public interest again triumphs over efficiency. And may the outcome be a vibrant media environment that thrives upon "the widest possible dissemination of information from diverse and antagonistic sources."³¹

Thank you.

31. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 623, 663-64 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).