Remarks of
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I. INTRODUCTION

Good afternoon, I want to thank The Media Institute for having me here today, it is always a great pleasure to be among fellow unapologetic defenders of the First Amendment. I cannot imagine a more appropriate time in history than now to discuss the media as an avenue to inform our citizenry and the FCC's appropriate role in promoting that end. Over the course of the last year and a half, the media has brought the world unprecedented sights, sounds and information from the tragedy and heroism of September 11th to the current war in Iraq.

During this time of War, the images over our televisions, the sounds over our radios, the ink on our newsprint and the words and images over the internet are testaments to many of the core values of our great nation and any true open democracy. Indeed, by embedding over 500 reporters around the world with military units, we are seeing a degree of media coverage never before experienced in any previous war. The real-time pictures and reports are a result of remarkable developments in communications technology and the breadth of media platforms. It is both thrilling to see the power of the medium and its reach as well as shocking to be brought so close to the horrors of war.

It is in times like these that we are reminded of the importance and vibrancy of a well-equipped free press and the cherished values we seek to promote in our electronic media policies. Preserving a diverse media that is competitive and serves our global and local community remains as vital today as it has ever been.

Broadcast ownership policies have long been an important tool in promoting these goals. Rules governing ownership structure as a means

for promoting diverse output is preferred to regulating that content directly. The First Amendment makes that an uncomfortable—indeed unauthorized—place for government officials to tread. For the most cherished of our constitutional protections frowns heavily on government controlling the messages we see and hear.

Ownership restraints serve as a useful, though not precise, proxy for promoting diverse viewpoints among the electronic media. Preserving an adequate number of independent owners/editors increases the probability of a wider range of viewpoints in the coverage and treatment of issues of significant public importance.

II. BROADCAST OWNERSHIP RESTRAINTS ARE AT RISK

This ownership approach to promoting diverse viewpoint is at serious risk, however, for the FCC has repeatedly failed to adapt its approaches to market reality, technological change, consumer preferences, or the law.

Most broadcast ownership rules in effect today in 2003, were promulgated between 1940 and 1975. In this earlier era, the FCC was successful in crafting limiting rules based primarily on reasonable assumptions and assertions about the nexus between ownership and content viewpoint. These rational explanations were generally accepted as adequate by the judiciary without much empirical proof.

The success of this approach was due to the nature of the media at the time. In those days, electronic media was limited to broadcast television and radio. The medium was heavily concentrated, with just three networks dominating the television airwaves. News was vital, but offered by appointment and in small doses. In 1960, the so called "Golden Age of Television," broadcasters aired a total of 3 ½ hours of local and national news in snippets throughout the day. This was in New York City, the largest media market in the country. Under such circumstances, it was quite easy to accept as an act of faith the alleged harms of further consolidation among the already scarce sources of news and information.

As time passed, however, changes in the media landscape rendered many of these premises for regulation and the alleged dangers of further consolidation substantially less obvious or certain.

The continuing proliferation of more outlets and new media platforms was accompanied by a virtual explosion of diverse and varied content. In the last 40 years the number of media outlets has swollen nearly 195% and the number of media outlet owners has increased by 139%. There are more broadcast networks and new cable and satellite networks with an abundant range of programs. It simply has become more difficult to just assert that an ownership restriction is essential to promoting diverse viewpoints, where so many outlets and owners thrive.

Yet, despite these massive changes, the FCC has continued to hue close to its original line in justifying the continuation of its rules. It failed to recognize (as did many advocates of strong media regulation) that these changes would require more compelling explanations than the standard off-the-shelf ones and would demand more rigorous proof of its assertions in the face of so varied a media landscape.

As the years passed occasionally a rule was repealed or killed off by the court, but the ownership rules continued to glide along more out of inertia than propulsion.

The 1996 Telecom Act was a sea change. Congress significantly relaxed many of the existing broadcast ownership rules, expressing skepticism about their continued importance. More importantly, however, Congress directed the Commission to review its rules every two years. The FCC would no longer have the discretion to preserve rules based on airy claims or inaction. It would now be forced to justify its policies based on contemporary reality and marketplace change.

The real bombshell, however, was the standard the Commission is required to use in examining its venerable rules. Congress shifted the burden to the FCC, rather than the industry, to demonstrate the need for a rule. If we cannot conclude a rule is necessary, we are commanded to modify or eliminate it. And, we will have to do this exercise every two years.

This was a momentous departure. For decades the Commission had in essence required *proponents* of deregulation to prove why the rule was no longer necessary. Now, the *FCC* has the obligation to prove a rule is in fact necessary—indeed one of my colleagues interprets the law to

mean we must prove a rule is indispensable to the public interest. The congressional bias is for deregulation and the standard for maintaining a rule is an enormous hill to climb.

There has been only one biennial review to date and it did not fair well. The Commission made an effort to keep the burden on those seeking repeal of a rule. It also interpreted the statute to give the FCC discretion not to review a rule at all, or to continue its operation with only cursory assertions of its continued value.

When the review hit the court, the result was sobering. The court roundly rejected the FCC's view of Congress' intent, holding Congress clearly expressed a preference for deregulation and placed the burden on the Commission to prove a restriction's worth. It wielded its sword most violently at the Commission's failure to offer much explanation at all for retaining some rules, striking dead the cable/TV cross ownership rule to leave no doubt as to the seriousness of our obligation.

The stark result is this: Any hope we have of preserving the use of ownership rules as a way of promoting our diversity goals, will rest on the FCC's ability to offer significantly more compelling explanations of the rules it employs. If we fail, the rules will be gone in a year. In making our choices, we cannot ignore the new breadth and depth of the media marketplace when placing limits on broadcast owners. Ignoring other sources of viewpoints in a market is hazardous to the health of a reasonable broadcast regulatory regime.

If we resort to passion, histrionics, intuition and the cries of Chicken Little to keep the current regime as it is, the rules will not stand for long. The noise-makers must join in a commitment to finding solutions. We need compelling proposals and defenses of those proposals, not the usual alarmist political attacks employed to prevent change. If no changes are made, we will have given over the choice to the courts.

I have seen this bad movie too often. The plot is the same. Having been warned by Congress and warned by the Courts, some nonetheless press stubbornly against the grain—overplaying their legal hand, leaving the public interest without a dime.

Choosing to ignore the more plausible readings of the statute, the Commission's inconsistencies and lack of proper analysis doomed the last biennial review, and perhaps raised the bar higher than it needed to be.

The Commission overreached twice in setting EEO obligations. Twice the rules were overturned as unconstitutional. Thus, for years, employees did not enjoy the fruits of these rules only the cold comfort of our good intentions. Worse yet, the damaging constitutional precedent penned in those cases have further setback governmental efforts to promote race and gender diversity, *in all contexts*, not just broadcasting. [Now we must look to other ways to promote minority and female opportunity—which is why I strongly support Sen. McCain's Ownership Diversification Bill and urge its passage and I intend to initiate a new Commission effort to find creative ways to promote opportunity.]

Recently, the insistent march to push the public interest standard bar dramatically higher in reviewing mergers, resulted in a court decision finding that the mere approval of a broadcast application subsumes any affirmative public interest inquiry for a license transfer. Many--zealous to the end--lay blame with overreaching courts. But the blame rests squarely too with those irresponsibly pushing too hard against the law.

Against this backdrop, we will wrestle once again with the graying broadcast ownership rules in the current biennial review. Our concerted goal is to learn from our mistakes and embrace the necessary changes that will preserve a reasonable broadcast ownership structure that is contemporary and is faithful to Congressional intent.

We are working very hard to provide more rigorous evidence and rationales for the choices we make. We have commissioned a dozen academic studies to offer strength to our decisions. What is truly unique about this undertaking is that for the first time, the Commission is looking at these issues through the eyes and ears of the American public, and not the personal tastes of appointed government officials. We are taking greater account of the breadth of voices and viewpoints, so as not to be vulnerable to the accusation we have ignored genuine sources of information. We are working to bring greater coherence and consistency to our rules and we hope to clarify our goals and our methods through a

simpler regime that still protects our essential ideals. This is a tall order, but we have what we need and are committed to success.

III. THE PUBLIC INTEREST CASE FOR CHANGE

The case for change, however, is not merely a response to an unfavorable court ruling or two. There are compelling public interest reasons to change as well.

First, It is important for us to rebuild our media regulatory regime in order to get a coherent and internally consistent set of rules that more correctly reflect the media landscape and the rich and varied ways consumers and citizens get there information. If we adopt rules that do not peer through the eyes and listen through the ears of consumers and see how they obtain news and information, then it is questionable whether we are truly acting in their stead, or merely using their name in vein to promote some other agenda.

Second, change may be imperative if we want to preserve free over the air television. Free television itself serves a very important public interest, yet its future is not guaranteed. Broadcast TV offers important content to citizens without charge. It can be accessed from virtually any location. And, it is vital in emergency situations—be it weather or terrorist attack.

Yet the market trends are against free TV. By our last cable competition report, over 85% of households subscribe to cable or DBS—opting to pay for television. Pay TV has enormous market advantages. It has access to two sources of income—advertising and subscription. Cable and DBS have much more channel capacity, allowing them to offer greater quantity and variety of content at all times of the day. And, multi-channel platforms are closer to offering the personalization and interactivity that consumers are coming to expect in the internet age. Changes in our rules may give TV a fighting chance to adapt, respond and survive.

Third, while many view big as always antithetical to the public interest, scale and efficiency are becoming more vital to delivering quality news and public affairs. The world is getting smaller. We are all part of a global community as well as a local community. It is increasingly

imperative to have a larger perspective on matters of public interest, whether it be health issues (as in the recent case of a deadly pneumonia from Asia), political issues (the fate of Tony Blair), economic matters (oil prices and the effect at the pump), or terrorism and military threats. And, news events now move at a sweeping pace, breaking faster and spreading farther than ever before. This complex world requires ever more sophisticated news gathering and delivery capability. The scale and resources necessary to do it are increasing.

At the same time events in our local community remain essential. As the cost and sophistication of news and public affairs rises it is important to bring new assets to ensuring the local community is covered. It may be that allowing newspapers to enter the local TV market will bring the local classifieds, the Metro section, the local movie schedule, and editorial opinion to television, enhancing the local character of that medium and stimulating its vibrancy. One of our studies found that newspaper owned broadcast stations produced almost 50% more local news, and received significantly more awards for local news excellence than other affiliates. In light of this data, it is hard to see how a complete ban on newspapers owning TV stations serves the public interest.

Fourth, Digital Migration. Media is itself changing as a new digital world unfolds. Voice, video and data can now travel effectively on many more platforms and will begin to accelerate the proliferation of information. As this becomes possible the consumer is demanding greater personalization and control of his programming choices, using the computer tools integrated in his watching and listening devices. We see the internet itself becoming an essential source of important content. ABC news has just launched the first 24 hour broadband broadcast. Satellite radio is in the market offering hundreds of channels of diverse (ad free) content. Indeed, my colleague Jonathan Adelstein, a music lover, just got the system and raves about it. MP3 players like the Ipod are rapidly becoming the critical source for music and audio applications. And personal video recorders are revolutionizing the way we watch TV.

Opponents of change often want to dismiss these new sources as less effective or immature. I say rather than reject them we should be trying to drive them, in order to unleash new sources of media content and information and give greater access to mass communication. These tools

have made their weight felt. War protestors and supporter alike have used the medium to organize and convey messages as never before seen.

We should allow sufficient flexibility for providers to bundle assets and products to distribute new applications that consumers may desire, rather than pre-configuring the media ownership model solely for a traditional broadcast world.

Fifth, Diversity itself. More capacity may allow producers to respond to increased customer fragmentation and competition for viewers and listeners. More capacity increases the ability to program more choices and more niches that appeal to an increasingly diverse population.

IV. CONTENT AND A FIRST AMENDMENT WARNING

Whenever media ownership debates unfold, it isn't long before every perceived ill and every dissatisfaction with what we see and hear on television and radio is paraded out as a consequence of too much concentration.

If you listen you can hear it now. It is suggested that concentration is to blame for indecent or course television programs—ignoring that the media was substantially more concentrated in the supposedly clean 1950s. It is argued that TV has become too violent. It is argued that quality of television has declined and that TV is too bland and homogenized because of corporate conglomeration.

I do not doubt at all that there are pitfalls to big media, nor do I doubt that there are benefits. But, I do not think concentration itself is the root cause of the quality of content we see today, I think that fierce competition is.

A monopolist has the luxury occasionally of putting aside what sells in order to air content that might be less appetizing (even if nutritious) because its audience is captive. Such was undoubtedly the case in the era of Cronkite and Murrow. But, where choice abounds in a competitive market, one can ill-afford not to give "em what they want." Today, if you do not capture a viewer's attention and hold it, he simply clicks his remote control to find something that does. Or, he turns off the TV and turns on the Playstation or Xbox. Or, he strays to the computer to surf the

net. Or, he picks up a paper, book or magazine. Or, he listens to music on his MP3, radio or stereo. Or puts a DVD in to watch a movie. Or, god forbid, unplugs entirely and goes out to take a walk with his kids.

My warning is this, while we are right to concern ourselves with Citizen Kane, we should not use that concern to justify the resurrection of King George. Our founding fathers said little about commercial owners of news and print, but they reserved the top spot on the bill of rights to condemn the government from foisting its values, preferences, viewpoints or tastes on a free people. This is where the gravest constitutional danger lies.

It is said that the public interest is not just what interests the public. I respect and share the sentiment. But, the danger of this aspiration, when invoked in regulatory policy, is that it implies a justification to require that the public accept by law, what it is uninterested in accepting by choice. Such a view surely keeps Mr. Jefferson from a restful slumber. Those committed to his cherished commandment should remain vigilant watchman in the current battle over broadcast ownership.

I thank you, again for inviting me to be with you today.