Consumer Federation of America

**TESTIMONY OF**
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**on**

**MEDIA OWNERSHIP**

**BEFORE THE**
**SENATE COMMERCE COMMITTEE,**
**WASHINGTON, D. C.**

**October 2, 2003**

Mr. Chairman and Members of the Committee,

My name is Mark Cooper. I am Director of Research of the Consumer Federation of America.[1] I greatly appreciate the opportunity to appear before you today to discuss media ownership rules. This is the single most important issue confronting the Federal Communications Commission (FCC) because it deeply affects the fundamental structure of the forum for democratic debate in our society, in addition to affecting an extremely important area of economic commerce.

For two years we have urged the FCC to engage in rigorous market structure analysis and to adopt a high First Amendment standard for its media rules. It has completely failed to do so. The FCC has adopted a remarkably narrow view of the public interest under the Communications Act and abandoned the most elementary principles of market structure analysis. The result is a set of rules that bear no relationship to the reality of American media markets. The FCC's is wrong on the facts, wrong on the law and the resulting rules are entirely unreasonable. That is why Congress must step in and restore order.

## THE FACTS

### ILLOGICAL ASSUMPTIONS IN THE NEWSPAPER-TV RULE[2]

The FCC refuses to look at the actual audience of a media outlet in calculating its Diversity Index. The Index underlies the decision to grant blanket approval to TV-newspaper combinations in over 80 percent of all markets where over 95 percent of all Americans live. Refusing to recognize reality leads to absurd results.

For example, under the FCC's analysis, in Tallahassee Florida the PBS station operated by Florida State University, which captures less than 1 percent of the TV audience, counts as much as the number one TV stations, which captures almost 60 percent. Community Newspapers Holdings Inc., which owns the Thomasville Times Enterprise and the Valdosta Daily Times, counts twice as much as the Tallahassee Democrat, even though its newspapers have less than half the circulation. Under the FCC rules, the leading newspaper and the leading television station in Tallahassee would be given "no questions asked" approval to merge, even though the resulting company would have almost 60 percent of the TV audience, 70 percent of newspaper readers and control nearly two-third of the news room staff in the market.

The documents I have submitted for the record provide dozens of similar examples in markets of all sizes. These range from New York, where the Dutchess County Community College educational TV station counts more than the New York Times, to Lexington Kentucky, where the Corbin Times with a circulation of 5,000 is equal to the Lexington Herald, with a circulation of 115,000, and even more important than the CBS duopoly, which has over 60 percent of the TV market.

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[1] Consumer Federation of America (CFA) is a non-profit association of 300 pro-consumer groups, which was founded in 1968 to advance the consumer interest through advocacy and education.

[2] I have submitted for the record a study entitled *Abracadabra! Hocus-Pocus! Making Media Market Power Disappear With The FCC's Diversity Index* in which we examined over a dozen state capitals that demonstrates the FCC's analysis is riddled with these absurdities. (Available at www.consumerfed.org/abra.pdf )

## UNREALISTIC ANALYSES IN THE TV RULES[3]

The TV rules are based on similarly unrealistic assumptions. For example, the FCC campaign to raise the national cap on direct network ownership of TV stations by national networks as a tool to save "free TV" ignores the fact that every one of the broadcast networks is embedded at the core of a vertically integrated television conglomerate. The recent acquisition of Vivendi's U.S. entertainment assets by NBC means that all five owners of broadcast networks (CBS, ABC, Fox and Time Warner (WB) in addition to NBC) all own film production, film libraries, TV production and cable networks in addition to their broadcast networks. Four of the five own publishing and theme parks as well.

The synergies and economic power that result from internalizing production, initial distribution, syndication and repurposing are the hallmark of the television industry in today's multichannel environment. This integration of production and distribution has been reinforced by legal rights that allow the media giants to gain carriage on cable systems, which have enabled the parent corporations of the broadcasters to capture a large share of the non-broadcast video market. As a result, the network owners have used their cable offerings to recapture between two-thirds and three quarters of the audience they claim to have been losing for over-the-air TV.

These five firms and a sixth close ally[4] account for almost three quarters of the TV audience, programming expenditures and writing budgets of the entire industry and own over four-fifths of the prime time shows. More importantly, the five owners of the broadcast networks capture virtually 100 percent of the television news audience. In market structure analysis, five firms, even if they are equal in size, is not considered a large number. In fact, by the Merger Guidelines of the Department of Justice, which have been used for over twenty years to indicate where mergers create an anticompetitive concern, such a market is considered highly concentrated.

In economic terms, the national TV market is a tight oligopoly. And, the industry is financially healthy; the FCC's own analysis said so. Advertising rates are going through the roof. Advertising revenues performed better in the 1990s, the decade when multichannel video was supposed to be undermining broadcasting, than the previous two decades.

There is no public policy purpose to be served by allowing these entities to become larger and more powerful in either the national or local TV markets, yet that is exactly what the FCC proposes, allowing the networks to directly control stations that reach an additional 10 million households. The new rules expand the number of markets in which a single entity would be allowed to hold the license for two stations from about 50 to about 150. For the first time, it would allow a single entity to hold the licenses for three stations in one city.

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[3] I have submitted for the record a document entitled *Free TV Swallowed by Media Giants"* demonstrating the flaws in this save free TV reasoning. (Available at www.consumerfed.org/free-tv.pdf )

[4] Liberty has major financial interests in and business joint ventures with several of the big five.

## THE LAW

### THE FCC DEFINED ITS FIRST AMENDMENT DUTIES TOO NARROWLY[5]

Any discussion of media ownership rules must start from the recognition that, above all, they are based on the First Amendment right of the people to speak. For over sixty years the Supreme Court has expressed a bold aspiration for the First Amendment in the electronic age that rests on two fundamental principles.

First, the Court has declared that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Second, broadcast licenses, which create powerful electronic voices, especially for television, are scarce. "Because of the problem of interference between broadcast signals, a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public." Therefore, the Supreme Court has repeatedly concluded that there is no "unabridgeable right to hold a broadcast license where it would not satisfy the public interest."

With its most recent rulings on media ownership, the FCC has turned its back on this First Amendment jurisprudence. Instead of accepting the challenge of the Supreme Court's bold aspiration for the First Amendment to promote "the widest possible dissemination of information from diverse and antagonistic sources," the FCC has adopted the narrowest vision imaginable. It has declared that it is concerned only with ensuring that ideas can leak out and avoiding "the likelihood that some particular viewpoint might be censored or foreclosed, i.e. blocked from transmission to the public." If the distribution of media ownership undermines a robust exchange of views, the FCC is unconcerned, declaring: " Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions… nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing."

We do not claim that all ideas are of equal value, as the Commission wrongly implies, but we do insist that in our democracy ideas have an equal opportunity to be heard. By abandoning the bold aspiration for the First Amendment and adopting these remarkably lax rules, the FCC will allow massively powerful owners of multiple media outlets to decide which ideas are broadcast widely and which merely leak out to the public. There is a grass roots rebellion growing against the media concentration that these rules would spawn because the narrow view of the First Amendment adopted by the Commission is offensive to the traditions of vibrant civic discourse that the American people have always embraced. The rules violate the basic tenets on which our democracy stands and on which it has thrived.

[5] I have submitted for the record the first chapter of my book entitled *Media Ownership and Democracy in the Digital Information Age*, which outlines he First Amendment principles that should govern media ownership policy. (Available on line at no charge under a creative commons license at http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf )

### ANTITRUST PRACTICE IS ILL-EQUIPPED TO DEAL WITH FIRST AMENDMENT ANALYSIS OF MEDIA MARKETS[6]

The FCC claims that the confines of its narrow concept of the First Amendment prevent it from using the most fundamental information in market structure analysis, the shares of the firms in the market. Specifically, it has refused to look at the actual, real world audiences of media outlets, claiming that it must treat every outlet as if it had the same audience.

By this twisted logic, the Communications Act, which is clearly intended to provide greater protection than the antitrust laws for the public interest in media markets because of their important role in democratic debate, is gutted. Under the FCC's new standard for the First Amendment, citizens get less protection from media corporations' accumulation of market power than consumers do under antitrust laws. By the FCC's own analysis, in over half the scenarios for broadcast-newspaper mergers that it considered the FCC would give blanket approval to mergers that would violate the antitrust *Merger Guidelines* by a substantial margin.

Antitrust law cannot deal with these problems. First, over the past two decades every major relaxation of structural limits on media ownership – deregulation of cable, repeal of the Financial and Syndication Rules, lifting the cap on radio ownership, and the TV duopoly rule – has been followed by a swift merger wave. Although some have argued that antitrust was intended to and should consider citizen issues, antirust practice has moved far toward pure economic considerations. Antitrust is about economic efficiency and profit; the First Amendment as it relates to the media is about understanding and truth. To put the matter simply, antitrust officials do not "do" democracy. As Justice Frankfuter put it almost sixty years ago in the seminal case, "truth and understanding are not wares like peanuts and potatoes." Antitrust officials can tell you when a merger between TV stations will raise the price of advertising; they do not examine if it lowers the quality of civic discourse.

## REASONABLE RULES

### RIGOROUS MARKET STRUCTURE ANALYSIS SHOWS MEDIA MARKETS TO BE CONCENTRATED[7]

Over a year ago, the Consumer Federation of America presented a framework for examining media markets to the Commission that would allow it to apply rigorous market structure analysis within a framework of high First Amendment principles. Last spring we presented a detailed analysis of media markets based on traditional economic approach, a thorough review of the First Amendment jurisprudence and the empirical record before the FCC.

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[6] I have submitted the for the record the second chapter of my book entitled *Media Ownership and Democracy in the Digital Information Age, which* discusses the weakness of economic analysis for First Amendment policy. (Available on line at no charge under a creative commons license at http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf ).

[7] I have submitted for the record our analysis entitled *Promoting The Public Interest Through Media Ownership Limits: A Critique Of The FCC's Draft Order Based On Rigorous Market Structure Analysis And First Amendment Principles*. (Available at www.consumerfed.org/divindex.pdf )

- ? **Considered as separate products, which the empirical evidence indicates they are, we find that over 95 percent of the newspaper markets, 90 percent of the TV markets and 85 percent of radio markets are highly concentrated by antitrust standards.**

- ? **Local and national TV news markets are more concentrated than entertainment markets.**

Although it is difficult to combined different types of media outlets in a single framework, for cross media analysis we treated newspapers and TV broadcasters as dominant co-equals in media markets. TV dominates on the demand-side – being cited by about twice as many people as their dominant source of news. But, newspapers dominate on the supply-side, with almost twice as many newspaper newsroom staff in daily newspapers as there are newsroom staff at broadcast TV stations. Newspapers also produce a great deal more news copy than TV stations and they are frequently the source of ideas for TV news stories.

In response to survey questions, 80 percent or more of respondents cite newspapers and TV as the primary source of news and information, particularly about elections. Therefore, we assumed that other sources (radio/Internet/weekly)[8] account for 20 percent. The FCC failed to ask the proper questions and botched the analysis. It vastly overestimated the importance of these sources, giving them a 45 percent weight, almost equal to newspapers and TV.

- ? **We concluded that, even by our broad definition, over 90 percent of all media markets in this country are concentrated.**

- ? **In the handful of markets that are unconcentrated, most could only sustain one or two mergers before they, too, would become concentrated, but the FCC would allow multiple mergers within and across media in these markets.**

## RIGOROUS MARKET STRUCTURE ANALYSIS INFORMED BY HIGH FIRST AMENDMENT PRINCIPLES PROMOTES THE PUBLIC INTEREST[9]

Traditional antitrust practice defines a market as concentrated if it is has the equivalent of fewer than 10 equal sized competitors. Because media markets are so vital to democratic discourse, we recommended that the FCC adopt this standard as a bright line test, refusing to approve mergers in concentrated markets or that would create concentrated markets.

[8] The network claim that the Internet gives the average citizen an electronic voice equal to a broadcast license misrepresents the power of broadcast video as a distribution medium. Television is a powerful push medium; the Internet is still a weak pull medium. There may come a time when the Internet and widely available unlicensed spectrum may give citizens powerful electronic voices that rival the booming quality of the broadcast media, but that certainly has not happened yet. If the networks truly believe that the Internet equalizes the media landscape, they should be willing to turn back their licenses and distribute their programming over the Internet (they already supplement their broadcast licenses with web sites). Let them advertise their URL and have the public log onto their prime time shows and give let the broadcast licenses be enjoyed by someone else.

[9] I have submitted for the record our *Petition for Reconsideration*," which outlines the important roles that source diversity has in ensuring "widest possible dissemination of information from diverse and antagonistic sources." (Available at www.consumerfed.org/recon.pdf )

Public policy should not allow cross media mergers in markets that are concentrated, with an exception for conditions of financial distress or deminus acquisitions. Preserving the institutional independence, competition and antagonism between newspapers and television in every city in America is one of the most critical ways to ensure a robust exchange of views.

Public policy should not allow TV-TV mergers in markets that are highly concentrated. When hundreds of millions of Americans who would want a license cannot hold even one, it is difficult to justify allowing media conglomerates to own two, not to mention three in the same market.

Given the high degree of vertical integration in the television industry and the penetration of cable by broadcasters, the 35 percent ownership limit, which is actually a traditional antitrust level for monopsony power analysis (i.e. networks as buyers of programming exercising market power over sellers), is generous. In the early 1990s two fundamental public policy changes were made for broadcast television. The Financial and Syndication rules which limited the ability of networks to own prime time programming were repealed and broadcasters were given must carry/retransmission rights. The results are clear. Independent production of prime time programming has virtually disappeared and vertically integrated giants dominate the industry. At this stage of the game, rather than increasing the ownership cap to 45 percent, Congress should be considering whether to drop the cap back to 25 percent, or reinstituting the FinSyn rules.

**INCONSISTENCIES AND CONTRADICTIONS IN THE FCC ANALYSIS**

The FCC rules are also riddled with internal contradictions. The FCC justifies getting rid of the ban on cross ownership on the basis of a discussion of the market share, or the “strength,” or “influence” of individual outlets. Yet, when it comes to writing the new rule, it declares that market share, strength and influence do not matter.

The FCC defends mergers in its competition analysis, claiming that the production of news programming is difficult and expensive. Then it claims it does not have to consider market shares in its diversity analysis because the production of news programming is easy and cheap.

The FCC concludes that the top four local stations and the four major national networks should not be allowed to merge with each other because such mergers would increase economic market power, create dominant firms that are much larger than their nearest rivals, diminish the incentive to compete, and produce little public interest benefit because the merging parties are likely to be healthy and already engaged in the production of news and information products. Every one of these is a valid reason to ban a merger between dominant TV stations and dominant newspapers in the local media market. The FCC failed to apply this reasoning to cross-ownership mergers and ban dominant firm combinations.

I am confident that the Court will overturn the rules, but that will only send them back to the agency, which has spent two years misreading the record, misinterpreting the law and mangling the analysis. Congress should take action. The national cap was enacted by Congress. The cross-ownership ban is a bright line test that has been upheld in the courts. The evidentiary record supports both; the Congress needs to do so, as well.