SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN
APPROVING IN PART, CONCURRING IN PART

Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-__ (adopted Sept. 12, 2002).

Today we begin the 2002 Biennial Review of our broadcast ownership regulations. I support this Notice, and commend the Chairman for his strong leadership in this area. With this action today, we begin the most comprehensive review of our broadcast ownership regulations that I believe the Commission has ever conducted. We will examine the goals our rules are intended to achieve, the current marketplace in which they operate, and – pursuant to our statutory mandate – the extent to which each rule continues to be "necessary in the public interest as the result of competition." We also consider whether a different regulatory framework might better serve the Commission's policy goals in today's marketplace. While this task will be challenging, I am hopeful that we will end this process with a clear, reasoned and justified approach to ownership restrictions that will withstand judicial scrutiny.

I think it is important to note that the media landscape has changed dramatically since our ownership rules were adopted. These rules are, frankly speaking, old. Our long-standing goals of competition, diversity, and localism, however, do not lose their importance with age. These goals remain critical. But the import of these goals does not relieve us of our statutory obligation to review our rules. We therefore embark on this biennial review to ensure that whatever ownership rules we retain or adopt, they fulfill these goals in a manner that reflects the current marketplace.

I write separately to express a few concerns. First, I am troubled by the Notice's articulation of the legal standard inherent in Section 202(h) of the Telecommunications Act of 1996 (the basis for this biennial review). That provision instructs the Commission to review its broadcast ownership rules every two years to determine whether they are "necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest."[1] This Notice "invite[s] comment" on the standard the Commission should apply in determining whether to modify, repeal, or retain our rules pursuant to this provision. Yet, the Notice also notes that the "Commission" already articulated an interpretation of this standard before the D.C. Circuit, arguing in its rehearing petition in *Fox Television* that "necessary in the public interest" in §202(h) means merely "useful" or "appropriate." As I have said previously, I disagree with this interpretation. I believe interpreting "necessary in the public interest" as meaning merely "in the public interest" inappropriately reads the critical word "necessary" out of the statute. Congress included the term, and I believe we must give it more significance. "Necessary in the public interest" must mean more than "useful" or "appropriate." I believe the term "necessary" should be read in accordance with its plain meaning to mean something closer to "essential." Accordingly, I concur in the Notice's discussion of the legal standard of Section 202(h).

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (196), §202(h).

I also would have preferred that this Notice provide more guidance to industries and consumers regarding our direction. For instance, I believe we could have provided more guidance on newspaper/broadcast cross-ownership. Unlike every other one of our major broadcast ownership regulations, the newspaper/broadcast cross-ownership rule has not been modified since its adoption in 1970s. Today, newspapers are treated differently from all other forms of business that disperse information (including broadcast television stations, which generally are permitted to combine in large markets). In short, only newspapers remain caught in a 1970s atmosphere.

Almost seven years ago, the Commission expressed its belief that the newspaper/broadcast cross-ownership rule needed to be reviewed, and possibly revised, to reflect marketplace changes since the 1970s. The Commission committed to "commence an appropriate proceeding to obtain a fully informed record in this area and to complete that proceeding expeditiously."[2] The then-Chairman emphasized that:

> there is no reason to wait – especially when there is reason to believe that . . . the newspaper/broadcast cross-ownership rule is right now impairing the future prospects of an important source of education and information: the newspaper industry.[3]

Unfortunately, despite this rhetoric, the Commission followed that decision not with a rulemaking, but merely with a Notice of Inquiry into the waiver policy for newspaper/radio combinations. And the Commission has never completed this proceeding.

In its 1998 biennial report, the Commission again concluded that the newspaper/broadcast cross-ownership rule should be modified: "We recognize that there may be situations in which the rule may not be necessary to protect the public interest in diversity and competition."[4] Again the Commission promised to initiate a rulemaking proceeding to begin this process.

For a third time in the 2000 biennial report, the Commission again committed, this time:

> in the near future, [to] issue a notice of proposed rulemaking seeking comment on whether we need to modify the daily newspaper/broadcast cross-ownership rule in order to address contemporary market conditions.[5]

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[2] Capital Cities/ABC, Inc., *Memorandum Opinion & Order*, 11 FCC Rcd 5841, ¶87 (1996).
[3] *Id.* at Separate Statement of Chairman Reed E. Hundt.
[4] 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, *Report*, 15 FCC Rcd 11058, ¶95 (2000).
[5] 2000 Biennial Regulatory Review, CC Docket No. 00-175, *Report*, 16 FCC Rcd 1207, ¶32 (2001).

Thanks to Chairman Powell's leadership, the current Commission finally complied last September, issuing another Notice. We now have a full record on the extent to which the newspaper/broadcast rule should be retained, modified or eliminated, and we have had almost a year to review the record. Regardless of what the Commission concludes is the appropriate action to take, the affected parties deserve to be spared further delay in knowing that answer. I believe we could have concluded this proceeding by the end of the year.[6]

In light of this history, I would have preferred we go further in explaining our direction with regard to the newspaper/broadcast rule. For instance, while there may be disagreement on what steps the Commission should take in smaller markets, I believe there is less disagreement regarding whether some change might be appropriate in the largest markets. I would have preferred to tentatively conclude that some change was warranted. We also could have provided some form of interim relief, at least until this rulemaking is complete. For example, we could have provided broadcast stations and newspapers the same opportunity to combine that two television stations have in the largest markets, as long as a significant number of independent voices remain in the marketplace.

Accordingly, for the reasons discussed above, I approve in part and concur in part on this Notice.

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[6] Contrary to claims that acting on this one rule would be unfair to other relevant industries, the Commission long ago gave an advantage to other licensees by relaxing their local ownership restrictions. Since 1996, the TV/radio cross-ownership rule was relaxed, the TV duopoly rule was relaxed, the dual network ban was relaxed, the national radio cap was eliminated, the cable/network cross-ownership ban was eliminated, and the local radio caps were increased. As a result, the number of radio and television licenses one entity could own in a local market was significantly increased … as long as the entity did not also own a newspaper. Indeed, it is the newspaper industry that has been prejudiced by the Commission's failure to act on the 1998 and 2000 Biennial Review Reports' conclusions that this rule should be reviewed and likely modified. Moreover, I do not believe that addressing the newspaper-broadcast rule separately would prejudice the outcome of this proceeding. Broadcasters and newspapers would still be considered "voices" in a local media marketplace, and the Commission could still regulate ownership of these entities as deemed appropriate in this rulemaking.