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Relaxing the Rules of Media Ownership: Localism and Competition and Diversity, Oh My! The Frightening Road of Deregulation

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By Kristen Morse*

I. INTRODUCTION

Pay no attention to the Commissioner behind the curtain... The Great and Powerful FCC has spoken.

With recent changes to an array of media regulations, much of the public has little insight into how the Federal Communications Commission's (FCC) new media ownership rules will affect their lives. The less information the public has, the less power they have to thwart the efforts of the politicians who claim to really *know* what is best for the American people. But do our politicians actually know what is best for the residents of Dunkerton, Iowa, or Piney Flats, Tennessee? Perhaps, but with multi-media outlets becoming more prevalent in today's society, the public ought to understand the driving forces veiled behind a curtain of power.

In a world where we have strived toward expanding diversity, the FCC seems to be taking a leap backward. On July 2, 2003, the FCC voted along party lines (three Republicans against two Democrats), to relax the rules that guide media ownership, which potentially allows greater media control to fall into the hands of fewer entities. While the FCC had no idea that either side of the debate would have such strong reactions to the vote, both public outcry from media activists

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and support from media networks have been overwhelming.

If concentration of media ownership is the wave of the future, consumers may need to subscribe to twice as many channels to maintain the viewing diversity they currently enjoy. But media conglomerates argue that new media and changing times will force them to either increase prices or collapse – neither of which would benefit the public.

The FCC's recent changes are only the beginning of this passionate debate. This article will explain the FCC and its role in the creation of media regulation. In addition, the Biennial Review will be examined, and the rationale of both sides of the debate will be discussed. This article will also describe the reactions of Congress and the White House. As new litigation emerges, both of these entities play an integral part in modifying various regulations. Lastly, the article will focus on public reaction to many of the new rules and the measures that have been taken to diminish the effect of the new rules or quash them all together.

II. HISTORICAL BACKGROUND

A. The Federal Communications Commission

The Federal Communications Commission is an independent agency of the United States government and is directly accountable to Congress. The FCC was created by the Communications Act of 1934 (1934 Act)[1] to replace the Federal Radio Commission in the regulation of all non-federal government use of radio, television broadcasting, and telephonic communications.[2] In addition, the FCC inherited several former duties of the Interstate Commerce Commission (now the Surface Transportation Board) in the regulation of wire communication and with a jurisdictional arm that spans all fifty states, the District of Columbia, and other U.S.

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1. *See* 47 U.S.C. 151 (1934).

2. *Encyclopedia: Federal Communications Commission*, *at* http://www.Nationmaster.com/encyclopedia/Federal-Communications-Commission (last updated, Jan. 9, 2004) [hereinafter Encyclopedia]; *see also* Les Brown, *Self-Regulation in American Television in Areas Aside from Program Content*, 13 CARDOZO ARTS & ENT. L. J. 705 (1995).

territories.[3]

The FCC is a President-appointed and Senate-confirmed body comprised of five Commissioners, each of whom serve five-year terms,[4] and of which only three may be from the same political party.[5] From the five Commissioners, the President designates a Chairperson.[6] In addition, to prevent any direct conflict of interest or bias, the Commissioners cannot have a financial stake in any FCC-related business.[7] The current Federal Communications Commission is comprised of Republicans, Chairman Michael Powell, Kathleen Abernathy, and Kevin Martin and Democrats, Michael Copps and Jonathon Adelstein.

After its inception in 1934, the FCC laid a foundation of regulations, particularly for television broadcasting, and assigned two bands of television frequency: Very High Frequency (VHF) and Ultra High Frequency (UHF).[8] VHF included channels 1-13 and could only support 400 black and white stations nationwide.[9] Because of VHF's limitations, UHF was created, allowing for both a larger number of stations as well as the capacity to carry them in color.[10]

Subsequently, the evolution of television as a media staple grew exponentially, becoming "a vital tool for the timely dissemination of news and information."[11] Today there are thousands of media outlets and far more news and public interest programming options available to the public.[12] The FCC strives to regulate these media entities in

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3. Encyclopedia, *supra* note 2, at 1.

4. *Id.* There are some exceptions to the five-year term, just as with the Presidency; if a Commissioner is to be replaced mid-term, his successor may only serve for the remainder of the original Commissioner's term. *Id.*

5. We will see what an important part this last requirement played in the 2002 Biennial Review.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* This allocation between VHF and UHF in the 1950's, and the lack of UHF tuners, is analogous to the dilemma facing digital television and high definition television in the twenty-first century.

11. 2002 Biennial Regulatory Review, 68 Fed. Reg. 46286 (Aug. 5, 2003), *available at* http://www.fcc.org/ownership [hereinafter "Report and Order"].

12. *Id.* at ¶ 128.

order to balance quality and competition and the interests of free, over-the-air broadcasters with those of the new digital technologies.[13]

In order to accomplish this balance in regulation, the FCC has two main weapons - revoking broadcast licenses[14] and approving mergers. Broadcasting has always been a government-controlled industry because only those with a government license can broadcast,[15] and "[n]o matter how much money someone wants to invest to develop better or more popular television or radio programming, it will not reach potential audiences unless someone with a federal license agrees to carry it."[16] In addition, broadcasting licenses cannot be transferred or sold without FCC permission, and when a license is challenged by some entity desiring a particular frequency, the FCC holds comparative hearings in order to judge which applicant is most deserving.[17]

The FCC's power, however, is not solely discretionary. Both license renewals and merger actions are to be approved if they benefit "public interest, convenience, or necessity."[18] Even with this requirement, "fewer than 1% of station renewals are not immediately granted, and only a small fraction of those are actually denied."[19] The current debate over deregulation stems from the conflicts between the FCC and opponents who argue that, "[w]hen these local broadcast licenses become concentrated in a few hands, those few hands decide what goes on the air."[20]

With an understanding of what the FCC is and how it is designed to operate, this comment will shift its focus to the more recent contributions of the Commission and the effect it has had on public interest.

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13. *Id.*

14. "These licenses are also called 'station authorizations' or 'instruments of authorization.' The licenses dictate the authorized power of the station, operational hours, technical specifications of the transmitter and antenna being used, location of transmitter, latitude and longitude of antenna, and name and address of licensee." Brown, *supra* note 2, at 711 n.28.

15. Cheryl Leanza, *More Than "A Toaster with Pictures": Defending Media Ownership Limits*, 21 COMM. LAW. 12 (Fall 2003) (citing 47 U.S.C. § 301 (2003)).

16. *Id.* at 18.

17. Brown, *supra* note 2, at 710.

18. Encyclopedia, *supra* note 2, at 2.

19. *Id.*

20. Leanza, *supra* note 15, at 18.

B. *Telecommunications Act of 1996*[21]

While the rules have been modified since their inception in 1934, one recent and clearly defined directive from Congress came in the form of the Telecommunications Act of 1996 (1996 Act).[22] On February 8, 1996, Congress enacted the 1996 Act, "focusing on the need to 'promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.'"[23]

The 1996 Act handed down regulatory measures across a wide spectrum of telephonic and media topics. The Act included Section 202(h), which mandated the FCC to review the broadcast ownership rules every two years to determine if they are still "necessary in the public interest," and if not, the FCC is directed to "repeal or modify any rule it determines to be no longer in the public interest."[24] The 1996 Act stated:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[25]

Along with the directive for a biennial review, Congress left some of the ownership rules to the FCC's inquiry but also took the initiative to make changes to the ownership rules itself - revamping

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

22. The Act is codified in scattered sections of Title 42 of the U.S.C.

23. Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148, 154 (D.C. Cir. 2002) ("*Sinclair*") (citing Telecommunications Act of 1996 § 257(b) (1996)).

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

25. *Id.*

regulations placed on radio ownership and national television ownership.[26]

In radio, the 1996 Act eliminated a national cap on ownership and relaxed "common ownership" restrictions in local markets, as long as no one owner had stations making up more than fifty percent of the market's radio stations and there were a certain number of other radio outlets independently owned and available to the public.[27] In television, Congress raised the national media ownership level to allow a single media entity to reach 35% of American television households, up from to 25%.[28] The Act also instructed the FCC to amend its waiver policy for cross-media ownership rules, expanding the eligibility for such a waiver from the largest 25 markets, to now the top 50 markets.[29]

Congress left the task of local television ownership rules to the FCC, and in October of 1996, the FCC began research on how to satisfy the Act's concerns for the duopoly rule.[30] The FCC ended up with a rule that allowed a common ownership of two TV stations in the same local market, called the Duopoly rule.[31] In limiting this rule, however, both stations cannot be in the top four highest ranked in the market, and once the stations have merged, there must still be at least eight remaining independently owned television stations.[32]

The FCC conducted its first biennial review in 1998 and issued its 2000 Review and Order in May 2000.[33] The 2000 review examined three existing rules, making modifications to the Dual

26. *Sinclair*, 284 F.3d at 154.

27. *Id.*; *see also* 1996 Act §§ 202(a), (b).

28. *Sinclair*, 284 F.3d at 154.

29. *Id.*

30. *Id.* The Duopoly Rule dictates the number of television stations with overlapping "Grade B" signal contours that can be owned by the same company in the given market size. *Id.* at 152.

31. The Duopoly Rule was formerly known as the "one-to-a-market" rule. *Id.* at 154.

32. *Id.*

33. Press Release, FCC, FCC Issues Broadcast Ownership Biennial Review Report; Will Begin Rulemakings on Duel Network, Radio Market Definition, Experimental Station and Newspaper/Broadcast Cross-Ownership (May 30, 2003), *at* http://ftp.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/ nrmm0028.html.

Network Rule and the Media Cross-Ownership Rule.[34] The National Television Ownership Limit was retained at the 35% cap on television households that one company could reach.[35]

The Dual Network Rule was changed from one-to-a-market, to allowing the common ownership of *one* of the top four stations (ABC, CBS, NBC, and FOX) and another non-top four station.[36] The change was attributed to the economic efficiencies that would be realized in the mergers of such stations with no harm to either competition or diversity to the public.[37]

The Commission also modified the Media Cross-Ownership Rule that had previously prohibited the common ownership of a television station and a newspaper in the same market. The Commission decided that the ban should be lifted in special situations where "it is necessary to protect the public interest" and it does not interfere with policy goals.[38] However, the 2000 Commission did not lift the restriction as a general rule because it felt that it "continues to serve the public interest by furthering the important public policy goal of viewpoint diversity."[39] The Commission concluded that economic efficiency of allowing the cross-ownership would not outweigh the concentration of ideas that would occur, and although more news outlets were becoming available to the public, they were not so-used to be considered 'substitutes' for television and newspapers.[40]

1. Problems With the Prior Media Ownership Rules

The 1996 regulations came under scrutiny in 2002 when the courts became involved in the two prominent cases of *Fox Television Stations v. FCC*[41] and *Sinclair Broadcast Group, Inc. v. FCC*.[42] The

34. *Id.* The Radio Market definition was modified but was not re-examined in the 2002 biennial review.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, 1044 (D.C. Cir. 2002) (*Fox*), *reh'g granted*, 293 F.3d 537 (D.C. Cir. 2002) (addressing the national TV ownership rule);

42. *Sinclair,* 284 F.3d 148 (addressing the local TV ownership rule).

courts in both of these cases were asked to review FCC regulations and, after much deliberation, found that there was really no analytical basis for some of the media ownership rules; according to the courts, the rules seemed quite arbitrary due to the lack of support based on empirical research.[43]

In *Fox*, the court addressed the National Television Ownership Limit and remanded the national caps for justification by the FCC.[44] In doing so, the court looked to the language of Section 202(h) of the 1996 Act and determined that it "carri[ed] with it a presumption in favor of repealing or modifying the ownership rules."[45] This interpretation seemed to indicate that the FCC's decision to modify five of the current rules was, at least in theory, a favorable conclusion in the eyes of the authors of the 1996 Act.

In the case of *Sinclair Broadcast Group, Inc. v. FCC*,[46] heard by the D.C. Circuit Court of Appeals, Sinclair challenged the FCC's Local Television Ownership Rule that allowed the common ownership of two television stations in the same market, as long as one of the stations was not among the four highest ranked stations in the market[47] and, after the merger had taken place, there were still eight independently owned and fully operational television stations remaining in that market.[48] In the 1996 Act, Congress directed the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market."[49] The Commission did so and created the aforementioned rule.

In challenging the FCC's local ownership rules, Sinclair included the argument that "limiting common ownership of television stations in a local market to those with eight independent voices [was] arbitrary and capricious" and "the restrictions violate the First Amendment."[50] The court explained the changes made in the 1996

43. *See id.*; *see also Fox*, 280 F.3d 1027.
44. *Fox*, 280 F.3d 1027.
45. *Id.* at 1048.
46. 284 F.3d at 148.
47. Rankings are based on the Neilson National Rating System.
48. *Id.*
49. 1996 Act § 202(c)(2).
50. *Sinclair*, 284 F.3d at 152.

Act, and Sinclair claimed that the FCC's reasoning for the Duopoly Rule was arbitrary and capricious, claiming that the number eight was "plucked out of thin air."[51]

The court, using the rational basis standard of review, remanded the Dual Network Rule for FCC review.[52] However, in both *Fox* and *Sinclair*, the court admonished the FCC, telling them that they needed to support their biennial review decisions with stronger empirical evidence in order to maintain consistency between the various rules.[53]

2. The FCC's Attempt to Solve the Problems

In light of the court's obvious disappointment with the rules, the current Commission set out to perform its biennial review in 2003, six months late, in order to find a data-based solution to the problems of the then-current rules.[54] Although the FCC took two and a half years to complete the bi-annual review, it did so amidst a flurry of controversy, with Congress pleading for the FCC to further delay its results in order to conduct additional research on the topic.

The FCC attempted this feat with two things in mind: the language of the 1996 Act and the First Amendment.[55] In order to justify a change in the media ownership rules, the FCC shielded its changes with the court opinions, which remanded the rules in the aforementioned cases. The FCC relied greatly on the D.C. Circuit's finding that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules . . . uphend[ing] the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule."[56] The interpretation of this language, however, is where many opponents challenge the recent decisions of the FCC. Although the court did

51. *Id.* at 158.

52. *Id.* at 172.

53. Richard E. Wiley & Rosemary C. Harold, *Communications Law 2003: Changes and Challenges*, 769 PLI/Pat 509 at 519-20 (2003).

54. Report and Order, *supra* note 11.

55. Wiley & Harold, *supra* note 53, at 520-21.

56. *In re* 2002 Biennial Regulatory Review, 18 FCC Rcd. 13620, 13625 (2003); *see also* Prometheus Radio Project v. FCC, 373 F.3d 372, 442 (Scircia, J. concurring in part and dissenting in part).

remand the cases for FCC review, it was not because the regulations were "no longer in the public interest" but because of the lack of rationale supporting the rules. The FCC, however, did not distinguish the reasons for the court's ruling and used the ambiguity to satisfy its own interpretation.

The FCC had to ensure that any determinations it made were within the limits of the First Amendment of the Constitution. This meant that the regulations had to stand up to the appropriate standard of review, and the Commission determined that the "rational basis" standard of review "remain[ed] the correct constitutional standard to apply to its broadcast ownership rules."[57] Therefore, the new regulations would be constitutional if there is a "reasonable means of promoting the public interest in diversified mass communications."[58] In order to accomplish this level of review, the FCC needed to quantify just how the regulations were going to promote diversity, localism, and competition.

3. The Media Ownership Working Group is Established to Assist in Gathering Research for an Empirical Analysis of Policy Goals

In response to the challenges presented by the courts' rulings in *Fox* and *Sinclair*, in October 2001 Commissioner Powell announced the formation of the "Media Ownership Working Group" (the Group).[59] The Group, comprised of seven experts in their respective fields,[60] was created to develop an empirical foundation on which to build the media ownership regulations.[61] The research was conducted to provide an analytical basis for the FCC to attain its

57. Wiley & Harold, *supra* note 53, at 521.

58. *Fox*, 280 F.3d at 1045.

59. Press Release, FCC, FCC Chairman Michael Powell Announces Creation of Media Ownership Working Group (Oct. 29, 2001), *available at* http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/2001/nrmc0124; *see also* MCI v. FCC, 515 F. 2d 385 (D.C. Cir. 1974).

60. The seven members of the group were: W. Kenneth Ferree, Chief of Cable Services Bureau; Paul Gallant, Special Advisor to the Bureau Chief, Cable Services Bureau; Nandan Joshi, Attorney-Advisor, Office of General Counsel Jonathan Levy, Deputy Chief Economist, FCC; Robert Ratcliffe, Deputy Chief, Mass Media Bureau; David Sappington, Chief Economist, FCC; Royce Dickens Sherlock, Deputy Chief, Policy Division, Cable Services Bureau. *Id.*

61. *Id.*

goals. In announcing the Group's creation, Commissioner Powell stated:

> For too long, the Commission has made sweeping media policy decisions without a contemporaneous picture of the media market. We need to rigorously examine whether current forms of media regulation are achieving the Commission's policy objectives, and how changes in regulations would affect the policy goals of competition, diversity, and localism. I am creating the Media Ownership Working Group to bring a sharp focus to these tasks.[62]

The Group conducted multiple studies and research on various media concerns and reported its results to the Commission.[63] Taking these results into consideration, the FCC was able to establish a factual basis to support the upcoming changes.

C. FCC Rationale for Modifying the Rules: Diversity, Competition and Localism

The FCC claims that the modifications are necessary to reflect changes in the media marketplace and will not have an ill-desired effect on the public.[64] To the contrary, the Commissioners maintain that the current regulations were modified with three main goals in mind: diversity, competition, and localism.[65] Keeping these goals at the forefront of their decision-making process, the Commissioners felt confident that the new rules would meet the judicial focus of benefiting public interest.[66] The strategy of the 2003 Biennial Review was to: 1) ascertain how the policy goals will be measured and 2) assess whether the current ownership rules are "necessary" to achieve them.[67]

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62. *Id.*

63. *Id.*

64. Press Release, FCC, FCC Sets Limits on Media Concentration (June 2, 2003), *available at* www.fcc.gov/ Bureaus/Miscellaneous/News_Releases/2003.

65. Report & Order, *supra* note 11, at ¶ 17.

66. *Id.*

67. *Id.*

1. Diversity

The FCC identified and designated five categories of diversity pertinent to the media ownership policy goals:[68] viewpoint diversity, outlet diversity, program diversity, source diversity, and minority and female ownership diversity.[69] Given the different types of diversity and their collective integration into the public, the FCC developed a Diversity Index,[70] which measures the availability of key media outlets in markets of various sizes, in order to ensure there were enough independent voices available to the public. In a press release from the FCC Media room on June 2, 2003, the Commission stated:

> The index is "consumer-centric" in that it is built on data about how Americans use different media to obtain news. Importantly, this data also enabled the FCC to establish local broadcast ownership rules that recognize significant differences in media availability in small versus large markets. The objective is to ensure that citizens in all areas of the country have a diverse array of media outlets available to them.[71]

The Diversity Index uses data regarding the type of media the American people use to get the news in a particular market size.[72] The goal in developing the index was to ascertain that there were multiple news outlets for any given person, keeping in mind the more frequented media and the number of sources available, in order to ensure a diverse marketplace while promoting competition.[73] Ideally,

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68. *Id.* at ¶ 18.

69. Viewpoint Diversity: the availability of media content reflecting a variety of perspectives; Outlet Diversity: the number of independently-owned firms in a particular market; Program Diversity: the variety of programming formats and content; Source Diversity: the availability of media content from a variety of content producers; and Minority and Female ownership Diversity: the number of minority and female ownership of broadcast companies in a particular market. *Id.*

70. *Id.* at ¶ 351.

71. 73 Press Release, FCC, FCC Sets Limits on Media Concentration (June 2, 2003) at 2, *available at* http://www.fcc.gov/ownership.

72. Report & Order, *supra* note 11, at ¶ 351.

73. *Id.*

promoting competition would benefit the public by lowering costs and fostering innovation through the increase in available capital to the broadcasters.[74]

2. Competition

In promoting a competitive marketplace, the FCC referred to the Communications Act of 1934, which prohibits the FCC from granting any broadcasting monopolies, stating that in order to serve the public interest, the FCC is to "assure fair opportunity for open competition in the use of broadcasting facilities."[75] In its 2003 Report and Order, the FCC noted:

> Although lower prices are an important benefit of competitive markets, we have repeatedly emphasized that competition also is the wellspring of greater innovation and improvements in the quality of service. Thus, although the public does not pay a subscription fee to receive over-the-air broadcast signals, we continue to have a public interest responsibility, distinct from our diversity and localism goals, to ensure that broadcasting markets remain competitive so that all the benefits of competition – including more innovation and improved service – are made available to the public.[76]

In order to uphold the levels of fair competition, the FCC examined where the media outlets are bringing in revenue and determined that while advertising used to be essentially the only way to make money, now many radio and television owners get their profits directly from the consumers in the form of subscriptions.[77] With the innovation and use of cable television, DirecTV, and

74. For an example of how the diversity index is applied to a given market, see Diversity Index – Summary, Press Release FCC, FCC Sets Limits on Media Concentration, (June 2, 2003) at 9, *available at* http://www.fcc.gov/ownership.

75. U.S. v. Storer Broad. Co., 351 U.S. 192, 203 (1956).

76. Report & Order, *supra* note 11, at ¶ 67.

77. *Id.* at ¶ 61.

satellite radio, many owners have dual income sources.[78] The FCC reasoned that this competitive edge put the non-subscription, over-the-air broadcasters who maintain the free service at a disadvantage.[79] Therefore, the FCC decided that in determining levels of competition "in . . . markets comprised of both free over-the-air broadcasters as well as subscription delivery systems, we will look to audience share as one metric for assessing the state of competition, which we find to be a more accurate gauge of competition in these circumstances."[80] In performing the analysis for competition, the FCC said that it is attempting to lower prices, increase innovation, and improve service in order to benefit the public.[81]

3. Localism

The Communications Act of 1934, which serves as the basis for the FCC's power, also included a congressional directive for the FCC to "make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[82] Localism is at the core of every American, and it is imperative that the public be informed not only what is happening on a national level but also regarding issues in their own back yard.[83] News programming, local productions, and even commercial advertising which reflect the lives of the community are important in stabilizing viewers.

The FCC's 2002 Biennial Review looked to the Supreme Court's opinion in *NBC v. United States*, which states: "[l]ocal program service is a vital part of community life. A station should be ready, able, and willing to serve the needs of the local community."[84] In balancing the equation for new media rules, the FCC relied on two

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78. *Id.*
79. *Id.* at ¶ 62.
80. *Id.* at ¶ 67.
81. Press Release, FCC, FCC Sets Limits on Media Concentration (June 2, 2003) at 2, *available at* www.fcc.gov.
82. 47 U.S.C. § 307(b).
83. Report & Order, *supra* note 11, at ¶¶ 73-75.
84. *Id.* at ¶ 76 (quoting NBC v. United States, 319 U.S. 190, 203 (1943)).

factors: "(1) the selection of programming responsive to local needs and interests, and (2) local news quantity and quality."[85] After obtaining this data, the FCC believed that it could tailor the media regulations to provide a stronger focus on reflecting the values of our communities.

The FCC looked to the three policy goals – diversity, competition, and localism – when conducting its Biennial Review, yet while the goals themselves seem to be universal, some feel that their promotion may not have been successfully accomplished by the new rules. And, as the FCC set out to develop rules that it felt would endure judicial scrutiny, it used both the research by the Media Owner Working Group and its Diversity Index to ensure that the new rules would have empirical analysis based on competition and carefully balanced against the public interest in diversity.

III. FCC REPORT AND ORDER – JUNE 2, 2003

In June 2003, after twenty months of deliberation in trying to carry out the orders of Congress' Biennial Review, the current FCC issued a *Report and Order of Proposed Rulemaking,*[86] based on what it believed would foster diversity, localism, and competition. The new rules did not change all six of the existing regulations but significantly impacted the five that were modified.

A. *The FCC Modifies Five of the Six Media Ownership Regulations*

In light of the language of the 1996 Act that stated the regulations should be modified if they were determined to no longer be in the public interest, with this Congressional order, the FCC declared that its new rules continued to serve the public interest and therefore the changes satisfied its duty of review.

The FCC examined six media ownership rules: the Dual Network Ownership Prohibition, Local TV Multiple Ownership Limit, National TV Ownership Limit, Local Radio Ownership Limit, Cross-Media Limits, and Radio and TV Transferability Limited to Small Businesses.[87] Of the six, all were changed under the 2002 Review

85. *Id.* at ¶ 78.

86. *See id.*

87. *See generally* Report & Order, *supra* note 11.

except for the Dual Network Ownership Prohibition, originally adopted in 1946, which banned mergers between the top four national broadcast networks. The FCC felt that for apparent reasons, this prohibition was necessary to facilitate diversity and competition.

The modifications made to the remaining five rules, are briefly shown in the following chart and will be expanded on below:[88]

Old Rule	What has Changed
Companies may not own broadcast and print organizations in the same market.	Restrictions on cross-ownership rules lifted in areas with nine or more television stations, which are the largest markets; other markets would face some limits; cross-ownership banned in markets with three or fewer TV stations.
No broadcast company can own stations that reach more than 35 % of the national audience.	The plan would allow the nation's four national television networks and other group owners to buy enough television stations to reach 45% of the national audience. The networks had sought total repeal, but the change at the very least ensures that News Corp. Inc.'s Fox network and Viacom Inc.'s CBS network, which currently reach nearly forty percent of the audience, will not have to sell stations.
Companies can only own two stations in one market if they are not large stations, and there are eight other competitors.	Broadcasters will be allowed to own three stations in the biggest markets where there are eighteen stations, such as Los Angeles, up from two; companies could add a second channel in smaller in markets where there are at least five stations, as long as one is not in the top four, based on ratings.

88. Howard I. Finberg, *Enter the Matrix: The FCC's New Rules, at* http://www.poynter.org/column.asp?id=56&aid=36005 (June 2, 2003); *see also*, 2003 FCC Order and Report – FCC 03-127 *at* http://hraunfoss.fee.gov/edocs_public/attachmatch/FCC-03-127A1.pdf.

A company may not own two of the top four broadcast stations in a market.	No change. The FCC bars a broadcaster from owning two of the top four rated stations in any market. Those four are usually the affiliates of the major networks - Fox, CBS, NBC, and ABC.
Companies are limited in radio station ownership.	No change to old rule. New constraints may arise as the agency imposes new market definitions to avoid monopolies that have sprung up in some markets, but these monopoly clusters will not be broken up unless the clusters are sold.
No mergers allowed between the top four networks.	No change. Mergers prohibited among top four networks: ABC, CBS, NBC, and Fox.

Of the rules that were modified, this article will focus on the three that have raised the most criticism: the Local TV Multiple Ownership Rule, the Cross-Media Ownership Rule and the National TV Ownership Rule. While the changes may look insignificant to the lay television viewer, media activists and political opponents are rapidly permeating the public with the knowledge needed to form educated opinions on the changes.

1. Local TV Multiple Ownership Rule

The Local TV Multiple Ownership Rule, originally adopted in 1964, was changed in order to enhance competition and preserve diversity.[89] The FCC felt that the old rule was no longer necessary to promote the title goals, and, in fact, may have even suppressed program diversity and localism.[90] Consequently, the rule was changed to allow a company to own two stations in a market with five or more stations and three stations in markets with eighteen or

89. Press Release, FCC, FCC Sets Limits on Media Concentration (June 2, 2003) at 4. The FCC felt that "the prior 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." *Id.*

90. Report & Order, *supra* note 11, at ¶ 133.

more stations, still subject to the duopoly rule.[91] In addition, the rule counted both commercial and non-commercial TV stations in calculating the number of television outlets in a given market.[92] Although the new rule upholds the ban on mergers of the top four stations, it also adopted a process by which a waiver can be granted, on a case-by-case basis, to allow such mergers in markets of eleven or fewer stations.[93]

In adjusting the Local Ownership rules, the FCC reasoned that these changes accurately reflect the inundation of media outlets available to the public, thus promoting competition and diverse programming.[94]

2. Cross-Media Ownership Limits

The 2003 Cross-Media Limits replaced the previous rule, which prohibited the ownership of a television station and a newspaper in the same market, in addition to a television station and a radio station in the same market. The new regulations lift the complete ban on such cross-media ownership but maintain limits based on the market size. In order to obtain such ownership in a market with three or fewer television stations,[95] a waiver must be obtained by showing that the television station sought does not serve the same area as the other media owned.[96] In markets with four to eight television stations,[97] a single entity can own one of the following combinations:

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91. Press Release, FCC, FCC Sets Limits on Media Concentration (June 2, 2003) at 4.

92. *Id.*

93. *Id.*

94. *Id.* "Because viewpoint diversity is fostered when there are multiple independently owned media outlets, the FCC's competition-based limits on local TV ownership also advance the goal of promoting the widest dissemination of viewpoints." *Id.*

95. "The FCC found that key outlets were sufficiently limited such that any cross-ownership among the three leading outlets for local news – broadcast TV, radio, and newspapers – would harm viewpoint diversity." *Id.*

96. *Id.* at 7.

97. The FCC concluded "markets were found to be less concentrated today than in the smallest markets and that certain media outlet combinations could safely occur without harming viewpoint diversity." *Id.*

> (A) A daily newspaper; one TV station; and up to half of the radio station limit for that market (i.e. if the radio limit in the market is 6, the company can only own 3); **OR**
> (B) A daily newspaper; and up to the radio station limit for that market (i.e. no TV stations); **OR**
> (C) Two TV stations (if permissible under local TV ownership rule) up to the radio station limit for that market (i.e. no daily newspapers).[98]

Lastly, in a market with nine or more TV stations,[99] the FCC eliminated the cross-ownership ban all together.[100]

The FCC based its modifications on the Media Ownership Working Group's research and the newly developed Diversity Index and concluded that the prior rules were no longer necessary because of the increase in media sources available to the public.[101]

3. The National TV Ownership Limit

The National TV Ownership Limit has gained the most publicity by far and has sparked the reactions of Congress and many media activists. The prior rule capped the percentage of U.S. television households that one company could reach at 35%,[102] while the new rule raised that limit to 45%.[103] The FCC's biennial review revealed that the 35% limit "did not strike the right balance of promoting localism and preserving free over-the-air television for several reasons."[104]

The lift in the ownership limit was prescribed to preserve

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98. *Id.*

99. "The FCC concluded that the large number of media outlets, in combination with ownership limits for local TV and radio, were more than sufficient to protect viewpoint diversity." *Id.*

100. *Id.*

101. *Id.*

102. Press Release, FCC, FCC Sets Limits on Media Concentration, (June 2, 2003) at 5.

103. *Id.* On March 31, 2003, there were 1,340 commercial TV stations in the U.S. Of these 1,340 stations, Viacom owns 39 TV stations (2.9%), Fox owns 37 (2.8%), NBC owns 29 (2.2%) and ABC owns 10 (0.8%). *Id.*

104. *Id.*

localism by facilitating negotiations between broadcast networks and their local affiliates, and in doing so, networks will have incentives to continue to broadcast free programming.[105]

In interpreting the congressional directive in the 1996 Act, as well as the judicial construction in *Fox* and *Sinclair*, the FCC believed that they were entitled to adopt the changes. However, the language of the Act states that the regulations should be modified if the old rules *no longer serve* the public interest, not that the regulations can be changed *as long as the new rules serve* the public interest. This strict interpretation of the language of the Act of 1996 got little attention from the FCC Chairman in justifying the new rules. It was not lost on adversaries, however.

B. *Political Opposition from Many Different Angles is Keeping the Topic at the Forefront*

1. FCC Democrats are Speaking Out Against the New Media Regulations

Opposition within the FCC itself surfaced shortly after the 3 to 2 vote along party lines to adopt the new rules. Democrat Commissioner Adelstein released a statement, in what was a clear attempt to separate himself from the majority view, proclaiming, "I'm asking my colleagues to reconsider the rule changes so we can fix this anomaly before new mergers take place that let a single owner dominate the media in many smaller towns."[106] His comments were in response to the new FCC rule that counts each noncommercial TV station as an individual station, without taking into consideration that some stations repeat the same broadcast across a state, thus allowing the same number of stations to account for more "individual voices" in the market.[107]

In defense to attacks that the FCC's media rules did not achieve its goals of localism, competition, and diversity, Powell said that "[the FCC] created enforceable rules that reflect the realities of

105. *Id.*

106. Press Release, FCC, FCC Commissioner Jonathan S. Adelstein Calls on FCC to Fix Anomaly in New Media Rules Before They Take Effect (July 15, 2003) at 1, *available at* 2003 WL 21659265.

107. *Id.*

today's media marketplace."[108] The FCC press release also stated that evidence had shown that "the TV networks provided more and better local news than other owners of TV stations," and that by raising the national TV ownership limit, the FCC was actually helping to reach more Americans in order to provide these advantages.[109] Powell continues to maintain that "[o]ur democracy is strong," and stated that it would be "irresponsible" to not take into account the new media viewpoints of the Internet, cable, and satellite when calculating diversity of outlets.[110]

2. Congressional Resistance to the FCC Changes

Since the Report and Order issuing the new regulations, the FCC has been faced with opposition from both the American public as well as Congress itself. Led by Democratic Senator Byron Dorgan of North Dakota, Congress has taken steps to overturn at least some of the FCC's regulations, and the Court of Appeals for the Third Circuit issued an order to stay the implementation of the FCC's rules until the debate was over.[111]

The three strategies that lawmakers have pondered in dealing with the new rules are: (1) non-germane amendments (riders) to appropriations bills for 2004; (2) Congressional Resolution of Disapproval; and (3) Senate Commerce Committee legislation to amend the rules.[112]

The Congressional Resolution of Disapproval is a rarely-used congressional measure that would nullify all of the FCC's rules, and such a bill was introduced by Senator Byron Dorgan and passed the Senate on September 16, 2003.[113] Senator Dorgan claimed that the rules were "wrong-headed and will result in more consolidation and

108. Press Release, FCC, FCC Chairman Powell Defends FCC Media Rule, (July 23, 2003) at 1, *available at* 2003 WL 21707597.

109. *Id.*

110. *Id.*

111. Prometheus Radio Project v. FCC, 2003 WL 22052896 (3rd Cir. 2003).

112. Wiley & Harold, *supra* note 53, at 543-45 (2003).

113. Ted Hearn, *Dorgan to USC CRA Against FCC*, Multichannel News, July 3, 2003, *at* http://print.google.com/print/doc?articleid=Oblau9pJTA8 (last visited Oct. 18, 2004).

less competition in broadcasting."[114] The measure faces tough opposition in the House and would also have to muster enough support in the interim to defeat a possible presidential veto if it were to pass in both Houses. In response to the resolution, FCC Chairman Powell said:

> [The resolution] would bring no clarity to media regulation, only chaos. It would create perverse results, such as a return to looser radio rules permitting greater consolidation. This is a harm the FCC's new media rules were designed to avoid. It would also reinstate ownership rules that were overturned by the courts . . . . I hope the House will take a more considered view of the public interest."[115]

While disapproval of the new rules was overwhelming, the fact is that courts were consistently disapproving of the prior rules; this prompted the review to take place. If the Resolution had passed, it would have been a step backwards in media ownership as a whole.

Second, immediately following the FCC's June 2003 announcement, a hearing was held by the Senate Commerce Committee in order to review the new rules. On June 19, 2003, the "Preservation of Localism, Program Diversity, and Competition in Television Broadcast Service Act of 2003" was passed, attempting to overturn some of the new changes, including setting the national ownership cap at 35% and nullifying the cross-media ownership rules.[116]

Lastly, the riders to the appropriation bill seemed to be Congress' best weapon in attacking the rules. Both the House and Senate introduced appropriations bills, which included funding for the FCC and riders which rolled the national ownership cap back to the previous 35%, thus undoing the FCC's change to that regulation. Above the Congressional commotion, however, President Bush made threats to use his not-yet-invoked veto power in order to quash the bill. Since the Republicans hold a majority in both Houses of

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114. *Id.*

115. Wiley & Harold, *supra* note 53, at 544-45 (quoting FCC Chairman Michael Powell).

116. *Id.*

Congress, meetings were held between some Republican members of Congress and President Bush in an attempt to negotiate "off the floor." The parties struck a deal to compromise at a 39% cap on national media ownership, appeasing the President and the powerful lobbyists for two media conglomerates already over the 35% threshold.[117] The compromise was seen as a victory by some, while others, including Senator Dorgan, vow to continue fighting.

In the House, the appropriations bill was passed in November 2003, but as Congress recessed in December 2003, the fate of the bill in the Senate came to a halt, with publicity and tensions mounting.[118] When Congress finally reconvened on January 20, 2004, however, it took the Senate only two days before a sixty-five to twenty-eight vote approved the $328.1 billion appropriations bill.[119] Congress needed little more than a presidential signature to pass the 2004 Omnibus Appropriation bill into law, and on January 23, 2004, President Bush did just that, ending the National Ownership debate.[120] This legislation meant not only a compromise regarding the national ownership cap, but it also took much of the decision-making process on this issue out of the hands of the FCC. While neither side was fully satisfied by the outcome, Chairman Powell was quoted as saying: "If 39 percent is where democracy survived and 45 is where it died, so be it."[121] Senator Dorgan, however, remains vehemently against the FCC and the appropriations bill rider stating: "If anyone thinks we're going to fold our tent and go home, they can think again."[122]

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117. Doug Halonen, *Ownership Cap Deal Angers Some Lawmakers*, Tvweek.com, (Dec. 1, 2003) *at* http://www.tvweek.com/article.cms?articke Id=21040.

118. H.R. 2673, 108th Cong. (2003). Republican Representative Henry Bonilla of Texas sponsored the bill on July 9, 2003.

119. Frank Ahrens, *Senate Adopts TV Station Limit: Measure Modifies FCC's Rule Raising Broadcaster's Reach*, Wash. Post, at A05 (Jan. 23, 2004), *available at* http://www.washingtonpost.com/wp-dyn/articles/A40143-2004Jan22 (last visited on Jan. 31, 2004); *see also* 2004 WL 55833387.

120. The bill was passed into law on January 23, 2004, as Pub. L. No. 108-199.

121. Ahrens, *supra* note 119, at 3.

122. *Id.*

3. Public Reaction to the Recent Developments

Outside the realm of the lawmakers, the public and media activist groups, such as the Prometheus Radio Project (Prometheus),[123] found themselves playing a crucial role in the development of media ownership. On September 3, 2003, only one day before the new rules were to be enacted, the U.S. Court of Appeals for the Third Circuit stayed the FCC rules.[124] Prometheus brought a motion to stay the rules, claiming that their enactment, pending numerous challenges in district courts throughout the country, would result in irreparable harm.[125]

In considering Prometheus' motion, the court considered the following four factors: "(1) the movant's likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the request is denied; (3) whether third parties will be harmed by the stay; and (4) whether granting the stay will serve the public interest."[126] In weighing the factors, the court found that while it is difficult to tell if the movant would win on the merits, the substantial harm to Prometheus, should the rules take effect, and the relatively small harm to third parties in maintaining the status quo, prompted them to grant the motion.[127] Thus, the court ordered that "prior ownership rules remain in effect pending resolution of these proceedings."[128] This was a critical decision in the fight against media consolidation and one that turned the tables on the FCC.

The tables were turned only so far, however. Less than a month after the Third Circuit granted a stay of the FCC rules, in what seemed to be a victory for anti-conglomerate activists, the FCC approved another mass merger between Univision and Hispanic Broadcasting Corporation (HBC).[129] The merger was approved on

123. The Prometheus Radio Project is a non-profit organization consisting of radio activists, in order to facilitate the growth of the Free Radio Movement and present an organized demand for the democratization of the airwaves through their grass roots campaigns.

124. *Prometheus Radio Project*, 2003 WL 22052896, at *1.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. Press Release, FCC, FCC Grants Conditioned Approval of Univision/HBC Merger, (Sept. 22, 2003) *available at* 2003 WL 22176063.

September 22, 2003, under the old FCC ownership rules but was made conditional on the fact that once the stay was lifted from the new FCC rules, Univision had six months to comply with them.[130] The two dissenting Commissioners of the FCC expressed grave concern over the lack of diversity that Hispanic listeners and viewers would enjoy.[131]

C. The Effect that the Recent Actions will have on the Media Debate

Once a bill is passed through Congress, the courts must interpret it as any other law and can only overturn it they find it to be unconstitutional. Having its role taken away from them, as well as amending its biennial review to every four years, is a blow to the power that the FCC currently exercises. The FCC did not spend much time licking its wounds, however, as it went on to approve yet another large-scale merger[132] between DirecTV Satellite Television service and Rupert Murdoch's News Corporation (News Corp.)[133] in December 2003.[134] "The FCC-approved deal allows News Corp. to effectively shut out local programming – especially in rural markets"[135] which is where most of the population who depend on free over-the-air broadcasting reside.[136]

Many lawmakers, and certainly the media owners themselves, have never had to manage without the luxury of cable; but for a great portion of the American people, over-the-air broadcasting is their

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130. *Id.* The current number of radio stations owned by the new Univision violated the new rules. *Id.*

131. *Id.* (statement by Commissioner Michael J. Copps, dissenting).

132. A $6.6 billion merger to be exact. David Sirota, et al., The Progress Report: Murdoch's Mega-Media Merger, (Dec. 22, 2003), *at* http://www.alternet.org/story.html?StoryID=17447 (last visited Oct. 11, 2004).

133. News Corp., owner of Fox, Inc., includes local television stations, "a major national broadcast network, numerous cable and satellite channels, the most widely used electronic program guide, newspapers, magazines, a publishing house and movie studios." *Id.*

134. *Id.*

135. *Id.*

136. The merger was approved on party lines with the three Republican Commissioners voting for it and the two Democratic Commissioners standing strongly against it.

only source of viewing.[137] While traditional media outlets are afraid of losing viewers to internet users, studies show that the number of people who have computers is roughly the same as the number of people who do *not* subscribe to cable television.[138] What does this tell us? That the same people desperately need the same amount of free broadcasting as before the surge of new media, yet those individuals will be the ones who suffer from mergers like the DirecTV merger.

The cost of doing business comes at a higher price for those who are simply uninformed about the effects that the media and high-powered conglomerates have on their own lives. But as the public learns of the deregulation, they have begun to stand up for what they believe. In fact, since the 2002 Order, over two million communications have been directed to the FCC in response to the recent deregulations, and of those, ninety-nine percent opposed any diminution of regulative protection from media concentration.[139]

IV. CRITIQUE

A. What is Wrong with Media Concentration?

While some feel that "[g]overnment shouldn't be in the business of deciding who can or can't own a media company, or what percentage of the population those companies can reach,"[140] it may seem reasonable to say that self-regulation is enough to sustain a free enterprise. Yet what happens when self-regulation turns into its own type of censorship – informing the public on issues that make business sense to the entity in charge of broadcasting such news? The influence of the media is greater than the local newscast would have the American people know.

Just how much influence does the "business" of media have over what is broadcast to the public? For example, even as recent as the 1996 regulations, media played a part in conveying the Act to the

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137. ERIK BARNOUW ET AL., CONGLOMERATES AND THE MEDIA, 154 (1997).

138. *Id.*

139. Leanza, *supra* note 15, at 12.

140. *Congress Shouldn't Block New FCC Rules,* RockyMountainNews.com, *at* http://www.rockymountainnews.com/drmn/opinion/article/0,1299,DRMN_38_2240850,00 (2003).

public. Surprisingly, when the media ownership regulations were being eased, television and newspapers both seemed very reluctant to report these changes to the public.[141] In fact, while only a fragment of the 1996 Act included a parental television monitoring device called the V-Chip, it was mentioned 1,391 times by the major newspapers in the first half of 1996, while the broadcast licensing terms were not mentioned once.[142] This illustrates the extent to which media programming shapes how the American public gets its information.

A more current example of conglomerate power is the attempt by Viacom subsidiary, CBS, to land the first interview with former prisoner of war, U.S. Army Private First Class Jessica Lynch.[143] CBS, with all of its resources and media outlets, was able to offer Jessica Lynch opportunities spanning multiple Viacom entities, including a two-hour CBS news documentary and a reunion special with the Marines who rescued her from the Iraqis. CBS also had the leverage to offer her a publicity campaign that would "feature segments on several CBS news programs, including CBS Evening News, an MTV appearance, a Country Music Television concert in her hometown, a two-hour, made-for-TV movie produced by CBS Entertainment, and book publication with the imprimatur of Viacom's Simon & Schuster."[144]

Journalistic integrity has taken a backseat to the fiscal-minded businessmen behind theses media conglomerates. Like the Wizard of Oz, they are the men and women behind the curtain, showing only what they want us to see. In knowing only what the media owners want us to know, compounded with the diminishing number of independent voices, there is literally no medium through which diversity can be achieved.

Broadcasting regulations benefit the public interest through competition and competitive prices and also serve to keep the public well-informed – from more than a single source that exposes only the information that a business entity feels is important for the public to know. As long as anyone can remember, broadcasting has always

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141. BARNOUW ET AL., *supra* note 137, at 9.

142. *Id.* at 9-10.

143. Leanza, *supra* note 15, at 18.

144. *Id.* (citing Jim Rutenberg, *To Interview Former P.O.W., CBS Offers Stardom*, N.Y. TIMES, June 16, 2003, at A1.)

been regulated in one fashion or another. But times have changed since regulation began, as Chairman Powell stated in the FCC's 2002 Report and Order:

> A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic . . . .[145]

Powell went on to say:

> Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap. Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest. Not surprisingly, therefore, several of the existing rules have been questioned, reversed, and in some cases vacated by the courts. Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve.[146]

If Powell maintains that the new rules are in the public's best interest, why is such a large segment of the public against them? The argument is easy according to the media activists and fundamental journalists: money talks and media has become a business more than a duty.

One example of the American public standing up against the

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145. *See* Report & Order, *supra* note 11, at ¶ 3.
146. *Id.* at ¶ 4.

media conglomerates is the Adbusters Media Foundation,[147] publishers of Adbusters Magazine, who has established a campaign it calls "the battle for Media Carta."[148] The Foundation's fight relates to what it calls a lack of media democracy and its magazine and website address the issues of the FCC's further deregulation. Its movement includes a written declaration called the Media Carta in which the founders express their goals and disdain for the current trend in media ownership. One part of the Media Carta states: "We have lost confidence in what we are seeing, hearing and reading: too much infotainment and not enough news; too many outlets telling the same stories; too much commercialism and too much hype. Every day, this commercial information system distorts our view of the world."[149]

Adbuster's quest for media democracy addresses the fact that not only do the media conglomerates own the stations, they control one hundred percent of the information broadcasted, including the paid commercials.[150] In particular, television stations can choose whom they are willing to sell their airtime.[151] While it may look like an economical decision, do not be fooled. Their decisions may be lucrative for the owners, but what they are really accomplishing is a form of censorship. This censorship seems to be just another way for someone to decide what the American Public should, and should not, be exposed to. The consolidation of these media outlets puts these decisions into the hands of fewer entities, thus beginning the concentration of our media exposure. "Never heard of media concentration? Guess why: Media Concentration."[152]

Adbusters is not alone in advocating against media conglomerate

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147. Adbusters Magazine, *at* http://www.adbusters.org/information/foundation (2004) (last visited on October 11, 2004). Adbusters is a non-profit, reader-supported, magazine concerned about the "erosion of our physical and cultural environments by commercial forces." Its work has been embraced by organizations like Friends of the Earth and Greenpeace and has been featured in hundreds of alternative and mainstream television and radio shows around the world. *Id.*

148. *The Battle for the Media Carta, Adbusters,* Journal of the Mental Env't, Jan./Feb., 2004 at 50, *available at* http://www.adbusters.org/information/ foundation (last visited Oct. 21, 2004).

149. *Id.* at 57.

150. *Id.* at 50.

151. *Id.*

152. *Id.* at 55.

control and hopes that "the emergence of 'media democracy' as a rallying point for widespread grassroots activism gives reason to hope that Powell's victory may be temporary."[153] Scholars join in the fears of the FCC's control, expressing concern about a "Powell-led Commission" which is not attempting to promote the "widest possible dissemination of information from diverse and antagonistic sources," but "defines its job as merely preventing the complete suppression of ideas."[154]

Do the powerful media conglomerates really have that much influence over lawmakers? The truth is that businesses need to make money in order to survive – it *is* in the public interest for them to do so – and companies that would otherwise be merging have a legitimate concern in matters of earning revenue. Media companies are no longer just competing with other media conglomerates. They now face the challenge of competing with new media, including Internet and other computer resources. Even the CEO of Intel, Andy Grove expressed that his "chip-making company is at war with the television for eyeballs."[155] In 1996, Intel's market value ($96 billion) was twice that of Disney ($48 billion), with competitor Microsoft at $90 billion. "Old Media" owners must have some reason to worry when it comes to their profitability. Why else would Murdoch's News Corp. spend almost $10 million on lobbying between 1999 and 2002?[156] Murdoch himself has also "met personally with FCC commissioners and key lawmakers several times" and "[f]or the 2004 election, News Corp. has already contributed $200,000."[157] Surely it is a coincidence that its merger with DirecTV was approved without question.

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153. Johnathan Lawson, *The Genesis of the Media Democracy Movement, Adbusters*, Journal of the Mental Env't, Jan./Feb., 2004 at 50, *available at* http://adbusters.org/magazine/51/articles/genesis.html (last visited Oct. 21, 2004).

154. Mark Cooper, Media Ownership and Democracy in the Digital Information Age: Promoting Diversity with First Amendment Principles and Market Structure Analysis 6 (2003), *available at* http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf (last visited Oct. 21, 2004).

155. ERIK BARNOUW ET AL., *supra* note 137, at 1997.

156. David Sirota, Christy Harvey and Judd Legum, *The Progress Report: Murdoch's Mega-Media Merger*, Alternet.org, December 22, 2003, *at* www.alternet.org/story.html?StoryID=17447.

157. *Id.*

V. CONCLUSION

New media is not going anywhere soon, and if the government is going to react to the changing markets, it needs to react to the changing research and public opinion as well.

As Powell himself said after less than half of a year as Commissioner:

> The night after I was sworn in, I waited for a visit from the angel of the public interest. I waited all night, but she did not come. And, in fact, five months into this job, I still have had no divine awakening and no one has issued me my public interest crystal ball.[158]

As the FCC's attention shifts to the fate of its regulations and the next biennial review, the American public can only hope that Powell and the Commission awaken to hear the cries of diversity, competition, and localism.

158. Cooper, *supra* note 154, at 5 (citing Michael Powell, The Public Interest Standard: A New Regulator's Search for Enlightenment, 17th Annual Legal Forum on Communications Law, American Bar Association (April 5, 1998)) (internal quotations omitted).