

University of Hawaii at Manoa

eVols Repository

Box SP13

Hamilton Library

<https://evols.library.manoa.hawaii.edu>

Box SP13, All Folders

---

# Chronological: Hearing on Media Ownership

Senator Daniel K. Inouye Papers

Speeches, Chronological, Box SP13, Folder 52

<https://hdl.handle.net/10524/72706>

---

Items in eVols are protected by copyright, with all rights reserved, unless otherwise indicated.

*UHM Library Digital Collections Disclaimer and Copyright Information*

**TO: SENATOR**  
**FROM: MARGARET**  
**RE: MEDIA OWNERSHIP HEARING**  
**DATE: MAY 13, 2003**

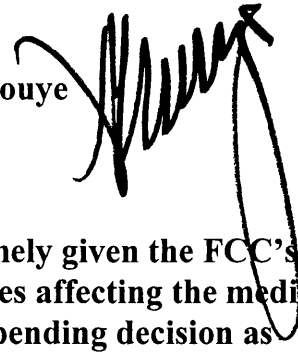
---

**Enclosed is a statement for the record drafted by Commerce Committee Staff. In addition to stating your long standing concerns about any rule changes that will increase concentration in the media industry, your statement requests unanimous consent to enter into the record a letter from the Hawaii Chapter of the Society of Professional Journalists expressing concerns about potential rule changes, and in particular, opposing any change to the duopoly rule because of the Emmis Communications situation in Hawaii.**

**Do you wish to submit the statement for the record?**

A handwritten signature in black ink, appearing to be 'LGR', located in the lower right quadrant of the page.

Opening Statement of Senator Daniel K. Inouye  
Hearing on Media Ownership  
May 13, 2003



Today's hearing on media ownership is particularly timely given the FCC's announcement that it will complete its review of six major rules affecting the media market on June 2. The *New York Times* has described the impending decision as possibly the most significant change governing media ownership in a generation. Unfortunately, the outcome could be an epitaph for the free press as we know it.

If the FCC, as expected, jettisons the remaining rules limiting media companies from owning larger numbers and combinations of television stations, radio stations and newspapers, we may soon face a media landscape where a few large conglomerates control the news and entertainment programming available to all Americans. While today's hearing will focus mainly on the national television ownership cap and the newspaper/broadcast cross-ownership rule, we should not lose sight that other rules are under review and that the cumulative impact will likely have many unforeseen consequences. We are fortunate to have before us today industry representatives who can help us comprehend the far-reaching implications of this decision.

We should also reflect on the effect that deregulation has had in other media markets. Since the national radio cap was lifted in 1996, the commitment to community based, local news has declined. Local artists have lost their ability to get air time and programming has become nationalized and homogenized. Similar effects are also evident in the television market, which has been marked by significant consolidation over the last few years.

In addition, since the financial interest and syndication (Fin Syn) rules were lifted, independent programmers have been nearly shut out of the primetime schedule. In 1992, sixteen new television series were produced independently. In 2002, there was only one independently produced series selected by the networks. Despite these cautionary tales, additional deregulation could enable a single entity to own nearly every editorial voice in a local community, including two television stations, multiple radio stations, the local newspaper and a cable system. In Hawaii, such an outcome could mean that the entire state essentially has one source of news and entertainment.

Press reports also have signaled the FCC's intention to raise the national television ownership cap from 35% to 45%. While raising the cap to 45% may sound like an incremental change, the significance is much greater given that the current rule discounts a company's actual ownership reach by 50% for all of its UHF stations. As a result, raising the cap to 45% could allow networks and other large owners to reach up to 90% of the country. The failure of the FCC to review the UHF discount is inconsistent with its mandate to determine whether all of its media rules "are necessary in the public interest as a result of competition."

In addition, relaxation of the cap would undermine our unique system of broadcasting, with its combination of national networks and local, independently-owned and operated broadcast outlets. Retaining the 35% cap would ensure that a proper balance of power is maintained between the national networks and their local affiliates, which in turn protects the public interest.

I have joined many of my colleagues in asking the FCC to delay its decision to ensure that there is an opportunity for meaningful review and comment on any proposal to change these rules. In addition, I am troubled by recent reports of a quid pro quo arrangement where a company agrees to compromise on the national television ownership cap in order to receive favorable treatment on the newspaper/broadcast cross-ownership issue. It is imperative that rigorous analytical examination, and not behind-the-scenes deals, determine the outcome on these critical issues.

A robust and antagonistic debate is a critical component of our democracy. While competition among five or six large companies might be enough to protect consumers in a market for widgets, I believe caution and prudence to be the better course for the marketplace of ideas.

Mr. Chairman, I request unanimous consent that a copy of a letter from the Hawaii Chapter of the Society of Professional Journalists, expressing concerns about the potential impact of changes to certain media ownership rules, be included in the record.



# **SOCIETY OF PROFESSIONAL JOURNALISTS**

## **Hawaii Chapter**

May 7, 2003

John McCain  
241 Russell Senate Building  
Washington, D.C. 20510

Sen. McCain:

We do not envy the job of the Federal Communications Commission in trying to deal with rules governing the concentration of media ownership.

But that does not mean we condone the way the commission has avoided the public and won't give it a chance to review and comment on the commission's rules.

This should NOT be tolerated in a democratic society. That is why we want to thank many of you for urging the commission to postpone its rulemaking to give the public a chance to comment on the proposed rules. We also want to thank you for holding a hearing on the matter. We cannot appear before you, but Sean McLaughlin of the Honolulu Community-Media Council will appear and present our position. He is very knowledgeable about this issue.

We have been writing to the commission for almost two years because Emmis Communications Corp. owns two of the top four television stations in Hawaii. This action was taken after months of study that convinced us that such so-called duopolies probably will harm journalism standards and reduce the number of voices people in Hawaii can view.

The Honolulu Community-Media Council and we have invited the commission here to view things firsthand on what a duopoly does and why the public should fear duopolies in the future. But the commission chose to hold only ONE hearing in Richmond, a town without any duopoly questions at issue.

It is to their credit that members Michael Copp and Jonathan Adelstein have traveled on their own to hear concerns from varied groups in Seattle and San Francisco and other towns far from the East Coast, where a lot of media companies are headquartered.

It has become clear from the chairman's comments that he intends to water down the rules forbidding co- or cross-ownership of top television stations.

At the Richmond hearing, it seemed the chairman did not want to hear from the public unless it could come up with a formula, an impossible task for common people trying to back up an intangible right like the First Amendment and the marketplace of ideas.

In putting together the rules, the FCC is relying on some questionable reports, most of which aren't on point.

There are many reasons why media companies would like a change in the duopoly rule. But will those reasons be in the public interest? History has taught us that isn't always the case.

The FCC faces changing its duopoly rules because of a federal appellate court ruling having to deal with the so-called eight-voices test. That means if a merger of stations may be allowed if the merger results in no less than eight independent voices in a market area. We believe that even if Hawaii's two daily newspapers and one news-gathering radio station were added to the mix, the FCC would have only six independent media voices after allowing Emmis to keep both television stations.

Allowing one media company to own two stations or a newspaper to own a station in the same town probably would lead to:

- ◆ Degradation of journalism. The loss of competition that homogenizes newscasts will eventually mean that some issues won't be reported on. Competition is the driving force in the industry. More and different stories are reported every day thanks to competition.
- ◆ Loss of voices. Minorities, elected officials and others should fear the diminution of media voices. It will increase the chances that their views will not be heard or aired because the electronic soapbox will not be as available to them.
- ◆ Unfair competition. Giving a company the right to own two top television stations in town grants that company an advantage in selling advertising and pooling assets to the detriment of competing media. Granting a newspaper backed by a media conglomerate the right to own a TV station will give that newspaper a decided advantage over a competing newspaper and other stations. It will help hasten the demise of two-newspaper towns.
- ◆ Loss of jobs. Such media concentration will result in the loss of jobs. No matter what the media companies tell you, their only real savings in the future is to cut back staff and air similar or the same stories on two stations.
- ◆ Economics. The cost of advertising will go up commensurately with the increase in concentration of media ownership. Competition keeps ad rates low. For example, when Honolulu's two daily newspapers were in a joint operating agreement, the rates were high to advertise in the papers because they had a monopoly. But when the two papers broke apart, the ad rates fell and are now at low levels. Imagine two television stations that control 50 percent of the market. The same thing could – and probably will – happen if duopolies are allowed.

This all started because almost three years ago, Emmis Communications agreed to sell KGMB (third-rated TV station) when it bought the assets of Lee Enterprises. Emmis already owned KHON (No. 1 station). But Emmis hasn't done so and has asked the FCC to allow the duopoly arrangement until the rules are settled. As you are aware, the duopoly rule prohibits common

ownership of TV stations that are ranked in the top four in audience share within the same Nielsen Designated Market Area.

Emmis requested and received from the commission a six-month waiver of the duopoly rule, pledging to divest one of the two Honolulu stations during that period. A Sept. 25, 2000, Memorandum Opinion and Order from the commission's Mass Media Bureau stated that the six-month waiver would "not harm diversity or hinder competition in a manner conflicting with the public interest."

That may have been the case then. However, with Emmis now approaching the third anniversary of its acquisition of KGMB, the corporation continues to hold licenses for both KGMB and KHON, thanks to repeated extensions of the initial waiver. Recently, Emmis has taken steps toward consolidating operations of the two stations – which venture down the slope of violating the intent behind the commission's initial waiver, as well as both the letter and spirit of the duopoly rule even as it was revised in 1999 to allow greater opportunities for common ownership of broadcast stations within local markets.

In essence Emmis promised to play by the rules, but when it didn't suit the company, it turned around and wanted to be excused from following the rules.

There are so few truly independent news voices left in Hawaii. Allowing the Emmis duopoly to continue and amending the duopoly rule could undermine that fragile communications environment here. We ask that if the FCC is so bent on reducing the number of media voices in the marketplace, that Hawaii be exempted from such onerous rules because of our unique situation of being separated from the mainland and our lack of easy access to various news media.

There has been a number of incidents that shows Emmis Communications is moving ahead with consolidating functions of KGMB and KHON. They include:

- One person been named to head up programming for both stations. Mr. Rick Blangiardi, general manager of both stations, says the move is to help him coordinate things.
- Cameras from both stations on Friday nights were sent to different high school football games and same footage was shared between the two stations. Is this fair to the other stations that don't have enough crews to cover these events?
- Continued sharing of footage from minor news events between the two stations. KGMB and KHON are sharing cameramen for routine news items, showing the same footage on the two separate news broadcasts.
- In April, KGMB's satellite truck was apparently shared with KHON to give live reports from a search for three dangerous prison inmates. Other stations do not have such expensive equipment to do that kind of live broadcast. It was an unfair advantage to the duopoly stations.
- Last September, KGMB broadcast two high school football games rather than cover the primary election live. While station officials felt they were doing a service by broadcasting the games, the airtime was not in the traditional sense of public service. Would KGMB have broadcast the games, if its so-called sister station weren't covering the election? John Veneri, a weekend sports anchor for KHON-TV, provided color commentary for the high-school football doubleheader at Aloha Stadium on Sept. 21, the night of the primary

election, to be aired on KGMB-TV. How can the anchor of one station be the color commentator for a competing station without reducing the amount of competition between the two stations?

- Mr. Blangiardi holds weekly joint staff meetings of department heads of both stations. The sales manager of KGMB is meeting with the sales manager of KHON; the programming manager of KGMB is meeting with the programming manager of KHON. Is this to enhance competition or consolidation?
- KHON has referred to KGMB as its "sister" station on air.

We have been perplexed as to why Emmis would raise the eight-voices issue with the commission. There aren't enough independently owned media in Honolulu to result in eight independent voices after a merger of KGMB and KHON. There are only four television stations in Hawaii that have news-gathering. If the FCC amends the rules to meet the Sinclair decision, then two daily newspapers (the only ones of statewide circulation) and two radio stations (the noncommercial Hawaii Public Radio and commercial KSSK) would be added. (There are no cable television stations that have daily news-gathering capabilities). This means there would be only seven independent voices left if the duopoly waiver were granted to Emmis under new rules. This, of course, depends on what voice test the commission decides on, but the commission would have to lower the standard quite a bit to give Emmis enough leeway to qualify. The figures cited by Emmis seem to be an attempt to hide how few voices there actually are here:

- 21 television stations; make that 4: only KGMB, KHON, KHNL and KITV has news-gathering
- 6 daily newspapers; make that 2: There are only two newspapers of statewide circulation, which is the DMA involved: Honolulu Star-Bulletin and the Honolulu Advertiser.
- 74 radio stations; make that 1: Only the noncommercial Hawaii Public Radio does news-gathering.

A simple check of the "facts" presented by Emmis will show its figures misleading at best.

We believe that journalism in Hawaii (those stations also serve Kauai, Maui County and the Big Island) will suffer due to co-ownership of KHON and KGMB.

We fail to see why the commission has not enforced its existing rules while the public has not had a formal opportunity to comment on what amounts to a dramatic, if indefinite, policy shift.

Our concerns were not eased by the explanation from Clay C. Pendarvis, chief of the Television Branch of the Video Services Division of the FCC's Mass Media Bureau. In an Aug. 9, 2001, letter, Mr. Pendarvis wrote: "On March 23, 2001, Emmis was granted an extension of the six-month temporary waiver. In the extension request, Emmis demonstrated that it had made good faith attempts to find a buyer willing to purchase the station at a fair and reasonable price. The Commission staff letter noted that, given the specific economic factors discouraging purchase of a television station in the Honolulu market, there was substantial risk that holding Emmis to the six-month divestiture period would result in a forced sale. A forced sale of assets could unnecessarily restrict the value of the station to be divested and could artificially limit the range of potential buyers. ..."

Emmis must have been aware of economic conditions in Hawaii when it agreed to acquire KGMB-TV as part of the multi-station deal. In this case, we believe the broader public's interest in diversity and competition far outweighs the limited business interests of several big corporations. Nor do we see it as the FCC's mission to ensure risk-free transactions for large broadcast corporations. While aspects of the duopoly rule have been portrayed as under attack by the courts as "arbitrary and capricious," we want to point out that the specific portion of the rule that deals with joint ownership of two stations in the top four of a local market has not been targeted in recent rulings by the U.S. Circuit Court of Appeals for the District of Columbia. We are left to wonder whether the commission's criteria for deciding when to enforce and when to waive its duopoly rules are not themselves arbitrary.

There can be no denying that last year's court rulings have sent a clear signal that regulations under the duopoly rule need more solid justification. But in our view, those rulings do not amount to a free pass to bypass regulations that have yet to be revised or better justified after rigorous public review.

We urged the commission to rethink its decision that continues to allow Emmis to own two TV stations in the top four of the Honolulu market. We also welcome assurances that Emmis' Honolulu predicament, allowed to go unresolved as long as it has, will not tie the commission's hands as it undertakes its review of the duopoly rule and, in particular, the prohibition on ownership of more than one of the top four TV broadcast stations in a market.

Honolulu is not an out-of-the-way place – it is not far from the American mainstream – but a dynamic, richly diverse city of nearly 1 million at the gateway to Asia and the Pacific. If anything, Hawaii's unique and complex history and cultural landscape make it even more important that the broadcast voices that reach the greatest number of citizens are not concentrated in the hands of a few. Beyond the harm we fear to our profession, we believe our community will suffer in profound, if not always measurable, ways if the FCC does not fulfill its traditional mission of preserving competition and diversity on the public's air waves.

Should you care to contact me, my address is 3054 Ala Poha Place #806, Honolulu, HI 96818.

Thank you for your attention to our concerns.  
Sincerely,

Stirling Morita  
President  
For the board of directors,  
Hawaii Professional Chapter, SPJ  
cc: Sen. Daniel Inouye  
Sen. Daniel Akaka  
Rep. Ed Case  
Rep. Neil Abercrombie

THE AMERICAN  
PROSPECT

**TAP on IRAQ**  
Click here for recent articles on Iraq.

**Wealth in Am**  
The Prospect's Special

ONLINE

▶Archives ▶Columnists ▶Issues in Depth ▶Press Room ▶Advertising ▶About Us

Volume 14, Issue 5. May 1, 2003.

## Print-Friendly Version

### A License for Power

*Paul Starr*

Where's the conservative suspicion of the media now that we really need it? The Federal Communications Commission is preparing to roll back long-established rules limiting media ownership, a move that would make the media behemoths more powerful than ever. You might think that prospect would excite an outcry from the right as well as the left. But the FCC review is taking place with only scattered opposition and scarcely any public debate, thanks in part to a virtual news blackout by the media giants themselves.

The regulations under review limit media consolidation so as to prevent monopoly and preserve localism as well as diversity. The rules bar any company from owning television stations that reach more than 35 percent of the national audience, prevent networks from buying one another, cap the number of broadcast stations that a single company can own in a particular market, and restrict "cross-ownership" of newspapers and broadcast stations in a community.

The argument against the rules is that new media -- cable and satellite TV as well as the Internet -- have so expanded the range of options that we no longer need ownership limits to ensure diversity. For example, as cable channels have gained ground, the networks' share of the TV audience has dropped, so why continue to limit the networks' ownership of stations?

But it's a myth that new technology has entirely broken up the oligopoly that long dominated television. A new study by investment firm Sanford C. Bernstein & Co. shows that the top five programmers -- Viacom/CBS, Disney/ABC, News Corp./FOX, NBC and AOL Time Warner -- now command 75 percent of the prime-time viewers. The Bernstein study projects, moreover, that after buying up weaker cable channels, the top five will raise their total share to the 85-percent level reached by NBC, CBS and ABC at their peak.

If the FCC relaxes current ownership limits, these same companies are likely to buy an increasing number of stations and other media properties, gaining tighter control of TV than the networks had in their heyday when they were limited to owning just six of their local affiliates.

The best evidence for what's likely to happen in television comes from radio, which has undergone a radical shift toward concentrated ownership since Congress eliminated the national cap on station ownership in 1996. No company had owned more than 40 stations in 1990; today a single company, Clear Channel, owns more than 1,200, and Clear Channel and Viacom together own stations with 42 percent of the nation's listeners. In Minot, N.D., according to a recent article in *The New York Times*,

Clear Channel owns all six commercial stations and has reduced the total staff for news reporting to a single employee who mainly reads wire-service reports. Commercial radio effectively no longer exists in Minot as a local communications medium.

The consolidation of radio ownership poses a particularly serious problem for the music industry and advertisers, but if the FCC removes the other limits on ownership, the ensuing consolidation could have far more ominous implications. Eager for positive TV news coverage and fearful of retribution, politicians are already loath to defy broadcasters. More mammoth media conglomerates in fewer hands will have even greater sway over public officials. And there is a special danger from mergers of newspapers and broadcast stations in particular communities: reduced news coverage of local affairs as staffs are combined and cut back.

Diversity in media ownership may well be inefficient in the sense that a single company can operate multiple broadcast stations and other media outlets at a lower cost than any combination of firms. But there is plainly a cost to diverse, robust and wide-open public debate that makes such consolidation undesirable on other grounds.

For most of American history, public policy favored a more decentralized media system, even at some cost. Postal policies were long designed to subsidize local papers; during the second half of the 19th century, for example, the Post Office delivered newspapers free of charge within the county where they were published -- a subsidy that protected local papers against more distant metropolitan rivals.

After radio broadcasting developed in the 1920s, the emergence of the NBC and CBS networks turned radio into a more uniformly national medium than newspapers had been. But even in this case, federal regulation prevented as tightly centralized a broadcasting system as developed under government ownership in other countries.

Support for localism and diversity has historically spanned party and ideological lines, often coming from members of Congress who represent smaller communities and states that have only limited local alternatives and are in jeopardy of ceding their media to outside control. With a few Republican senators from such states now signaling concern about the FCC review, this kind of bipartisan opposition to media consolidation may yet emerge. It's the one chance we have to keep some checks and balances in the mass media.

Paul Starr

Copyright © 2003 by *The American Prospect, Inc.* Preferred Citation: Paul Starr, "A License for Power," *The American Prospect* vol. 14 no. 5, May 1, 2003. This article may not be resold, reprinted, or redistributed for compensation of any kind without prior written permission from the author. Direct questions about permissions to [permissions@prospect.org](mailto:permissions@prospect.org).

MEMORANDUM

May 9, 2003

To: Democratic Members, Senate Commerce Committee  
From: Rachel Welch and James Assey  
Re: **Hearing on Media Concentration: 35% Cap and Newspaper/Broadcast Cross-Ownership**

On Tuesday May 13, 2003, beginning at 9:30 a.m. in SR-253, the full Commerce Committee will hold an oversight hearing to examine issues related to media concentration raised in the FCC's third biennial review of the media ownership rules. The six rules under review include two national rules: 1) National TV Ownership (35% cap) and 2) Dual Television Network Rule; and four local rules: 1) Newspaper/Broadcast Cross-Ownership Prohibition; 2) Local TV Multiple Ownership (TV duopoly); 3) Radio/TV Cross-Ownership Restriction; and 4) Local Radio Ownership Rule. The witnesses at this hearing will primarily focus their testimony on the 35% cap and the newspaper/broadcast cross-ownership prohibition. Chairman Powell has stated that he expects the Commission to vote on the item at the June 2 open meeting.

There will be two panels. The first panel will feature a large network broadcaster, an independent broadcaster and two small newspaper owners. The second panel will feature a consumer advocate and a Wall Street analyst. Senator McCain will preside.

**I. Consolidation in the Media Market**

By all accounts, there has been rampant consolidation in the media marketplace since the Telecommunications Act of 1996. Comcast has acquired AT&T's cable properties, AOL has acquired Time Warner, Viacom has acquired CBS, GE/NBC has acquired Telemundo and News Corporation has announced a deal to buy a controlling interest in DirecTV. In the broadcast television industry, the number of entities that own television stations has dropped 40% since 1995. In the radio marketplace, prior to the passage of the Telecommunications Act, the top radio station group owned 39 stations and generated annual revenues of \$495 million. Today the top group owns over 1200 stations and generates revenues of almost \$3.2 billion annually.

The programming market also has experienced substantial consolidation. From 1985 to 1992 there were approximately 25 independent television production studios. By 2002, only 5 independent studios remained. Since 1992, the number of prime time television shows produced independently fell from 85% to approximately 25%. The number of prime time television hours per week produced by the network studios increased over 200% while the number of prime time hours produced by independent studios decreased 63%. According to a Bernstein Research study conducted by Tom Wolzien, five conglomerates "controlled about a 75% share of prime-time viewing." With further consolidation, Mr. Wolzien concludes that the five companies will control roughly "the same percentage of TV households in prime time as the three networks did 40 years ago."

Many of the companies that produce and provide our local and national news are already vertically integrated entertainment conglomerates with diverse ownership of programming interests, distribution platforms, Internet assets, newspapers, television and radio stations, and cable and satellite properties. For example, one of the witnesses, Viacom, is a multifaceted, diverse corporation with corporate revenues in 2002 of over \$7.49 billion for its television division and \$20 billion overall. Viacom owns the CBS and UPN networks, and 35 television stations that reach approximately 40% of the national viewing audience. While this ownership interest is over the 35% cap, Viacom received a stay and is not required to divest any stations until the Commission's review of the cap on remand from the D.C. Circuit is completed. Viacom also owns Universal Studios, as well as numerous entertainment cable channels, including VH1, MTV, Nickelodeon, Comedy Central, Showtime, and Black Entertainment Television. In addition, Viacom has substantial ownership interests in several Internet properties, such as CBS.com, CBSSportsline.com, CBSMarketwatch.com, and CBSHealthwatch.com. Viacom owns Infinity Broadcasting, one of the nation's largest radio station owner group with over 150 radio stations.

## **II. The Biennial Review Proceeding**

In September 2002, the Commission initiated its third biennial review of its media ownership rules.<sup>1</sup> The Commission's stated purpose for this proceeding is to create a comprehensive and consistent regulatory framework across media rules based on empirical evidence that will avoid future criticism by the courts. To this end, the Commission established a Media Ownership Task Force, which commissioned or conducted 12 empirical studies released in October 2002. The studies examine the current state of the media marketplace, including how consumers use the media, how advertisers view different media outlets and how media ownership affects diversity, localism and competition.

Earlier this spring rumors began circulating that the FCC was creating a "diversity index" to measure the level of diversity in local markets. The index has been discussed as the media equivalent of the Herfindahl-Hirschman index used by the Justice Department to evaluate the anti-competitive effect of corporate mergers. Initially, there was speculation that the index would replace the current rules limiting concentration of media ownership. More recent reports indicate that the diversity index would be used as a tool and would provide a safe-harbor formula that effectively guarantees FCC approval of a transaction below a certain limit. If a transaction exceeds the limit, the parties would still be able to make an argument as to why the deal would not be contrary to the public interest. Many parties have expressed concerns that the Commission's failure to publicly disclose how this diversity index would operate and how it would weigh the relative value of various media outlets has made it difficult to comment on the

---

<sup>1</sup>The Commission also is currently reviewing the need for horizontal and vertical cable ownership limits in response to the D.C. Circuit's decision in *Time Warner Entertainment v. FCC*. It is expected that a decision on the cable ownership limits will be decided after the biennial review is completed.

efficacy of such a tool. In addition, there are concerns that a diversity index based on a national sample comparing the relative importance of key sources of news to the American public, might fail to adequately account for local variations.

Much controversy has surrounded the diversity index and the FCC's decision to vote on a final item June 2 without releasing the proposed changes for comment. Members of Congress have weighed in on both sides of this issue. On March 28, 2003, Representatives, Blunt, Bono, Fossella, Radanovich, Sessions, Shimkus, Stearns and Tauzin and Senators Allen, Breaux, Ensign, and Smith sent a letter to Chairman Powell urging him to complete a decision on rules they call "outdated" by June. They also raised the deadline established in the biennial review provision in the 1996 Act as requiring FCC action. On April 9, 2003, Senators Allard, Boxer, Cantwell, Collins, Dorgan, Hollings, Hutchison, Inouye, Lautenberg, Lott, Murray, Nelson, Rockefeller, Snowe and Wyden sent a letter to Chairman Powell expressing disappointment that the revised rules would not be released for comment prior to a final vote. Senators Allard, Collins and Snowe sent a separate letter on March 19, 2003 urging greater public debate in the FCC's review of the media ownership rules before a final decision is reached.

#### **A. The Biennial Review Standard**

The biennial review requirement was established by Section 202(h) of the Telecommunications Act of 1996 which provides:

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 a result of competition.** The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Chairman Powell has commented publicly that the biennial review requirement is "regrettable" and "destabilizing."

According to the Commission, implementation of the biennial review standard requires it to determine first whether the marketplace provides sufficient levels of competition to protect the public interest and then determine whether the rules need to be relaxed, modified, eliminated or strengthened. In recent decisions by the D.C. Circuit, the court has noted that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules," and faulted the Commission's justification for retaining its rules as lacking supporting factual evidence. As a result, the Commission has placed a premium on "quantitative evidence" to demonstrate that a rule is necessary to serve one or more of the public interest goals.

There has been some question with regard to whether the term "necessary" as used in Section 202(h) imposes a more stringent public interest standard than the "plain" public interest

standard found in other provisions of the Communications Act. Recently, a majority of the Commission concluded that the word “necessary” does not impose a higher standard. Commissioner Martin wrote a lengthy separate statement dissenting from this portion of the decision, arguing that the term “necessary” should be construed in accordance with its ordinary or natural meaning, which according to Webster’s is “absolutely necessary,” “indispensable,” or “essential.”

The Commission is charged with adopting and retaining rules that further the public interest goals of diversity, competition and localism and the courts have long recognized the Commission’s legitimate interest in promoting these policy goals. In the biennial review proceeding, the Commission has sought comment on the definition of each of these goals briefly described below.

**Diversity.** The Commission has considered four aspects of diversity: viewpoint diversity, outlet diversity, source diversity and program diversity. The Commission has posited that “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.

The United States Supreme Court has upheld challenges to the FCC’s authority to promote diversity. In *Turner*, the Supreme Court noted that “[f]ederal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation.”<sup>2</sup>

**Competition.** In the current proceeding, the Commission has sought to define its competition policy objective and to determine whether the market alone can achieve those goals or whether regulation is necessary to advance a competitive media market. In general, the Commission noted that it has relied on the principle that competitive markets best serve the public because such markets generally result in lower prices, higher output, more choices and more technological advancement than non-competitive markets. One specific area that the Commission is examining is competition in the media advertising market, including which outlets compete for ad dollars in the local and national markets.

**Localism.** “Localism” refers to the unique tastes, desires, and needs of a local community. Localism can also be embodied in the programming of the local news and information most pertinent to the community served by a local broadcast station. The Commission has traditionally pursued policies aimed at encouraging localism by fostering the provision of programming that meets local communities needs and interests. As the early Federal Radio Commission once described the system, broadcasters “must be operated as if owned by the public . . . . It is as if a community should own a station and turn it over to the best man in sight with this injunction: ‘Manage this station in our interest. . . .’” To that end, the

---

<sup>2</sup>*Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

Commission has licensed broadcast stations to serve local communities and has obligated them to serve the needs and interests of their communities.

## **B. Media Ownership Rules Currently Under Review**

Below is a brief review of five of the media ownership rules under review in the biennial review proceeding.

### **1. Television National Broadcast Rule (35% Cap):**

The national broadcast ownership cap prohibits any entity whose audience reach exceeds 35% of the 106.7 million television households in the United States as determined by Nielsen Media Research. A single entity, however, can control stations reaching significantly more households because the current rule discounts the reach of UHF stations by 50%. The UHF discount was adopted to account for the technological inferiority of over-the-air UHF signals compared with VHF signals -- a concern that is decreasing with technology improvements and cable and satellite distribution. This distinction will become completely unnecessary once broadcasters switch to digital. In addition, if a group owns or manages a second station in a market, those stations are not counted against the national cap.

As a result, for some of the networks, the UHF discount may undercount their true audience reach. For example, the current national ownership cap percentages of the big four networks are:

<b>ABC</b>	23.8%	23.8% without the UHF discount
<b>CBS</b>	39.9%	45.1% without the UHF discount
<b>FOX</b>	37.8%	44.4% without the UHF discount
<b>NBC</b>	31.6%	36.4% without the UHF discount

**History of the Rule.** The FCC first adopted a national limit for television broadcast stations in 1941 when it prohibited the common ownership of more than three stations nationwide. In 1944, the FCC increased the limit to five stations. In 1954, the FCC adopted the "Seven Station rule" by raising the multiple, national ownership limit to seven stations, but allowed no more than five of those stations to be VHF stations. The rule of seven stayed in place for thirty years, until 1984, when the FCC permitted common ownership of twelve television broadcast stations. In 1985, the Commission added an audience reach cap of 25%. The FCC retained the 12 station limit to prevent the acquisition of a tremendous number of stations in the smaller markets.

In the Telecommunications Act of 1996, Congress established a statutory limit on national ownership lifting it from 25% to 35% and removing the 12 station numerical limit. While the House version of the Act, H.R. 1555 contained language lifting the cap to 50 percent, the debate in the Senate was very close. In fact, on the Senate floor, an amendment to keep the

cap at 25 percent was approved by a 51-48 vote, but was later rejected 52-47 after Majority Leader Dole sought a revote. The conferees to the bill agreed to the Senate position, and adopted a 35 percent cap in the conference report. The FCC has twice reviewed and retained the 35% cap under the biennial review process.

**The Fox Decision:** The Commission's decision to retain the 35% cap in the 1998 Biennial Report was challenged in the D.C. Circuit in a suit initially brought by Fox, which was later joined by the other major networks.<sup>3</sup> The court remanded the rule, holding that the FCC's decision to retain the 35% cap was arbitrary and capricious and contrary to Section 202(h). The court stated that the Commission had "no valid reason to think the [35% cap] is necessary to safeguard competition" or "to advance diversity" and had given no reason to depart from the conclusion it had reached in its 1984 Multiple Ownership Order where the Commission said it "had no evidence that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming." The court, however, did not vacate the cap because "the probability that the Commission will be able to justify retaining the [35% cap] rule is sufficiently high" to make that remedy inappropriate. The court concluded that "we cannot say it is unlikely the Commission will be able to justify a future decision to retain the rule."

**Arguments For and Against. Preemptions.** Proponents of retaining the rule including consumer groups and the network affiliates argue that the cap was instituted primarily to further the goal of localism as well as competition and diversity. Affiliates claim that they better serve the goal of localism because the vertically integrated networks have a significant economic incentive in having their owned and operated (O&O) stations (as well as the affiliated stations) clear as much of the network programming as possible. As a result, the networks are able to reap the benefits of subsequent syndication deals in addition to the national advertising revenues they collect when the programming airs (networks air 12 to 13 minutes of advertising per hour of programming, while affiliates air 2 to 3 minutes per hour). In addition, with the elimination of the **financial interest and syndication rules ("Fin Syn") rules**, which prohibited the networks from owning syndication rights to any network programs,<sup>4</sup> there has been an increase in vertical integration of programming and distribution networks such as Disney-Capital Cities/ABC and Viacom/CBS. Most affiliates have small programming interests. Therefore, they argue that their incentive is to provide their communities with programming of local interest. The networks counter that local affiliates often "preempt" network programming for economic reasons, i.e., to air local college sports games, for which affiliates charge higher local advertising fees.

---

<sup>3</sup>See *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, rehearing granted, 293 F.3d 537 (D.C. Cir. 2002).

<sup>4</sup>In the late 1970s, the Department of Justice obtained consent decrees from CBS, NBC, and ABC, imposing significant limitations on the percentage of "in house" programs the networks could produce. These consent decrees, which have now lapsed, served to complement the FCC's promulgation of fin syn rules in 1970. The FCC allowed the Fin Syn rules expire in 1995.

Community Standards. According to the affiliates, O&Os have never preempted network programming on the basis that the programming does not meet community standards. On the other hand, affiliates have either preempted (Married by America) or pushed back on certain network programming (Victoria Secret Fashion Show at 8 p.m., a baseball game instead of the Presidential debate) that does not meet the community standards.

Bargaining Power/NASA Petition. Proponents also argue that retention of the rule is necessary to strengthen the relative bargaining power of the network affiliates in order to further the public interest goals of localism and diversity. In addition, proponents argue that the retention of the rule bolsters competition in the national advertising market.

In March 2001, NASA filed a lengthy petition at the FCC alleging numerous unfair, and potentially illegal, activities by the networks in violation of the Communications Act and FCC rules. While the petition is addressed in a separate proceeding from the currently pending biennial review of the media ownership rules, a recent letter sent by Belo Corp. to Chairman Powell proposed a compromise that would, among other things, raise the national ownership cap from 35% to 45% in return for favorable treatment on the issues raised in the NASA petition. Following this submission, Capitol Broadcasting, whose CEO will testify on Tuesday, strongly criticized the apparent deal-making between parties and the Commission. The FCC has yet to act on the NASA petition.

The petition specifically chronicles the practices that NASA alleges “impair affiliate independence and thus undermine localism, diversity and local licensee control over the programming and operations of television stations.” In their pleading, NASA asserts three specific complaints with respect to the network/affiliate relationship that are contrary to the “letter and spirit of the Act and the rules.” Specifically, they argue that the networks:

- (1) assert excessive control over affiliates’ programming decisions contrary to their rights as affiliates to reject programming and exercise control as a licensee over their stations;
- (2) assert excessive control over affiliates’ digital spectrum including demands by some networks for “control over as much as 100 percent of a local affiliate’s digital capacity or whatever portion of that capacity [the network] at any time decides to use.”; and
- (3) utilize the power and value of their affiliation to manipulate and at times prevent affiliates from exercising their own choice with respect to proposed station sales and license transfers.

Local News. The networks, who oppose retaining the rule, assert that O&Os provide their local communities with high quality local programming, that affiliates preempt only slightly more often than O&Os in prime time (9 ½ vs. 6 ½ hours) and that O&Os broadcast equal amounts of local news programming. The affiliates have submitted evidence in the record that

they provide equal amount of local news coverage as O&Os, but that the quality of affiliate news is significantly better based on the number of Du Pont, Peabody and RTDNA awards won when the FCC's study is corrected for market size.

The 35% cap is a highly contentious political issue. Congress after substantial debate specifically established the cap at 35% in the 1996 Act. Chairman Powell has recently signaled his intent to raise the cap to 45%. Questions have been raised about whether an increase to 45% will be sustainable on review given that the evidence in the record either supports retention of the 35% cap or complete elimination of the rule. In addition, efforts to raise the cap would be exacerbated by the effect of the 50% discount for UHF stations.

## **2. Newspaper/Broadcast Cross-Ownership Rule:**

The newspaper/broadcast cross-ownership rule bans the transfer or renewal of a television or radio broadcast license if the licensee would be owned or controlled by an entity that also owns or controls a daily newspaper in the same market. Specifically, the rule prohibits an entity from owning a television station whose predicted Grade A contour encompasses the community of publication of an English language daily newspaper or a radio station whose signal contour encompasses the community of publication of a daily English language newspaper.

There is an anomaly in the application of the newspaper/broadcast rule because it is triggered only when there is a transfer or renewal of a broadcast license. As a result, if the holder of a broadcast license acquires a newspaper in the same market, there is no FCC review of the combination until the station's license comes up for renewal. When the rule was adopted, television broadcast licenses were renewed every three years. Today, however, broadcast station licenses are only renewed every eight years, thereby creating a significant loophole in the cross ownership rule.<sup>5</sup>

**History of the Rule.** This ban was originally adopted in 1975 and the substance of the rule has not been altered since that time.<sup>6</sup> When the rule was adopted, the FCC not only prohibited future newspaper/broadcast combinations, but required many existing combinations in

---

<sup>5</sup> For example, the Tribune Company availed itself of this loophole in its acquisition of Times Mirror. Tribune already owned television broadcast stations in Los Angeles, Hartford, and New York when it purchases newspapers in those cities. Its licenses are up for FCC renewal in Los Angeles, on December 1, 2006; in Hartford, on April 1, 2007; and in New York, on June 1, 2007.

<sup>6</sup>For a number of years in the 1980s and 1990s, Congress prohibited the Commission from spending any of its appropriations "to repeal, retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies to administer" the newspaper/broadcast cross-ownership rule. In the FCC's 1994 appropriation, Congress permitted the Commission to revise its policies with respect to waivers for such combinations. There have been no restrictions on the Commission's activities regarding this rule since 1996.

highly concentrated markets to divest holdings within 5 years. The Commission also grandfathered over 75 existing combinations in markets that were not deemed highly concentrated. Today, there are approximately 55 combinations that were grandfathered, granted waivers or combined under the loophole in the rule. As part of its biennial review obligations, the FCC reviewed and retained the newspaper/broadcast rule in its 1998 and 2000 biennial review proceedings. In September 2001, the FCC initiated a review of the cross-ownership ban. The record of that separate proceeding was incorporated into the Commission's third biennial review proceeding currently pending.

**Arguments For and Against.** Proponents of retaining the rules argue that there is no benefit to newspapers by combining with a broadcast licensee. While a combination is expected to benefit the news product of the broadcaster it is not expected to impact the newspaper. Proponents also state that allowing such combinations will harm the advertising market by driving ad prices up. This has already occurred in markets where two newspapers operate under joint operating agreements. Opponents of the prohibition claim that with the emergence of cable and the Internet increasing competition and the number of voices in the market that the ban is no longer necessary. In addition, they argue that the efficiencies gained will allow failing broadcast stations and newspapers to remain viable through efficiencies in combining backroom operations. Proponents of the rule counter that the increase in voices argument is a red herring because the reality is that the top 20 Internet news sites are owned by the same media companies that currently own newspapers and broadcast stations. The Commission is expected to relax this rule especially in larger markets. It is unclear how the rule will be applied in small- and medium-sized markets. The Commission's diversity index is expected to be used in determining whether markets face sufficient competition to allow such combinations.

### **3. Local Television Ownership Rule (Duopoly):**

The duopoly rule allows the combination of two television stations in the same Designated Market Area ("DMA," as determined by Nielsen Media Research), provided that (1) the Grade B contours of the stations do not overlap; or (2)(a) at least one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and noncommercial television stations would remain in that market after the combination (the Top 4/8 Voice test).

The definition of "voices" in the current rule includes only broadcast television stations in the market. In 2002, however, the D.C. Circuit invalidated this definition of voices in the *Sinclair* decision finding that the FCC had not adequately explained its decision to exclude other media from its definition.<sup>7</sup> The court noted that the FCC's decision was inconsistent with its determination to include other voices in the definition used for the radio/TV cross-ownership rule, which also considers daily newspapers, radio stations, and incumbent cable operators.

---

<sup>7</sup>See *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("Sinclair"), rehearing denied August 13, 2002.

**History of the Rule:** The Commission adopted the duopoly rule in 1964 based on its early “diversification of service rationale,” which suggests that the Commission believed that its diversity concerns were better promoted by a greater number of separately owned outlets. In 1999, the Commission revised the rule to its current form.

**Arguments For and Against.** Proponents of retaining the duopoly rule argue that eliminating it would potentially allow a single owner to control all of the television outlets in a market in addition to radio stations, a cable system and Internet sites (and depending on how the rules are drafted potentially a newspaper). Such an outcome, they argue would not further the public interest goals. Opponents of the rule argue that the economics in small- and medium-sized markets make it difficult for some television stations to survive. As a result of declining ad revenues and increased costs associated with the transition to digital television, some stations have significantly cut their costs often by cutting their news departments. Opponents argue that allowing stations to combine would bring back vibrant local news to these stations by permitting the stations to share backroom operation costs and thus prevent stations from going dark.

Proponents argue that stations already are allowed to enter into local marketing agreements (“LMAs”) that allow many of these efficiencies to occur without the need for complete ownership. Proponents also argue that the FCC already has fail safe measures in its rules that allow a waiver of the rule where one station is a “failing station.” The Commission is expected to relax the rule to allow duopolies in many small- and medium-sized markets where they are currently prohibited. There has been speculation that the new rule may allow triopolies in the largest markets.

#### **4. Radio/TV Cross Ownership Rule:**

The radio/TV cross-ownership rule limits the number of commercial radio and television stations one entity may own in any local market. Specifically, the radio/TV rule permits the common ownership of 1 or 2 TV stations and up to 6 radio stations in any market where at least 20 independent “voices” would remain post combination; 2 TV stations and up to 4 radio stations in a market where at least 10 independent voices would remain post combination; and 1 TV and 1 radio station notwithstanding the number of independent voices in the market. An entity may own one TV station and seven radio stations in a market if ownership of the radio stations would be in compliance with the local radio rule. For purposes of this rule “voices” includes television, radio, newspapers, and cable.

**History of the rule.** The original rule was adopted in 1970. In 1989, the Commission adopted a presumptive waiver policy to permit radio/TV combinations, which originally applied to the top 25 markets. The rule was relaxed in 1999 to its current form.

**Arguments for and against.** Debate on this issue has been overshadowed by some of the other rules. Some relaxation of this rule is expected though the extent will depend on the application of the diversity interest.

## 5. **Dual Network Rule:**

The dual network rule prohibits ABC, CBS, FOX and NBC from combining with each other, but allows entities that were not "networks" as of February 8, 1996 (i.e., WB and UPN) to combine with each other or with one of the big four networks. This modification allowed the Commission to approve the Viacom-CBS transaction uniting CBS with UPN.

**History of the Rule.** The FCC originally adopted a flat prohibition against any entity owning more than one radio network in 1941. In 1946, the prohibition was extended to television networks. In 2001, modified the rule to its current form.

**Arguments For and Against.** There has not been much specific debate on this rule and the Commission is expected to retain the rule.

### III. WITNESSES

#### Panel I

**Mr. Mel Karmazin, President and Chief Operating Officer, Viacom Inc.** Mr. Karmazin is expected to testify that the national television ownership cap should be relaxed to enable networks to buy more stations and gain economic efficiencies.

**Mr. Jim Goodman, President and CEO, Capitol Broadcasting Company, Inc.** Mr. Goodman will testify that the national ownership cap should be retained in order to protect the public interest goal of localism.

**Mr. Frank A. Blethen, Publisher, Seattle Times.** Mr. Blethen will testify that the prohibition on the cross-ownership of newspapers and television stations should be retained to preserve diversity of viewpoints and competition between newspapers and television stations in local markets.

**Mr. William Dean Singleton, Vice Chairman & CEO, Media News Group.** Mr. Singleton will testify that the newspaper/broadcast cross-ownership rule should be eliminated because combinations will improve the quality of news on jointly owned television stations and increase efficiencies that will allow more daily newspapers to remain viable.

#### Panel II

**Mr. Victor B. Miller IV, Senior Managing Director & Equity Research Analyst - Broadcasting, Bear, Sterns & Co., Inc.** Mr. Miller will testify that the media ownership rules should be relaxed in order to enable media companies to realize efficiencies and increase profits.

**Mr. Gene Kimmelman, Director, Consumers Union.** Mr. Kimmelman will testify that the media ownership rules should be retained to protect the public interest goals of diversity, localism and competition.

● Opening Statement of Senator Inouye  
Hearing on Media Ownership: Cable  
May 6, 2003

● Thank you Chairman McCain for holding this hearing focusing on the effects of media consolidation in the video marketplace. Not only is such an examination warranted given recently completed mergers in the cable industry, but it is even more timely, given the recently announced merger between News Corporation and DirecTV.

- More importantly, today's hearing allows us to ask industry leaders the question that consumers often ask of us – namely, why does the price of my cable bill continue to increase year after year faster than the rate of inflation?

- In recent years, the cable industry has made significant network investments to upgrade its systems, so as to provide new services such as video on demand, broadband internet access, and in some limited cases, cable telephony.

● While members of Congress recognize the expense involved in this undertaking and the need of operators to develop and pursue their own market strategies, there is brewing concern that competition in the video marketplace may be failing to place sufficient downward pressure on cable prices.

Despite the continuing growth of subscribers to satellite programming, cable operators continue to control roughly three quarters of all multichannel video subscribers.

- While recent upgrades have allowed cable companies to better compete with the 100-plus channel offerings available to satellite subscribers, the provision of these additional channels has often resulted in significant increases to the monthly rate for expanded basic service. For example, according to statistics compiled by the FCC, while inflation rose only 3 percent in 2001, the average monthly price of cable service rose by over 7 percent.

● It is my hope that today's hearing will allow us to focus on the fundamental reasons for these price increases, and to develop strategies to ensure that the interests of American consumers are protected from abuses of market power. In that vein, our regulators must be vigilant in reviewing proposed mergers to ensure that further consolidation in the video marketplace produces tangible consumer benefits and serve the public interest.

● Similarly, if there are actions we can take to promote greater competition in the video marketplace, it is important that we actively explore such options, as further competition could undoubtedly provide consumers with needed assistance in ensuring lower prices.

● We welcome the witnesses and look forward to hearing their testimony.

**Questions for Sen. Inouye**  
**Media Ownership: Cable Hearing**  
**May 6, 2003**

**James Robbins**  
**Cox Communications**

You stated in your testimony that one of the largest contributing factors to the escalation of cable rates is the rising cost of programming, particularly sports programming.

**Question** – What measures do you think can be taken to manage the rising costs of obtaining sports programming?

In your testimony, you state that tiering is an “intriguing solution.”

**Question** – How does this solution differ from a pure “a la carte” system where a consumer could choose individual channels?

**Charles F. Dolan**  
**Cablevision Systems Corporation**

From your submitted testimony it appears that you are a supporter of an “a la carte” system for cable.

**Question** – What impact do you imagine this type of system would have on the diversity of programming available to consumers?

**Question** – Could such a system conceivably undermine the economic base of many basic cable programming services?

**James Gleason**  
**American Cable Association**

It is my understanding that a number of small cable operators are able to purchase programming through a cooperative that allows smaller cable operators to aggregate their purchasing power and obtain discounts.

**Question** – In your view, why doesn't this relationship work?

**Gene Kimmelman**  
**Consumers Union**

The FCC has argued that vertical relationships in media ownership promote diversity and allow for the development of innovative new programming.

**Question** – Would you comment on the trade offs of the perils of too much media consolidations verses the benefits?

**Leo Hindery**  
**YES Network**

One of the principles that you advocate including in section 616 of the Communications Act is the ability of programmers to receive “fair market value” for their programming.

**Question** – Could you elaborate on this notion? Who would determine this “fair market value”

MEMORANDUM

May 2, 2003

To: Democratic Members, Senate Commerce Committee  
From: James Assey and Rachel Welch  
Re: **Hearing on the Media Concentration: The Multichannel Video Programming Distribution (MVPD) Market (Cable & Satellite)**

On Tuesday May 6, 2003, beginning at 9:30 a.m. in SR-253, the full Commerce Committee will hold an oversight hearing to examine issues related to media concentration in the MVPD marketplace including rising cable rates, the cost of sports programming, program carriage issues, and the effects of past and newly proposed mergers on competition in this marketplace. There will be two panels. On Panel I, a GAO witness will provide interim findings regarding its ongoing inquiry into cable rate increases and the methodology used by the FCC in its annual report on cable prices. On Panel II, the Committee will hear testimony from five witnesses representing large and small cable operators, a cable sports programmer, and a consumer advocate. Senator McCain will preside.

**I. BACKGROUND**

*History of Cable Industry.* Cable Television (also called CATV or community antenna television) was developed in the late 1940's for communities unable to receive television because of terrain or distance from television signals. Since then, it has principally been used to provide video delivery service to subscribers via a coaxial cable or fiber optics. In 1965, the FCC first established rules for cable systems that received signals by microwave antennas, and one year later expanded these rules to cover all cable systems. In 1984, Congress added to these rules by passing legislation that established policies in the areas of ownership, channel usage, franchise provisions and renewals, subscriber rates and privacy, obscenity and lockboxes, unauthorized reception of services, equal employment opportunity, and pole attachments. The new law also defined jurisdictional boundaries among federal, state, and local authorities for regulating cable television systems.

Concerned about the significant rate increases that followed the 1984 Cable Act, Congress responded in 1992 by overriding President Bush's veto and enacting the Cable Act of 1992 -- the only successful veto override in the four years of President Bush's term. This law required the FCC to establish rules to govern rate regulation of cable service tiers offered by cable systems that are not subject to effective competition (pay-per-channel and pay-per-program rates were left unregulated). Rate regulation for programming in the "basic tier" (BST) was generally delegated to local franchising authorities while the FCC was responsible for regulating rates for programming in the cable programming service tier (CPST). The BST represents the lowest level of cable service a subscriber can buy. It includes, at a minimum, all over-the-air television broadcast signals carried pursuant to the must-carry requirements of the Communications Act, and any public, educational, or government access channels required by the system's franchise agreement. The CPST includes all program channels on the cable system that are not included in basic service, but are not separately offered as per-channel or per-

program services (commonly referred to as "Expanded Basic"). At present, roughly 89% of all cable subscribers take both BST and CPST services; the remaining 11% take BST only.

The 1992 Act also required the FCC to publish annual reports on cable prices that would also compare the average rates of cable operators subject to "effective competition" with those of operators not subject to effective competition. In this sense, "effective competition" was statutorily defined to exist where an operator faced certain competitive circumstances within its franchise area (e.g. where fewer than 30% of households in a service area subscribe to a cable system).

In 1996, Congress revisited this regulatory regime in passing the Telecommunications Act. At that time, there was concern that prescriptive rate regulation was failing to keep cable rate increases in check and was curtailing needed industry investment in the production of cable programming and plant upgrades. As a result, Congress elected to "sunset" FCC rate regulation of the upper tier programming (CPST) on March 31, 1999, and exempted certain small cable operators from rate regulation. In part, this regulatory relief was based on the belief that, by that date, cable operators would face competition from a number of other multichannel video providers, including direct-to-home satellite television providers, wireless cable, and telephone company-provided video dialtone systems. Since 1996, the cable industry claims to have spent approximately \$70 billion dollars on facility upgrades that allow (or will allow) operators to provide consumers with a wealth of new services including digital cable, video-on-demand, cable modem service, and cable telephony.

While video competition from wireless cable and telephone companies has largely failed to materialize following the 1996 Act, satellite television has emerged as the principal subscription competitor to cable television service in the multichannel video programming marketplace -- aided largely by Congress' enactment of the 1988 Satellite Home Viewer Act (which allowed more consumers to receive broadcast network television signals via satellite) and, more recently, the Satellite Home Viewer Improvement Act of 1999, which permitted satellite companies to retransmit a local broadcast network signal back into the same local market area.

*Today's MVPD Marketplace.* Despite the strong growth of direct broadcast satellite (DBS) services, cable continues to be the dominant technology for the delivery of video programming to consumers. According to FCC data, franchised cable operators control 76.5% of subscribers to multichannel video program distributor (MVPD) services with DBS providers ranking a distant but growing second at 20.3%. Though this market share for cable represents a slight decrease in market share from the previous year (78% in June 2001), it does not represent a decrease in the absolute number of cable subscribers (which increased slightly from 68.5 million to 68.8 million between June 2001 and June 2002), but in contrast reflects stronger DBS subscriber growth (from 16 to 18 million between June 2001 and June 2002).

In recent years, the cable industry has experienced significant consolidation as operators have moved to acquire and trade systems. Between July 2001 and June 2002, a total of 28

transactions were announced having an aggregate value of approximately \$73.3 billion and involving 14.3 million subscribers, although almost all of this activity resulted from the recent merger of the first and third largest cable operators (AT&T-Comcast). As a result, according to FCC data, the ten largest operators currently serve about 85% of all U.S. cable subscribers.

In addition to horizontal consolidation between operators, vertical relationships between video programming distributors and affiliated video programming suppliers also exist in the MVPD marketplace. On the one hand, vertical relationships can result in greater efficiency in the production, distribution, and marketing of video programming. However, vertical relationships can also be used to deter competitive entry in the video marketplace and/or limit the diversity of programming. According to FCC data, in 2002, of the 308 satellite-delivered national programming networks, approximately 30% were vertically integrated with at least one cable operator. Specifically, AOL-Time Warner has interests in 13% of all national programming networks, Cox has interests in 8%, Comcast in 3% and Cablevision in 2%. While FCC data indicates that the amount of vertical integration has decreased since 2001 (when the amount of vertical integration was estimated at 35%), these numbers would likely increase if the proposed merger between DirecTV and News Corp. is approved.

In 2002, Chairman McCain asked GAO to examine the reliability of information that cable companies provide to the FCC in its annual survey regarding cable rate increases and to review the FCC's process for updating and revising cable franchise classifications as to whether they face effective competition. On this latter point, GAO had estimated in a previous report (using a slightly different methodology) that cable operators facing competition from cable overbuilders provided service at prices that were 17% lower than in areas where competition was absent (compared to 7% lower according to FCC methodology). GAO is expected to complete this review in October of this year.

## II. CONSUMER RATE ISSUES

*Video Services.* Between 1996 and 2002 cable rates have increased 45%, nearly triple the 17% rate of inflation over the same period. According to the FCC's 2001 report on cable prices the overall average monthly rate for cable programming services increased by 7.5%, for the 12 month period ending July 1, 2001 (more specifically, average monthly charges for BST and CPST programming charges increased 7.3% while average monthly charges for equipment increased 9.1% over this period). While the FCC has not yet released its report for 2002, it is expected to reflect similar increases for the year of around 7- 8%.

In response to criticism for these increases, cable operators argue that they are driven principally by higher programming costs. According to statistics from the National Cable Television Association, overall programming expenditures for cable systems have almost doubled from \$5.7 billion in 1996 to \$11 billion in 2002. Large cable operators such as Comcast claim that its programming cost have increased by 13-15% over the past 2 years and that ESPN's rates in particular have increased 20% per year over each of the last 4 years. In addition to the

fact that higher cable rates reflect higher program costs, cable operators argue that such increases are justified given the \$70 billion infrastructure investment made over the last seven years to provide subscribers with additional channels and other new services such as cable modem service. Specifically, the industry notes that, according to the FCC's data, the price per channel of cable's video services actually declined by a penny between July 2000 and July 2001 (61 to 60 cents), when adjusted for inflation. Finally, cable operators also point out that cable rates have grown at a slower rate in the three years since the "sunset" of upper tier rate regulation (5.0%) versus the three years prior to rate regulation (7.3%).

*Sports Programming.* In response to criticism over rising rates, cable operators point to the rising costs of programming -- and in particular, sports programming. According to the cable industry, programming costs have increased 94% since 1996, and in 2002 alone increased somewhere between 10-20%. In particular, they argue that licensing fees for sports channels are far exceeding the cost of other non-sports programming. For example, while most non-sports cable networks charge license fees of between five to seventy-five cents per subscriber, the average monthly per subscriber charge is \$2 for ESPN and \$1.16 for Fox Sports Net. In the case of ESPN, operators argue that these per subscriber charges are increasing by 20% annually for several years. Moreover, operators argue that they are limited in their ability to move sports channels like ESPN from an "expanded basic" tier to a "premium tier" due to opposition from sports programmers who demand that their channels be available to the widest viewing audience possible so as to maximize advertising revenues.

In response, sports programmers such as ESPN note that, despite these license fee increases, programming costs represent about 25% of the cost of an average cable subscribers monthly bill and provide consumers with quality entertainment programming. Additionally, by focusing only on the increased costs, sports programmers claim that cable operators fail to highlight offsetting revenues collected by operators for advertising in connection with such programming. Thus, because of the impact of local advertising sales, ESPN argues that the average net cost to cable operators for carriage of ESPN is only about \$1 per subscriber. Additionally, sports programmers note that such complaints by cable operators merely reflect attempts to improve bargaining positions in industry negotiations, as there would be no guarantee that cable operators would respond to lower carriage fees by lowering consumer prices.

*YES-Cablevision Dispute.* A recent dispute in New York between Cablevision and the YES Network underscores the growing tension between networks offering sports programming and cable operators. Prior to 2002, the New York Yankees sold their local TV rights to the Madison Square Garden (MSG) network (owned by Cablevision) who contracted with cable and satellite operators for distribution of this content. In 2002, however, the Yankees elected to form its own television network (the YES Network) so as to negotiate directly with operators wishing to show their sports programming. While Cablevision had previously carried Yankee games to all expanded basic cable subscribers via the MSG channel, negotiations to secure similar carriage for the YES Network soon reached an impasse. While YES sought increased revenue for its program rights (according to some estimates \$160 million instead of the \$52 million previously

paid by Cablevision to MSG), Cablevision countered by offering to put the YES network on a "premium tier" and thereby charge Yankee fans a monthly \$2 fee to watch games that had previously been offered as part of their regular package of cable channels. After the intervention of Mayor Bloomberg, the parties ended their year-long dispute in March and agreed to a 1 year interim deal. Under the accord, the YES channel will be packaged with Cablevision's two other affiliated sports channels (MSG & Fox Sports Net New York) and offered to Cablevision's New York subscribers for an additional \$4.95 a month on top of the regular charge for expanded basic service. Subscribers will also be able to buy each channel separately for \$1.95 each.

Broadband Services. A key factor in the relatively slow adoption of broadband services has been rising consumer monthly prices. The trend throughout the past two years has been an overall increase in prices almost immediately from the first rollout of broadband as a mass-market consumer service. According to recent industry analysis conducted by ARS, Inc., average monthly cable broadband prices for consumers have steadily increased over the last 8 quarters from \$33.22 in 2Q 2000 to \$44.95 in 1Q 2002.

Recently, some consumer groups have raised additional concerns about recent price increases for broadband services initiated by Comcast in a number of markets. Specifically, the controversy has centered around Comcast's reported practice of raising the monthly fee for high-speed Internet service from roughly \$46 to \$60 for customers who fail to subscribe to Comcast's video cable service. In March, both Consumer Federation of America and Consumers Union wrote to federal officials arguing that such discounts represent anti-competitive tying and possibly predatory pricing schemes. In response, Comcast has argued that it is properly providing a \$15 dollar discount to consumers electing to subscribe to a "bundle" of services, much like other competitors offer discounts for bundled services, and that evidence necessary to support a claim of illegal tying or predatory pricing does not exist.

### III. OWNERSHIP ISSUES

Horizontal and Vertical Ownership Rules. Under the 1992 Cable Act, Congress required the FCC to establish limits on the number of subscribers a cable operator may serve and on the number of channels a cable operator may devote to affiliated programming. Until last year, these rules limited cable operators to a 30% share of nationwide cable, DBS, and other MVPD subscribers (the "horizontal limit"), and prohibited a cable operators from carrying affiliated programming on more than 40% of its channels for systems with less than 75 channels and 45 channels for systems with more than 75 channels (the "vertical limit").

In March of 2001, however, the D.C. Circuit reversed and remand the FCC's horizontal and vertical ownership limits (*Time Warner Entertainment v. FCC*). The court held that the FCC did not establish sufficient evidence in the record to support the limits, did not draw the necessary distinction between the limits established and the alleged harms of concentration and integration the limits were designed to address, and did not take into account the changing

industry market conditions. As a result, the FCC initiated a proceeding in September of 2001 to reexamine the need for such limits. While the FCC is also reviewing broadcast ownership limits as part of its Biennial Review, it is expected that a decision on the cable and horizontal ownership limits will not be part of that order. Instead, a separate order addressing these ownership rules will likely be released after the FCC's resolution of the broadcast ownership restrictions under consideration by the FCC (e.g. broadcast ownership, newspaper-broadcast cross-ownership), which is expected June 2nd.

Proponents of these structural limits argue that Congress' concerns in adopting these restrictions -- namely, a belief that concentration and vertical integration would allow firms to favor their own affiliated programming services, thus affecting the viability of independent programmers and jeopardizing program diversity -- continue to exist today. Opponents, however, argue that existing limits cannot be justified given the success of satellite television operators, the overall increase of cable programming providers, and the development of other related media and programming outlets such as the broadband Internet.

*Vertical Integration and Program Access Concerns.* As part of the 1992 Cable Act, Congress enacted a statutory prohibition on exclusive contracts for satellite-delivered cable or satellite-delivered broadcast programming between cable operators and their affiliated programmers. At that time, Congress found that cable operators dominated the market for the distribution of multichannel video programming, and concluded that the use of exclusive contracts between affiliated operators and programmers would inhibit the development of competition to cable. Since then, the FCC has issued and enforced "program access" rules that seek to promote competition and diversity in the multichannel video programming market by preventing vertically integrated programming suppliers from favoring affiliated video distributors over unaffiliated MVPDs in the sale of satellite-delivered programming.

These program access rules apply to cable operators and programming vendors that are affiliated with cable operators and deliver video programming via satellite to an MVPD. The rules prohibit any cable operator that has an attributable interest in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including process, terms, and conditions of sale or delivery, of satellite-delivered programming to any competing MVPD. The rules also prohibit vertically integrated satellite programming distributors from discriminating in the process or terms and conditions of sale of satellite-delivered programming to cable operators and other MVPDs. In addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with vertically integrated programming vendors.

This prohibition on exclusive contracts was originally set to expire on October 5, 2002. Large cable companies (particularly those with vertically integrated programming affiliates) argued that significant changes in the video distribution marketplace -- in particular, the fact that DBS operators now control over 18% of subscribers and that the number of cable programming networks has grown substantially since 1994 -- have made these rules unnecessary to preserve

and protect competition and diversity. In contrast, small cable operators and overbuilders argued for an extension of this prohibition, noting that access to programming plays a critical role in building and protecting competition in the market for video programming. On June 13, 2002, the FCC agreed to extend the current prohibition on exclusive contracts for another 5 year term.

While supportive of the FCC's recent action, some competitors have advocated that the scope of the rule should be expanded to include terrestrially delivered programming. In particular, RCN, a competitive overbuilder, has claimed that incumbent providers in New York and Philadelphia have relied on terrestrial delivery of local sports programming in order to circumvent the requirements of the program access rules and to gain a competitive advantage over would be competitors who must contract for such "must-have" programming. For example, in Philadelphia, competitors have charged that Comcast is able to circumvent the program access rules by delivering its SportsNet programming (which includes Philadelphia 76ers' and Flyers' games) to cable operators via *terrestrial* means. Though the FCC recently concluded that statutory language limits application of the rule to "satellite-delivered" programming, these concerns highlight fears among many competitors that new distribution paths (such as terrestrial delivery or potentially video-on-demand services) might be used increasingly to deny competitors access to "must-have" programming.

*DirecTV-News Corp.* On April 9, 2003, News Corp. announced its intent to acquire a controlling stake of DirecTV, the largest U.S. satellite broadcasting company with more than 11 million subscribers. Since 2000, News Corp. Chairman Rupert Murdoch has sought to obtain a U.S. satellite network to complement his pay-TV assets in the UK, Asia and Europe. Under the current deal, News Corp. would pay approximately \$6.6 billion for a 34% controlling interest in Hughes Electronics Corp, a unit of General Motors, which owns DirecTV. News Corp.'s current offer is for considerably less than its last formal bid in 2001, which was valued at about \$25 billion in cash and stock (but was for a 100% interest in DirecTV).

Under the terms of the deal, News Corp. will buy GM's 19.9% stake in Hughes and an additional 14.1% of Hughes from public shareholders. General Motors will receive mostly cash for its shares, while public shareholders who tender will receive a combination of cash and stock. Upon completion of the deal, Murdoch will become Chairman of Hughes, which ultimately will be transferred from News Corp. to its subsidiary Fox Entertainment Group, Inc., and News Corp. in exchange for a promissory note and shares of FEG. The new Hughes board will have 11 members with five members selected by News Corp. and six independent directors, three chosen by News Corp. and 3 by Hughes.

In reaching a definitive agreement with GM and Hughes, News Corp. has successfully outlasted a number of other potential suitors. In 2001, EchoStar, the second leading DBS provider with 8 million subscribers, beat News Corp.'s offer only to have the deal blocked by regulators on antitrust grounds. GM and Hughes also sought interest from other companies, including SBC, but no alternative bidder emerged. Liberty Media, the largest shareholder in News Corp. considered its own bid, but later agreed to help News Corp. finance this deal by

opting to buy more News Corp. non-voting shares for \$500 million.

As part of the acquisition, News Corp. and DirecTV have agreed to abide by the FCC's program access regulations, for as long as those regulations are in place and for as long as News Corp. and Fox hold an interest in DirecTV, as if News Corp. and its subsidiaries were vertically integrated programming vendors. The companies also have committed not to discriminate against unaffiliated programming services in terms of selection, price, terms or conditions of carriage on DirecTV.

This deal will constitute the first integration of a multichannel video distribution platform with a major national broadcast network, which is likely to have strategic implications in the media marketplace. The combination arguably will provide News Corp. with greater negotiating leverage with cable operators, content providers and Fox affiliates, among others. Indeed, some critics have argued that the availability of DirecTV as a distribution platform could result in higher prices for consumers if News Corp. is able to use the availability of the DirecTV platform to extract higher licensing fees, additional channel carriage from other MVPD operators or if DirecTV capitulates to higher programming costs from News Corp., which could be used in negotiation with other MVPD operators. In response, News Corp. notes that it will not have control over a majority of DirecTV directors and that all significant transactions between DirecTV and News Corp. will be reviewed by an independent audit committee. Additionally, the News Corp.-DirecTV combination may have other effects on the MVPD marketplace, as other networks may begin to look at the possibility of partnering with distribution networks. The deal comes at the same time the FCC is considering relaxing its media ownership rules, which is expected to allow media companies to consolidate within and across media markets.

*Retransmission Consent.* Under the Communications Act, cable operators and other multichannel video programming distributors are prohibited from retransmitting commercial television, low power television and radio broadcast signals without first obtaining the broadcaster's consent. This permission is commonly referred to as "retransmission consent" and may involve some compensation from the cable company to the broadcaster for the use of the signal. Alternately, local commercial and noncommercial television broadcast stations may require a cable operator that serves the same market as the broadcaster to carry its signal. A demand for carriage is commonly referred to as "must-carry." If the broadcast station asserts its must-carry rights, the broadcaster cannot demand compensation from the cable operator. While retransmission consent and must-carry are distinct and function separately, they are related in that commercial broadcasters are required to choose once every three years, on a system-by-system basis, whether to obtain carriage or continue carriage by choosing between must carry and retransmission consent.

Cable operators, and in particular small and independent cable operators, have expressed concern that the current process for seeking retransmission consent is being exploited by large media networks who are seeking to use their control over local broadcast station carriage rights to offer small cable operators "take-it-or-leave-it" deals that either require significant cash

payments for carriage or tie the carriage of other non-broadcast channels to the provision of retransmission consent. For example, according to filings by the American Cable Association (who has sought FCC inquiry into current retransmission consent practices), in certain cases, Disney has sought either 70 cents per subscriber or carriage of additional non-broadcast channels such as SoapNet, Toon Disney, and the Disney Channel.

#### IV. WITNESSES

##### Panel I

**Mr. William B. Shear, Director, General Accounting Office.** Mr. Shear will discuss GAO's preliminary findings regarding its inquiry into cable rates and the FCC's annual report on cable prices.

##### Panel II

**Mr. James Robbins, President & CEO, Cox Communications.** Mr. Robbins will testify about the impact of sports programming costs on cable prices and on the ability of broadcast networks to use the retransmission consent process to gain carriage of other non-broadcast programming networks.

**Mr. Charles F. Dolan, Chairman, Cablevision Systems Corporation.** Mr. Dolan will testify about the impact of sports programming costs on cable prices and on the recent carriage dispute between Cablevision and YES Network.

**Mr. Leo Hindery, Jr., Chairman & CEO, YES Network.** Mr. Hindery will testify about sports programming costs and the impact of vertical integration on the ability on non-affiliated programmers to gain favorable carriage terms.

**Mr. Gene Kimmelman, Director, Consumers Union.** Mr. Kimmelman will testify about rising cable prices and exercise of market power by cable operators. Mr. Kimmelman will also discuss the impact of increased vertical integration among multichannel video programming distributors.

**Mr. James M. Gleason, President & COO, CableDirect.** Mr. Gleason will testify in favor of a la carte pricing and for limits on the ability of networks to use retransmission consent proceedings to force carriage of non-broadcast programming.