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Few Gatekeepers, Many Views: Will the New Rules Compromise the Representation of Marginalized Voices?

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Madeleine M. Plasencia, *Few Gatekeepers, Many Views: Will the New Rules Compromise the Representation of Marginalized Voices?*, 53 *Am. U. L. Rev.* 547 (2004).

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PANEL DISCUSSION

FEW GATE KEEPERS, MANY VIEWS: WILL THE NEW RULES COMPROMISE THE REPRESENTATION OF MARGINALIZED VOICES?

**REGULATING MEDIA COMPETITION:
THE DEVELOPMENT AND IMPLICATIONS
OF THE FCC'S NEW BROADCAST OWNERSHIP RULES**

Washington, D.C.

Friday, November 14, 2003

MODERATOR:

VICTORIA F. PHILLIPS

Washington College of Law

PANELISTS:

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PROCEEDINGS*

MS. PHILLIPS: Hi. Welcome. Thanks for hanging in there on a Friday afternoon. I'm Vicki Phillips, and I teach here at the law school in the IP clinic and communications law classes. I have the privilege of moderating this last panel of the day.

Today we have heard a lot about the commission's goals of localism and diversity, and there has been a lot of debate about whether the proposed rule changes embody and advance these goals or whether they completely reject and abandon them. This afternoon we will continue this debate, focusing on the goal of diversity.

Commissioner Ness just noted how elusive and difficult this goal can be. But time and time again, the FCC, Congress and the courts have reaffirmed diversity as an essential goal of national communications policy, finding it is essential to our public welfare and it is essential to our democracy.

I think Cheryl Leanza this morning talked about the complicated structure and framework for these various types of diversity. I will just name them to give you a little background on what we are talking about in communications policy when we say diversity. There is viewpoint diversity, the availability of media content reflecting a variety of perspectives. There is program diversity, a variety of programming formats and contents. Outlet diversity is multiple, independently-owned firms in a market. And source diversity is availability of content from a variety of producers. And then, of course, there is diversity as a result of minority and female ownership of the media.

The Commission's order on June 2nd discusses each of these.¹ It finds some related and some unrelated to its ownership rules. To turn to our panel this afternoon, the order reaffirms that minority and female ownership remain important objectives; however, it largely seems to defer the consideration of how we're going to get there to another day, and announces a Further Notice of Proposed Rulemaking on the issue and the creation of an Advisory Committee on Diversity for Communications in the Digital Age.

* Text has been edited for flow.

1. In the Matter of 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, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Report and Order, 18 F.C.C.R. 13,620 (2003).

I think as we listen to the panelists, I'll just throw a few facts out there so you can consider them. Minorities make up one-third of the U.S. population, however, they own less than four percent of our commercial radio and less than two percent of our commercial television stations.² Latinos, our fastest-growing population, own less than two percent of radio stations and less than one-tenth of one percent of our television stations.³ And while women represent more than fifty percent of our population, they own less than four percent of our broadcast stations.⁴ Everyone appears to agree that diversity and diverse voices and diverse views are essential to a democracy. And I turn now to our distinguished panel for their views on whether or not under these new rules they will ultimately be heard.

I guess we'll start first with Professor Leonard M. Baynes. Len is a professor at St. John's University School of Law. He teaches communications law, business organizations, race and law, and regulated industries. And he also once served as a visiting professor here at WCL. Before he moved on to teaching, Professor Baynes was an associate with Gaston & Snow. He's been an attorney with Verizon Corporation, and he has served as a scholar in residence at the Federal Communications Commission. He's also served as the Chair of the planning committee for the Northeastern People of Color Legal Scholarship Conference and has organized several communications law conferences, examining market deregulation and competition. Professor Baynes has written many Law Review articles on race, racism and the law, communications law, or the intersection of the two. He received his undergraduate degree from New York University and his JD/MBA from Columbia.

PROF. BAYNES: I'd like to thank the American [University], Washington College of Law, Law Review for inviting me here. I'm always glad to come back to the Washington College of Law. I feel a part of the Washington College of Law family. Traveling to Washington, D.C. always presents the challenge concerning how to get here. Since September 11th, the Delta shuttle doesn't allow passengers to get up during the flight. So it raises the question whether I should drive, take Amtrak, or fly. You may say, how is this relevant? Well, I'll get there in a moment.

2. THE MINORITY TELECOMM. DEV. PROJECT, U.S. DEP'T OF COMMERCE, CHANGES, CHALLENGES, AND CHARTING NEW COURSES: MINORITY COMMERCIAL BROADCAST OWNERSHIP IN THE UNITED STATES (Dec. 2000), *available at* <http://search.ntia.doc.gov/pdf/mtdpreportv2.pdf>.

3. *Id.*

4. *Id.*

Well, yesterday I decided to fly. And the wind velocity was clocked at ninety miles an hour; whatever it was, it was very, very fast. And it wasn't a problem except for the ascent and descent. And I've never experienced the plane shaking and buffeting about during the ascent and descent. So it was quite a novel experience. I felt the G forces. I felt like an astronaut as I descended into Washington, D.C. As the plane descended, I was doing some deep breathing exercises. I looked to the guy who's next to me and said, "Oh, you're doing deep breathing exercises, too." And he said, "No. I have a weak stomach." So I said to myself, thank God that we actually landed.

But how is all this relevant? Well, I think it's relevant because with deregulation, small, minority-owned broadcasters will be competing against an increased number of very large media conglomerates. As the larger media companies grow even larger, it will become even harder for the small minority media companies to broadcast competing and positive images of people of color. Many people of color will feel like me on the plane; that a lot of forces are beyond our control; that the images that shape us or affect us are shaped by things that we can't control; that we're often buffeted about by society as to the images that are created.

I plan to talk about some of the media stereotypes that actually exist and how this is related to media consolidation. The ownership rules changes really just make this worse because, as was pointed out, minorities control very few stations. So they have very little control of how their images are actually shaped. And this is something that people have said for a very, very long period of time.

The social theorist, W.E.B Du Bois, said that most people of color have a two-pronged identity; that it's an image that is shaped by themselves, how they see themselves, but also how the larger society sees them.⁵ Americans still live in communities that are often racially segregated, that blacks and Latinos live in one part of town; whites live in the other part of town. The only place that we often encounter each other is through the electronic media. That's where we see each other. That's where we learn about each other.

The data I'm going to present are quite stark. I think what happens here is that the media does not do its job, and with deregulation marketing becomes much more important. Selling things to the mass audience becomes more important, and worrying

5. W.E.B. DU BOIS, *THE SOULS OF BLACK FOLK* 38-39 (Random House 1994) (1903).

about how they're presenting the issues, the news, becomes secondary.

There was a 1990 survey by the University of Chicago that asked respondents to rank attributes for particular racial groups.⁶ The results are quite stark. For instance, with respect to violence, they asked respondents whether they thought each racial group was violent. Over fifty two percent said African Americans were violent; forty-two percent said Latinos were violent; twenty-one percent said that Asian Americans were violent; and only 18.8% said that whites were violent.⁷ So you have this hierarchy that's created in terms of these particular stereotypes in terms of how people perceive different groups. One has to realize that some of these stereotypes are fluid, that they change over time.

When I teach one of my classes, I give the students a 1932 survey.⁸ It's a 1932 survey at Princeton University, and I ask them to look at this survey of these Princeton students in the user category, Negroes, which was used at the time, and many of them are some of the stereotypes that you would think of today. If you would say what are the stereotypes of African Americans, some of them are very similar, but violence is not there at all. So in fifty years or sixty years or seventy years have blacks all of a sudden become more violent?

Well, part of it is that certainly what we've seen in the 1990s is that with the broadcast media—even though crime was down—the reporting on crime increased over 700%.⁹ There have been a lot of other studies that have indicated and shown how the media has distorted the views of people of color. These stereotypes relate to how people feel about certain programs and policies that are seen as being more related to one racial group over others.

A University of Pennsylvania study also in the 1990s¹⁰ showed that blacks and Latinos in Pennsylvania were twice as likely to be in crime stories than in human interest stories.¹¹ And that very often the

6. Leonard M. Baynes, *Racial Profiling, September 11th and the Media: A Critical Race Theory Analysis*, 2 VA. SPORTS & ENT. L.J. 1, 33 (Winter 2002) (citing Robert M. Entman et al., *Mass Media and Reconciliation*, A Report to the Advisory and Staff, The President's Race Initiative Ch. 1 (1998)).

7. *Id.*

8. D. Katz & K. W. Braly, *Racial Stereotypes of One-hundred College Students*, J. SOC. PSYCHOL., 28, 282-90, tbl. 12.1 (1993) (on file with author).

9. Howard Kurtz, *The Crime Spree on Network News, While Homicides Fell, Murder Coverage Swelled, a Survey Finds. Is it All O.J.'s Fault?*, WASH. POST, Aug. 12, 1997, at D1 (reporting that crime coverage climbed from sixth to first from 1992 to 1996).

10. Baynes, *supra* note 6, at 33-34 (citing Daniel Romer et al., *The Treatment of Persons of Color in Local Television News: Ethnic Blame Discourse or Realistic Group Conflict?*, 25 COMM. RES. 286 (1998)).

11. *Id.*

depiction of the blacks and Latinos were in situations where they were assailants to a white victim,¹² even though those types of crime—for those who study crime—know that most crime is black-on-black crime, brown-on-brown crime, white-on-white crime, because of where we live. The number of cases where you have black-on-white crime is very small. In fact, the study showed it was six percent because we live in a segregated society.¹³

In addition, only one percent of the network news stories actually covered Latinos.¹⁴ And many of the stories, again, were very stereotypical, that they're immigrants or that there was crime or drugs. And very often what happens—as shown by another study, when the drug problem was covered by the news, often they covered the story by showing file film footage of a black neighborhood or the Mexican border.¹⁵ That's generally what they showed. So it leads people to believe that these are the only people who may be actually using drugs.

I think what happens here with the deregulation, the ownership rules, the change in ownership caps, the cross-ownership rules, these things are likely to become even worse; that we as a group don't necessarily have the power to influence what the media shows. I would suggest that this is probably likely to become worse. And there may be some solutions for these media distortions in terms of at least some policing by the FCC.

With respect to this issue, given the fact, even if we increase the number of minority stations—as we've heard, there's very, very few—many times they're broadcasting only to themselves. Whites may not necessarily listen or watch those particular stations, so what opportunities do we have to change the distorted discourse? And I've talked a little bit about the news, but entertainment is just as bad or even worse.

In 1999, as you may remember, there was a brown out campaign by La Raza, which is the Latino civil rights group, and also some complaints by the NAACP, because in 1999 with respect to the entertainment broadcast, the new fall season, there was not one minority in a featured role in 1999.¹⁶ There were lots of complaints.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 34 (citing Robert M. Entman et al., *Mass Media and Reconciliation, A Report to the Advisory and Staff, the President's Race Initiative* 9 (1998)).

16. Michael Fletcher, *Latinos Plan Boycott of Network TV: Goal of "Brown-Out" is Better Roles for Hispanics*, WASH. POST, July 28, 1999, at C1; Liz Leyden, *NAACP's Mfume Warns of TV Boycott*, WASH. POST, Nov. 4, 1999, at C7.

The broadcasters said, oh, we didn't realize this. And they started adding minorities mostly to secondary or tertiary roles.

So even though we're a very large percentage of the market—as was indicated, over a third of the U.S. population—and that blacks and Latinos actually watch more hours of television per day than whites, we don't have the power that we need to actually influence the images that need to be influenced so that we can have a real discourse about issues that actually affect us.

Getting back to my initial comment, if people think that blacks are violent, and that only blacks are violent—if people believe that's the case—then what is going to be the response with respect to drug laws or incarceration? If they think only blacks and Latinos are the ones doing anything wrong, it affects our social policy. And I think the broadcasters have been irresponsible in not broadcasting more balanced images. And I think that these rule changes are giving them something that they really don't deserve unless they clean up their act. They need to operate within the public interest, and they're not doing that. As a consequence, these rule changes will make people of color feel even more like my plane ride down to D.C. We'll be even more buffeted about by the turbulent winds of deregulation. Thank you.

MS. PHILLIPS: Thanks, Len. I think I'm going to exercise moderator's privilege and skip over Jane Mago since I think she will probably respond to a lot of what's said to my way left and my right. So let's listen now to Madeleine Plasencia.

Madeleine is a professor at the University of Tulsa College of Law. She's an expert and scholar in the areas of constitutional and privacy law, broadcast media and telecommunications and Internet law, and presently authoring a book on the impact of mass media and digital media, mass media, the internet and social justice, and an article, "The Miner's Canary on a Wire Racing to Broadcast Justice." Before moving to teaching, Professor Plasencia practiced law as an associate at the New York office of Fried Frank, and she's a graduate of the University of Pennsylvania School of Law and Cornell University.

PROF. PLASENCIA: First, I'd like to thank the Washington College of Law for inviting me to speak at this symposium conference, which is a tremendous conference with wonderful speakers, and I'm honored to have been invited. I also would like to thank the Law Review editors who have so graciously hosted this conference. I'm having a wonderful time, and I hope you are too.

I don't know if any of you remember the cover of Time magazine in 1983. In 1983, I was in college, and you were probably in diapers.

The cover of Time magazine in 1983 had a picture of a PC.¹⁷ And it said on the top, "Information Revolution." Twenty years later, where are we? Well, if we're looking at access from the perspective of minorities, we're only half a revolution there.

As law scholars and practitioners, we often struggle to get the law to match the current needs of our society. Sometimes we struggle to get the law to even be recognized as such. As the September 3rd Third Circuit stay of the FCC ruling¹⁸ shows, the judiciary may be the only proper venue for interpreting law these days.

Today's symposium organizers ask that we consider the effect the new rules will impose on media outlets and diversity of programming. And a few of the questions the editors asked us, the participants, to speak to are, first—and these are not all the questions, just a few—will an oligarchy replace competition and diversity; secondly, do the new regulations benefit minorities and women; should the FCC adopt content-based regulations that would provide diverse programming and opinions?

Let's take the first question first. Will an oligarchy replace competition and diversity? In this context I take the question to mean, will broadcast media be dominated by a few rather than by many? Well, maybe so. That's the position of those to my left . . . and maybe to my right So the question then might become: "Is there a pressure valve for others to be heard?"

Chair Michael Powell said that's what the Internet is for. He defended the rules by saying, "Our democracy is strong . . . It would be irresponsible to ignore the diversity of viewpoints provided by cable, satellite and the Internet."¹⁹ The chair's comments suggest that the Internet is a salvo for any oligarchic tendencies that the new regulations may impose. When asked about the digital divide, which is a term used to describe people of color, the poor, elderly and rural communities' relative lack of technological access, such as the Internet, Powell retorted—and you may very well already be familiar with this quotation, but lest you've forgotten, I quote again—"You know, I think there's a Mercedes divide. I'd like to have one; I can't afford one."²⁰

17. TIME, Jan. 3, 1983, at front cover.

18. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651 (3d Cir. 2003) (holding that the FCC had the power to exempt certain contracts from the filing requirement of 47 U.S.C. § 211).

19. Christopher Stern & Jonathan Krim, *House Votes to Prevent Change in Media*, WASH. POST, July 24, 2003, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn/A37741-2003Jul23?language=printer>.

20. Press Release, Congressman James E. Clyburn, FCC Should Not Ignore the

The Mercedes divide comment raised, and raises, two important concerns within the context of today's discussion. First, the comment acknowledges that a divide exists. And secondly, it raises another question, which is, is the divide just an economic divide? That the divide exists is problematic. The reasons for it are even more troubling.

First, the divide continues and is substantial. At the heart of the digital divide is Internet access. In 1998—and this is a quote from *Science* magazine—"Looming large was the concern that the Internet may be accessible only to the most affluent and educated members of our society."²¹ The 1999 NTIA [National Telecommunications and Information Administration] report from the Department of Commerce, titled, "Falling Through the Net: Defining the Digital Divide,"²² gave a more concrete picture of telecom access across the United States. In 1998, whites were three times more likely to own computers as African Americans or Hispanics. By 2000, whites were about twice as likely to own home computers and have home Internet access.²³ And in a separate section from that "Falling Through the Net 2" report, there's a section titled, "Persisting 'Digital Divide'."²⁴ There they noted substantial disparities have continued to widen both when comparing blacks and Hispanics against the national average and when comparing them against whites.²⁵ Most troubling and alarming, the NTIA found that even when taking into account the effects of lower income and educational attainment, blacks and Hispanics continued to experience lower levels of home Internet access.²⁶

By 2001, the Bush administration's NTIA hosannaed its findings, it's first findings, auspiciously titled, "A Nation Online: How

Digital Divide (Feb. 14, 2001), *available at* http://www.house.gov/apps/list/speech/sc06_clyburn/cc010214digitaldivide.html.

21. Frank Ahrens, *The Great Deregulator; Five Months into his Tenure as FCC Chairman, Michael Powell is Coming Through Loud and Clear*, WASH. POST, June 18, 2001, at C1; Donna L. Hoffman & Thomas P. Novak, *Bridging the Racial Divide on the Internet*, SCI. (1998).

22. NAT'L TELECOMM. AND INFO. ADMIN., FALLING THROUGH THE NET: DEFINING THE DIGITAL DIVIDE (July 1999), *available at* <http://www.ntia.doc.gov/ntiahome/fttn99/FTTN.pdf>.

23. NAT'L TELECOMM. AND INFO. ADMIN., FALLING THROUGH THE NET: TOWARD DIGITAL INCLUSION 13 (Oct. 2000), *available at* <http://search.ntia.doc.gov/pdf/fttn00.pdf>.

24. NAT'L TELECOMM. AND INFO. ADMIN., FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE (July 1998), *available at* <http://www.ntia.doc.gov/ntiahome/net2/falling.html>.

25. *Id.*

26. *Id.*

Americans are Expanding Their Use of the Internet.”²⁷ The report boldly asserts we are a nation online, but American Indians are not included in the report. So if you go to it, you won’t find any data on Native Americans.

Reading the report reminded me of another book that I had been reading at the time which has nothing to do with the subject of this conference, a book written by Steven J. Gould who died in 2002, a Harvard scientist. The title of the book is *Mismeasure of Man*, where he analyzed the Bell curve.²⁸ And he responds to data of eugenicists who scientifically conclude that white Gentile men are smarter than blacks, women and Jews. And Gould found that some scientists have a knack for throwing out any sample population that might skew desired results.

In any event, by fall of 2001, differences between blacks, Hispanics and whites persisted. Whites were almost twice as likely to log on from home at 59.9% than blacks at 39.8%, and Hispanics at 31.6%.²⁹ But by last spring, Chair Powell saw “the Internet itself becoming an essential source of important content.”³⁰ How can this be that only a few relatively wealthy who can afford a Mercedes might be the relative few who can also afford this “essential source of important content,” leaving all others without access to such an important source? No doubt, then, the Internet has become something more than just a pure luxury item. We’re not arguing about leather seats versus cloth. We’re really talking about a democracy versus a tyranny.

The divide is based, at least in part, on insidious race discrimination. As I mentioned, the NTIA report of 2002, came out in February of last year, “A Nation Online” asserted that gaps in access persist even when income and education as factors are netted out.³¹ Gaps emerge when redlining takes place. An advanced product may systematically not be made available in African American or Latino or Asian communities, such as in the video dial tone cases. Telephone service provided by companies, such as Bell Atlantic, as a result of infrequent maintenance of poles, wires, cables

27. NAT’L TELECOMM. AND INFO. ADMIN., A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET (Feb. 2003) [hereinafter NTIA, A NATION ONLINE], available at <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf>.

28. STEPHEN JAY GOULD, THE MISMEASURE OF MAN (1996).

29. NTIA, A NATION ONLINE, *supra* note 28, at 21.

30. Chairman Michael K. Powell, Remarks at the Media Institute (Mar. 27, 2003), available at http://www.mediainstitute.org/Speeches/powell_speech.html.

31. NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, A NATION ONLINE: HOW AMERICANS ARE EXPANDING THEIR USE OF THE INTERNET 10-11 (Feb. 2002), available at <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf>.

and conduits result in outages.³² This has been documented over and over again—the week long telephone outage of an entire area in Mission Hill.³³ From Leonard Baynes research we have a two-day telephone outage affecting a hospital in Jamaica Queens.³⁴ An article that's coming out, Professor Baynes has research that shows outages in Brooklyn affecting a daycare center and elementary school caused by "rotted cables," a two-month outage.³⁵

So I'm going to go ahead and merge questions two and three. The second question, do the new regulations benefit minorities and women? And the third, should the FCC adopt content-based regulations that would provide diverse programming and opinions? Commissioner Copps says, "The June 2nd decision bestows upon media conglomerates unacceptable levels of influence over the ideas and information upon which society and our democracy so heavily depend."³⁶ Commissioner Adelstein predicted, "As big media companies get bigger, they're likely to broadcast even more homogenized programming that increasingly appeals to the lowest common denominator."³⁷ So he said, "if this is a toaster with pictures"—we have the PC from 1982, the information revolution; today we have the toaster with Internet access in your kitchen. But "if the toaster with pictures" is in your kitchen, soon it will only have Wonder bread pop out.³⁸

Women and people of color taken together, as our moderator noted, own less than five percent of broadcast media outlets. So how likely is it, then, that top level jobs among the five biggest media giants, post new rules, will go to women and people of color? How likely is it that the five biggest media giants will devote their programming to disseminating feminist viewpoints? What of what

32. Madeleine Mercedes Plasencia, *The Politics of Race on the Electronic Highway: An Analysis of the Video Dialtone Redlining Cases, and the Nynex Consent Decree in Roxbury*, 15 *TOURO L. REV.* 513, 518-20 (Winter 1999).

33. *Id.*

34. William Sherman, *A Major Hangup for New Yorkers Phone Service Has Them at the End of Their Lines*, N.Y. *DAILY NEWS*, Nov. 22, 1998, at 7, available at 1998 WL 21935179.

35. Leonard M. Baynes, *Electronic Redlining and Deregulatory Injustice: The Color of Access to Telecommunications*, 56 *ADMIN. L. REV.* — (2004) (forthcoming).

36. Press Release, National Organization for Women, *New FCC Rules Threaten to Shut Out Women and People of Color from Media Industry* (June 4, 2003) [hereinafter NOW Press Release], available at <http://www.now.org/press/06-03/06-04.html>.

37. Joanna Glasner, *Tech a Key in Media Rule Change*, *WIRED NEWS*, June 3, 2003, at <http://www.wired.com/news/business/0,1367,59079,00.html>.

38. Press Release, FCC, *Statement of Commissioner Jonathan S. Adelstein Dissenting* (June 2, 2003), available at http://www.hraunfoss.fcc.gov/edocs_public/attachment/DOC-235047A8.pdf.

Vice President of NOW Terry O'Neal has said? "Women only won the right to vote in 1920. But that right is meaningless without exposure to a broad range of information—information that will let women know when their rights are at risk and allow them to make informed decisions about their future."³⁹

I can answer the first part of the question from the law itself, which is the Telecom Act.⁴⁰ The Telecom Act was designed to benefit women and minorities. Its language expands civil rights to the field of telecommunications, protecting against discrimination. In Section 151, the very first section of this statute protects against discrimination "on the basis of race, color, religion, national origin, or sex."⁴¹

This language is included to respond to concerns that telephone companies were engaging in redlining at the time that the Act was passed. If the relevant federal agency is unwilling or unable to enforce the law, then I in closing propose that the judiciary enforce the congressional mandate for a private right of action. In *Cannon v. University of Chicago*,⁴² which is a 1979 U.S. Supreme Court decision, the court observed that it has never refused to imply a private right of action when the language of the statute, explicitly confers the right directly on a class of persons.⁴³ And so, really, the only solution that I see to enforcing the Telecom Act these days may very well be through appeals to the courts as we see through the stay that the 3rd Circuit entered. Thank you.

MS. PHILLIPS: Our next speaker is W. Curtiss Priest. He's the director of the Center for Information, Technology & Society, and a Research Affiliate for Comparative Media Studies at MIT. He's a member of the American Economics Association and was a senior economist at MIT in the '80s, and testified before Congress on cost and benefits regarding regulatory decisions. Prior to that, he conducted the study for the FCC on the technical quality of telecommunications and evaluated foundation programs for the Kettering Foundation to improve communication between government and citizens.

In '85, Dr. Priest contributed a framework to the Office of Technology's landmark report to Congress, "Intellectual Property

39. NOW Press Release, *supra* note 35.

40. The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

41. 47 U.S.C. § 151.

42. 441 U.S. 677 (1979).

43. *Id.* at 694.

Rights in an Age of Electronics and Information,”⁴⁴ and he was the principal investigator of a three-year NSF study, entitled Social and Ethical Consequences of Designs for Medical Information Systems. He’s the editor and publisher of CITS Media Watch, and in that capacity he’s written about significant trends and issues in intellectual property and media concentration and cross-ownership.

DR. PRIEST: Good afternoon. It is a privilege to be here. What I thought I was going to do a couple of weeks ago was to do what Mark Cooper has already done, and that is his excellent book.⁴⁵ So what I’m going to do is try to go beyond that book and put things in the perspective of world history. There are things I’m going to say. I’m just going to extract from the paper I wrote. If you would like a copy, you can just send e-mail to priest@mit.edu.

To get your mind thinking in the framework that I’m trying to bring to you, I’m going to read what may be familiar to some of you, Zen Koan.⁴⁶ We have several monks of different stature standing, looking at a flag on the post. One said, “The flag is moving.” The other said, “The wind is moving.” An elder happened to be passing by. He told them, not the wind, not the flag, but the mind is moving. But then he commented, “Wind, flag, mind moves.” The same understanding, “When the mouth opens, all are wrong.”

We are all monks to our society. So it is also with information media. Zen Koan applies to many who view and see the flag waving. Our culture is not only waving. Also, when we try to speak about the movement of culture, the media concentration articulates a faulty vision. It’s funny. I work with the Alliance for Public Technology. A lot of people are working in this tiny little box, “I know this particular section of the Act better than you do.” I’ll just leave it at that.

I’m disappointed at Mark Cooper. I don’t see him. He so understated his brilliant work that I have to say I was riveted. This is a 300-page book. I put pieces about positive externalities to various public goods, but he lays it out so well that he doesn’t do justice to his own work. So I would encourage you to go to Larry Lesing’s Website, lesing.org, and you can buy the paperback or you can e-mail it to Kinkos, and in five minutes you have this 300-page book that you

44. OFFICE OF TECHNOLOGY ASSESSMENT, *INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION* (Apr. 1986), *available at* <http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk2/1986/8610/8610.PDF>.

45. MARK COOPER, *MEDIA OWNERSHIP AND DEMOCRACY IN THE DIGITAL INFORMATION AGE: PROMOTING DIVERSITY WITH FIRST AMENDMENT PRINCIPLES AND MARKET STRUCTURE ANALYSIS* (Creative Commons License 2003), *available at* <http://cyberlaw.stanford.edu/blogs/cooper/archives/mediabooke.pdf>.

46. *See* <http://www.ashidakim.com/zenkoans/zenindex.html>.

have to read before you write this paper. His writings are so wide ranging that someone must take this book and turn it into thousands of sound bytes.

Will Michael Powell sit down and read a polemic of this density? I've heard that he's very thoughtful, and so I hope he certainly does. Festinger goes back to 1957,⁴⁷ people are strong with ideological leanings. And, yes, I think he does have strong ideological leanings, tend to pre-filter information, to read or listen only to those who say what is included in their own belief systems.

My paper is entitled "Media Concentration: A Case of Power, Ego, and Greed Confronting Our Sensibilities."⁴⁸ I helped record the various forums that Copps and Adelstein thoughtfully convened throughout the spring,⁴⁹ which hopefully helped produce all those phone calls that we heard came in. I see greed or ego as a driving force behind media concentration. And it is not openly clear that the central owners of media believe they are doing anything wrong. In fact, they often argue that they do good for society when serving non-diversity interests, as in general, the public demand, the program quality, in the dollars per second that can be spent.

Think about what you like to watch. It's the dollars per second that actually provide a good deal of the appeal. With billions of dollars spent on marketing, the owners of media see that they can shepherd millions of dealers to wanting the same things. And indeed from the perspective of economic efficiency, if you can get everyone to want exactly the same thing, then the market will produce that product at ever-decreasing prices, which is about the only flag waving today. Why isn't this a case of what's good for the goose is good for the gander? Are we not a melting pot? Is that melting not a process by which, regardless of an ethnicity, we all become Americans, and by which America itself includes diversity?

It is really quite simple. In the marketplace you strive for corporate profits. The stockholders, of course, demand that from you. You may occasionally throw a bone to public discourse, diversity and free speech, but these bones will lack meat because the meat is saved for the stew. If WB is able to shape the values of teenagers so that all of

47. LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957).

48. W. Curtiss Priest, *Media Concentration: A Case of Power, Ego, and Greed Confronting Our Sensibilities*, 53 AM. U. L. REV. 635 (2004).

49. See Catherine Yang, *The FCC's Loner Is No Longer So Lonely, Michael Copps is winning allies in his war on Big Media*, BUS. WK., Mar. 24, 2003 (describing some of the public hearings and forums that Commissioners Copps and Adelstein held in February and March 2003), at http://www.businessweek.com/magazine/content/03_12/b3825069_mz016.htm.

them are fans of Dawson's Creek, are not all these teenagers better off? They get a program that can hire very alluring characters, hire the best producers, directors and writers.

Surely, no one wants the scant fare of a local public cable station. The sound often fades. There is no riveting editing. And the paces are nonexistent. So are not Eisner⁵⁰ and Murdoch⁵¹ doing everyone a favor by challenging American values in a never-ending vortex of advertisements that feed into programming and programming that feeds back to advertisements? Everyone wins.

A media-created notion of an American replaces multiple notions of Americans. As Steven Tyler sings, "Walk this way. Talk this way."⁵² Our kids attack other school kids out of frustration, disillusionment. More than half of drivers buy vehicles that make no ecological sense. Surely. Just roll back environmental laws. Forget that the Chinese warrants are artificially pegged to the U.S. dollar and we give away most of our manufacturing jobs.

Whatever you do, do it on credit. A Mastercard advertisement shows the cost of purchasing things in this economy. And when the bills finally tally, they ask, "Aren't you glad you used Mastercard?" No, I don't think so. [Running out of money? Spiraling house prices] make homes a fountain of money. Just refinance in the name of a lower interest rate. Get Bank of America to fund your new home equity line of credit and give you a card that lets you charge your renovation projects at Home Depot to our ever-increasing national debt.

George Orwell, 1949, in *1984* struggled with the questions of how controlled should a society be.⁵³ No one in *Logan's Run*⁵⁴ struggled with the same question as did H.G. Wells in *The Time Machine*, 1895.⁵⁵ Divide society in half where homogenous Elois were raised like cows and Morlocks operated machinery and provided the fodder and fed on the Elois.⁵⁶

What is the essential value of diversity? If we are a melting pot, then why care? How could media allow both cultural preservation and assimilation? How controlled should such a media be? Cooper's

50. Michael Eisner, CEO, Disney. See *Forbes Faces: Michael Eisner*, Jan. 16, 2001, at <http://www.forbes.com/2001/01/16/0116faceseisner.html>.

51. Rupert Murdoch, Chief Executive, News Corporation. See <http://www.newscorp.com/management/board.html>.

52. AEROSMITH, *Walk This Way*, on TOYS IN THE ATTIC (Columbia Records 1975).

53. GEORGE ORWELL, 1984 (Alfred A. Knopf 1992) (1949).

54. WILLIAM F. NOLAN, *LOGAN'S RUN* (Buccaneer Books 1995) (1967).

55. H.G. WELLS, *THE TIME MACHINE* (Robert Bentley, Inc. 1971) (1894).

56. *Id.*

writings return again and again to matters of civic discourse, the importance of civic discourse.⁵⁷ Many generations simply knew what defined their culture and passed their information on to future generations. So what is the relationship? We're not pilots in this country anymore. None of us here are; some other people are. So what is the relationship between cultural transmission and civic discourse? How does a concentrated media transmit cultural values? What cultural values are transmitted? Where are we in a society? I suggest we're in a back order. The consumption mentality is causing havoc with our resources, and I go on to describe that.

The news shows provide us matters of planet compatibility. They cannot and will not when the advertising base is built upon economic growth. Millions of years of human existence knew nothing of economic growth. Why? Is economic growth the god of all times? No. Is it a historical accident of this period in time? Yes, the availability of new jobs produced by this accident causes even the most liberal to embrace it.

But how do we find a balance between American values and an American economy? Do we allow our values to shape our economy or do we allow our economic structures to determine our values? Do we expect, for example, of the two billion Chinese, one billion driving SUVs? That's our current ratio here.⁵⁸ Why shouldn't it be there? Because there's just not enough fossil energy to do that. It's an impossibility. So we basically have an impossibility being driven by the media.

I'm going to compare these two. A diversity of species. We want diversity. Why do we want diversity? Because we want it to feed into the future generations. Just as in the DNA code,⁵⁹ there's so much evolved in many cultures. Wilson says that three species of life are extinguished every hour.⁶⁰ This means 27,000 species are extinguished each year. Just by the destruction of rain forests and so forth—and I consider what's happening in this country in the media to be a bit like the destruction of rain forests. Further, a cultural gene pool diversity better ensures the continuity of the human species.

57. See, e.g., COOPER, *supra* note 44, at 47 (arguing that market failure influences civic discourse).

58. Joseph G. Lehman & Peter VanDoren, *Save a Life, Buy an SUV*, May 29, 2001 (explaining that SUVs comprise forty-three percent of the vehicles on the road today), at <http://www.mackinac.org/article.asp?ID=3470>.

59. See, e.g., Freedland Bioinformatics Lab, Biological Sciences Dep't, Univ. of Md., Balt. County, *The Origin of Genetic Coding*, at http://www.evolvingcode.net/code_blue.php (last modified May 13, 2003).

60. National Park Service, *Wildlife Basics* (July 1997) (quoting E.O. Wilson, Harvard Biologists), available at http://www.nps.gov/piro/wl_wlbasics.htm.

Former Commissioner Ness said, “no, no. It’s very tightly boxed in like this, and we can’t think outside of that box.” Come on. We have to ensure that we go on, not for just this generation. So what if there’s a cataclysmic event or gradual climate change? Is our resilience going to be culturally bred out of us? Is this not a dangerous form of inbreeding? H.G. Wells struggles with this within his 1923 utopian novel.⁶¹ And I’ll just skip ahead. It’s a wonderful novel.

Cooper mentions the things that most attract people—celebrity personality, scandal, horse race and hoopla, and verbal duals. [Are the majority of Americans so overworked?] Who’s in charge? Are the people driving the media or the media driving the people? I then talked about Rokeach and the science of beliefs, attitudes and values.⁶² It’s a powerful science, and it just drives the system.

Anita alluded to the matter of how First Amendment rights, which were supposed to benefit the little people, are now being turned around in all the courts, saying, we as corporations have First Amendment rights. Taylor says we’re driven to pay a lot of money for things because of [value] and lists twenty four different things that add value to information, so that it actually appeals to us. Faced with three billion Web pages, Google search, we need filtering, and that filtering feeds back into why everybody watches the same thing.

Our society is in a protracted, transitory period. During this period, both the First Amendment and civil discourse rights are vital, what we wish to avoid, via corporate influences is the Disneyfication or the Wal-Martization. If the moguls have their way, our people will surely be just puppets on a string. They will be as in the Truman Show,⁶³ be artificially cut off from life. They will live in a hell hole of repeating the same behavior year after year that provides revenues to the owners of media.

MS. PHILLIPS: This panel is certainly going to demonstrate what a broad topic diversity is. And with that, we move to Peter Tannenwald. Peter is a partner at Irwin, Campbell & Tannenwald after many years as a communications lawyer in Washington. He’s represented a broad range of radio and television broadcast stations and common carrier clients in both regulatory and transaction matters; represents some vendors of new technologies and equipment manufacturers. And he’s been instrumental in the implementation of several new

61. H.G. WELLS, *MEN LIKE GODS* (Leisure Books 1970) (1923).

62. SANDRA ROKEACH, *THE GREAT AMERICAN VALUES TEST: INFLUENCING BEHAVIOR THROUGH TELEVISION* (Free Press 1984).

63. *THE TRUMAN SHOW* (Paramount Pictures 1998).

communications technologies. Mr. Tannenwald is a graduate of Brown University and Harvard Law School.

MR. TANNENWALD: Thank you, Vicki. And thanks to the law school for inviting me.

I'll give you a little different approach from what you've just heard because I've been in practice for over thirty-five years, and my job is to get things done for people. And one of the things that strikes me about what is going on with these regulations is that a lot of people have a lot of different goals. They're all looking at the same rules, and they're not focusing on how to make the rules achieve their goals. We've heard most of my ideas already today, but maybe I can bring some of them together. But before I do, I wanted to point out two problems with the way the FCC deals with these rules.

The first is that it is an agency with limited resources. The people said this morning a couple of times, this is the practicality they're dealing with. They can't deal with the whole world of rules at the same time, and so they divide it into little pieces. And they sometimes don't get the big picture because they're doing little pieces, and that's one of the problems here. You'll have to overlay that on what we heard this morning, which is basically that Chairman Powell has written off over-the-air broadcasting as an outdated and antiquated technology that is withering. And there is not a lot of reason to try to do much for it other than let it do its own thing and consolidate.

I really think he believes that. He keeps saying eighty-seven percent of the nation is on cable.⁶⁴ He might be looking a little bit backward himself. I can't be sure. But it always strikes me, that when I started practicing, we watched television over the air and we made phone calls on a wire, and today we make phone calls over the air and we watch television over a wire. But where are we going now? We're going to digital television that the cable companies don't want to carry. And so the broadcasters are going to have to figure out a way to enable you to watch that over the air. And the antenna manufacturers are looking at that. Or maybe we're going to get the pictures on our cell phone, or maybe we're going to get them on our broadband Wi-Fi. I don't know. But notice that nobody is talking about mandating open access to any of those new technologies. So if you're looking at how you're going to have diversity of voices or diversity of ownership, you're looking at something the Bell

64. Kathleen Hays, *FCC to Vote on Expanding Ownership Rules*, June 1, 2003, at <http://www.cnn.com/TRANSCRIPTS/0306/01/sm.02.html>.

companies are probably going to dominate unless they're too backward-looking.

So all I can say to Chairman Powell is, if you write off over-the-air technology, you've already locked yourself off into this decade, and you're missing what's coming next, or you might not be. But you shouldn't write it off.

And, by the way, in terms of indicating where your prejudices come from or who you represent, I represent some small market television broadcasters who are going to be put out of business by these new rules because of what they forbid, not what they permit. And I'm counsel to the trade association of lower power television stations who don't have cable rights, who are probably the biggest group of minority-owned, locally-based broadcasters in the country, and are starving because they don't have access to the delivery mechanisms.⁶⁵

In any case, what I do think is that we see people with a lot of diverse and different goals here. Most people are saying they want some kind of diversity of ideas. Some people think that you're going to get that diversity from the multiplicity of outlets. Vicki [Philips] talked about the different kinds of diversity. Some people think you're going to get it from minority and female ownership. Some people think you're going to get it from preventing the networks from controlling the program supply. But there is a whole series of rules that affect that more than the rules that we're talking about today, like the prime time access rule, how much of prime time programming the networks can own themselves; leased access on cable, what your right is to get on the cable system; all kinds of access to capital, which is a lot of the problem for minorities.

Anybody who thinks that minorities are driven by different goals than white people—I mean, some are, but some white people are driven by different goals too. Ask Al Liggins, Radio One, who's one of the big success stories.⁶⁶ Ask Univision.⁶⁷ They're interested in their stock price, and making a profit, and trading stations, the same as everybody else. And they're going to put stuff on there that people are going to watch and listen to. And if you think otherwise, I think

65. In *ValueVision Int'l Inc. v. F.C.C.*, Peter Tannenwald argued the cause and filed the briefs for Community Broadcast Association, a trade association for low-power television broadcast stations, available at <http://www.fcc.gov/ogc/documents/opinions/1998/valuevis.html>.

66. Radio One is the seventh largest radio broadcasting company in the United States and the largest targeting African Americans. Alfred C. Liggins, III is President and CEO. See http://www.radio-one.com/about_radio_one.htm.

67. Univision Communication Inc. is the leading Spanish-language media company in the United States and includes radio, television, music, and other internet offerings. See <http://www.univision.net>.

you're a little idealistic. And I'm not criticizing them. If you don't think that our economy should be driven by the profit motive, you might be living in the wrong country.

Dr. PRIEST: I might move.

MR. TANNENWALD: And if you don't think that bigger is better and richer is better, you can still live in this country, but you're not in the majority right now, at least the way the electorate is voting. So maybe what we really need to do is to educate the population a little bit and fix up our education, because if the audience demands more different programming or doesn't watch the lowest common denominator programming, somebody will put something different on.

It's a tough problem, and it's a big picture, and it's hard to get your hand around the whole thing. I'm listening to all these people talking here. Some people want to just punish big media. Some people think that big media are too rich, and that's sort of a combination of types of economic power. But what I really think underneath is they have too much money to get the politicians, so they have too much control over our political process because the politicians answer to them. And that's a problem you're not going to fix by how many TV stations they can own.

And then all the people who really object to the content of television programming—which is a little hard for me to comment on, because I just don't watch television, it's so bad. I have never seen most of the popular programs, and I really don't know how bad they are. That goes to the question of turning it off because these people can't survive without advertising support.

Think of it this way. General Motors didn't build small cars that get better gas mileage until people said they want to buy them, and the Japanese built them, and we bought them. And now General Motors builds them. And the same thing is with broadcasters. They're going to react in part to the audience. Remember that broadcasters prosper when advertisers buy on their stations, and that the maximization of the audience is only an indirect way to get to their goal, which is to sell advertising. And if the advertiser doesn't want to buy a diverse audience or only buys the top one or two stations in the market, people will orient their programming towards what makes that sale.

Now let's look at some of the people who oppose the commission and some of the commission's rules, and some of the damage that it can do. I really don't care whether the networks can reach thirty-five or forty-five percent of the nation because I agree with whoever said

this morning that only three percent of the people tune in anyway, and it's only potential viewers, not actual viewers. And as to how many stations you can own in a market, that's a little bit more difficult a problem.

What we really have now is the push towards economic efficiency, which several people have talked about. Regardless of who owns the station, the size of the economy and the market is going to control the number of program sources. An easy example that everybody knows here, if you ever listen to the radio in the morning, everybody gets their traffic from Metro traffic control. You may not realize that most of the radio stations get their news from Westwood One, regardless of who owns them.⁶⁸

Somebody mentioned this morning that a market can sustain only so many local newscasts. The weaker stations will sell time to a bigger station to put a second newscast on so that news staff of the bigger station can be used more efficiently by producing more different newscasts in a day.

You have the "centralcasting" that somebody mentioned today, Sinclair having a hub. And I have a client who does this too, where all the programming originates from one place, but they make it look local in the different cities. This is happening, and it's probably impossible under the First Amendment to stop it from happening. It doesn't really make very much difference whether an owner owns two television stations in the market or he owns one and buys the time on the other one to put his programming or some of his programming on it. I understand there's a rule that says if you buy all the [broadcasting] time on the other station, it's the same as if you owned it.⁶⁹ But if you only buy the news time, it's not the same as if you owned it, and it's not an attributable ownership interest.

What happens in the smaller markets, which are some of the areas that I deal with, here's where you really don't want to have one guy owning everything, and so you have a rule.⁷⁰ It says in the small

68. Westwood One is the "largest domestic outsource provider of traffic reporting services and the nation's largest radio network. See http://www.westwoodone.com/aboutus_co_profile.asp.

69. See Jay L. Birnbaum, *M&A Implications of Telecommunications Act of 1996*, 1 FORDHAM FIN. SEC. TAX L. F. 57, 58-63 (1996) (explaining how the 1996 Act substantially relaxed the FCC's multiple ownership restrictions within the broadcast sector), available at <http://www.heinonline.org/HOL/Page?handle=hein.journals/fjcf1&size=2&collection=journals&id=80>.

70. See *In re 2002 Biennial Regulatory Review—Review of the Commissions Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 F.C.C.R. 13,620, 13,671 (2003) (maintaining a prohibition on mergers of the top four rated stations in a large market).

markets you can't have two or three stations, or whatever it is. Well, I deal with one market [with a small population], and it can barely sustain one news operation. The guy is about ready to cut it back or close it down. He thinks if he had a second station he'd be able to continue that news because he'd be able to put it on two stations.

Are we better off having him cut it back or are we better off giving him two outlets for it and potentially reducing the chances that somebody else will start a local newscast? That's not an easy question to answer. People could have different opinions on it.

Another situation where two stations are running together out of the same building in a relatively small market, where since the mid 1990s they've been programming together. One owner programs both of them even though they are separate owners of the two stations. One has thirty-three—and I don't know the number on the other—separate news people, separate news producers, separate anchors, separate reporters, and separate newscasts, but they share the trucks, and the traffic, the satellite dishes and stuff like that.

That's not going to be allowed under the new rules. And when you break that up, one of the stations is going to shut down its news department. Now you might say, well, that's too bad because in the end there was one guy at the top, one owner who was calling the shots. But in fact that's not really what happens in news. What you really need is different assignment editors, and that they have, so is that good? Maybe it's a case for a waiver; maybe it's not.

The problem is they have a one-size-fits-all rule with a linear thing saying the big markets can have something and the smaller ones can't. It doesn't work. And the reason is because not all of the goals are completely laid out so that you can see where you want to get. The reason the goals are not all laid out is, one, politics; two, some people don't want to think it through; but three, not everybody agrees on the goals, and so we get in a lot of disagreements. But in the end, the commission with its limited resources tries to come up with something. What's it trying to do? Keep the President happy, keep Congress happy, keep the courts happy, and stop all the e-mails. So you get what you're going to get.

It's not an easy task. I don't think they've got it right, but I don't think they have it as wrong as some of the public interest groups think because there are too many other forces at work that have to be manipulated to get where the public interest groups want to get in terms of diversity. And even to get there, you have to assume that there's somebody who knows better than the public what they want to

listen to or watch because the public is watching the pablum that was referred to earlier.

My last comment will be, to the extent I do watch television, it's news at night. And I usually watch Fox News because it's at 10:00. And it's very difficult to watch because it doesn't have anything but blood and sex in it. But once in a while, if I stay up later to watch the news on another station afterwards, they've copied that format, which means the public must be demanding it. That's bad, which means maybe we ought to look at what is being learned in our schools.

MS. PHILLIPS: The last person on the panel is Jane Mago, who is the chief of the Office of Strategic Planning, "strategery planning," as this administration might call it. She told me I could say that. Jane is actually the designated federal official for the Advisory Committee on Diversity. So she will help us figure out how we go forward with all these issues.

Just by way of background, Jane has been at the FCC, for awhile I worked with her there. She has had an incredible career at the FCC. She worked for three commissioners. She was common carrier advisor to Ann Jones. She was senior legal advisor to Rachelle Chong, and she was senior legal advisor to Chairman Michael Powell when he was a commissioner. She served as general counsel of the agency, and she spent a lot of her career in the general counsel's office as a litigation attorney and assistant general counsel for trial and enforcement. Before she moved to OGC, Jane was deputy chief of the Enforcement Bureau, and deputy chief of the Land, Mobile and Microwave division in the former Private Radio Bureau. And she started way back when as a staff attorney in the Common Carrier Bureau. Jane has a law degree from State University of New York at Buffalo and a BA and MA in communications from that same school.

MS. MAGO: Anytime I listen to that litany, I think that the only thing that somebody could conclude is that I can't manage to keep a job somewhere over the course of the twenty-five years that I've now been at the FCC. I will also acknowledge one of my friends from the audience who was there when I started twenty-five years ago. Hi, Jerry.

As I sat and listened to everybody this afternoon, I said, "okay; what is it exactly that I'm doing here? What am I going to do? Am I going to defend my boss? There were a few hits. Am I going to try to explain the media ownership rules?" I think that's probably been done. So I'll only do that on a very brief level. "Am I going to talk about the Diversity Advisory Committee?" As Vicki mentioned, I'm the designated federal officer, because I think that's one of the most

promising areas. Am I going to just answer the questions that were on the forum? And I decided against that one, because the answers are, no, maybe, maybe, no. I won't even tell you what the questions were anymore.

So let me start off. I'm going to try to just make a couple of points. I think that one of the things that's most important is that we have a lot of agreement among all of those who think about these issues. I think one of the major things we agree with is that diversity is something that is a very important goal for all of us. And whether we're talking about the viewpoint diversity, program diversity, outlet diversity, source diversity or diversity of owners, I think that all of us agree that that's something that is something to be strived for. How we get there is one of the things that's one of our key problems that we have. And the FCC's goal is to try to find ways that work within the system that we have. Peter just mentioned it a couple of minutes ago.

We have some constraints. Some of the basic constraints and some of those that were most important in the course of developing the media ownership rules are that we are a federal agency. We are constrained by the First Amendment, among other things. We are also constrained by the provisions of the Communications Act of 1934, as revised by the Telecommunications Act of 1996.⁷¹ There were also a variety of provisions in that Telecommunications Act of 1996 that put us in a little bit of a strange box when it came to our media ownership rules.

Among other things, we have to look at our rules every two years.⁷² We have to justify and decide that those rules in fact are still necessary to serve the public interest in light of the competition in the market.⁷³ In other words, the Act tells us we have to look at what's going on in the marketplace, we have to be able to defend what we're doing, and we have to come to the affirmative conclusion that those rules are still in the public interest.

And what happens if we don't? Well, the D.C. Circuit told us. If we don't come to that affirmative conclusion, in the case of the cable broadcast cross-ownership rules, they were vacated. They're out of there. In the case of the ownership cap, the forty-five percent ownership ceiling that I think we've probably all talked about today, the nationwide cap, the court said, take it back; you guys haven't

71. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

72. Telecommunications Act § 161.

73. *Id.*

explained this. You guys go back, and you explain what it is that you're thinking about here, and tell us what is the basis, what is the justification for what you're doing.⁷⁴

In the case of any of the other rules, we have to look at them. We have to be able to justify what we're doing. What are the other ones we've got to look at? We have to look at the newspaper cross-ownership rule. We look at all of our cross-ownership rules with regard to the local market structure. We're looking at the radio rules. Those were spelled out to some extent in the 1996 Act.⁷⁵ We're looking at this national cap. We looked at the dual network rule and we left where it was. We made some revisions to the others. We've decided that there are some markets where the newspaper cross-ownership rule is important and needs to stay. There are others where it didn't make any sense because, in part, the evidence that was there before has indicated that it wasn't serving the purpose that it was intended for. Do we, in fact, get more information out to the public with co-owned stations, because we had several grandfather stations who told us that. Not always. But there was evidence in the record, and we looked at it. We tried to revise it. We tried to limit that to the right kind of market.

With regard to the various local ownership rules, we tried to say, okay, let's look at an economic model that's going to make sure that there are a number of different voices that are out in the market that they can still speak to the public. Did we get it right? That's a matter of opinion. There's a lot of people who can have diverse opinions on that. We thought we got it right. We'll see what happens when we get to the court. Congress is still doing something with that.

Radio rules, we said, geez, this looks like it's kind of gotten to be a little bit of a mess. Let's tighten this up. There are some anomalies in this system, so let's tighten those up and let's try to figure out how we can make sure that no one gets control of a specific market, as happened in the Minot, North Dakota situation.⁷⁶ And then let's

74. *Sinclair Broadcast Group, Inc. v. F.C.C.*, 284 F.3d 148, 169 (D.C. Cir. 2002) (rejecting petitioner's challenge to the local ownership rule provision in the television local marketing agreements, but holding that the definition of "voices" in the local ownership rule is arbitrary and capricious in that the FCC failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception was necessary to the public interest).

75. Telecommunications Act §§ 301 through 399a.

76. Press Release, U.S. Senate Committee on Commerce, Science, and Transportation, McCain: Nullification of FCC's Media Ownership Regulations Too Sweeping (Sept. 11, 2003), available at <http://commerce.senate.gov/newsroom/printable.cfm?id=211208> (explaining that because the Telecommunications Act of 1996 eliminated the national radio ownership cap, one single radio company in Minot, North Dakota, was able to own six of the seven commercial radio stations).

make a modest increase in what we're talking about as our national ownership cap.

Again, I don't think that these were exactly earthshaking matters, but they were matters that were related to the specific requirement that we had to be able to fulfill. We had to be able to look at the rules. We had to be able to justify what we were doing based on the record before us. That was the attempt that was made.

I'll talk a little bit about some of the points that were made here this morning. Let me say where I'm not in agreement. Do I think that you can look only at broadcasting when you're talking about diversity and the types of issues there? The answer? No. We can't do this at the FCC because the courts have told us that we can't. Does that mean we can go to a world where we're going to say, well, we don't have to worry about it anymore? No. And we didn't do that either.

What the commission did do was recognize that we have changed, that the world has changed significantly over the last twenty, thirty, forty years, significantly. We moved from a society that was based on really a one-to-many type of communication to a structure that's changed significantly. We have much more technological development that has allowed us to get to the point where citizens have much more control over the means of their communications.

They have lots more choices than they used to have. Madeleine mentioned the Internet. That's not the sole source of what the Commission relied on, but the Internet is there and we cannot ignore its existence. And the courts won't let us, and we don't think it would be appropriate to do that. You also have much more cheap publishing than you used to be able to get your voice out. Even now, when you have cell phones or other devices where you can communicate to a whole lot of people and tell them to show up at one place—what's that called, when you all show up at the bookstore at the same time and communicate? You can send messages out that get to many groups of people? Oh, come on. I'm fifty. All right. I give up.

MALE SPEAKER: They don't do it here.

MS. MAGO: This is law school. They're much more serious than that. Let me just throw out some numbers. In the commission's study that we relied on in the course of what we were doing, we looked at ten cities. And we said, okay, how many outlets are there; how many more outlets are there in the market? Between 1960 and 2000, the average increase in the number of outlets was 195%. The average increase in the number of outlet owners was 139%. Even in

small towns like Burlington, Vermont, the number of media outlets—and that's including things like cable, satellite, radio, TV stations, and newspapers—went up over 250%. And, independent ownership of those stations is a lot more diverse than it was, with 139% more independent owners than there were forty years ago.⁷⁷

In our Ninth Video Report and Order, the commission found that there were 308 satellite delivered national programming networks.⁷⁸ There were 166 that were owned by independent companies.⁷⁹ That's fifty-four percent of that number; sixty-four were owned by MSOs, plus five that were owned by MSO broadcasters; that's about twenty-two percent; seventy-three were owned by the top four broadcasters. That's twenty-four percent. Those numbers do not indicate that there is the kind of concentration that I hear about or that I think is often feared. You have to look at the numbers and look at the real data. Now, it is true there could be some consolidation of that, but it is not at a level that I think is one that causes the kind of concern that I've heard about.

Now, having said that, should the commission be concerned about trying to make sure that there are still opportunities out there for additional ownership? Of course we should. That's exactly why the commission has taken a number of different steps, such as creating the Advisory Committee, the group that I am the designated federal officer for. An advisory committee pulls together people from the outside who really know what they're talking about and has them come together and try to give the commission advice on creating new ways to address the problems. It advises the Commission to think outside the box and try to help us to figure out how to do that. We have twenty-five members. We try to balance the membership of our committee so that we have viewpoints that come from the industry side, from the public sector side and from the financial markets, where we know where there are probably ownership issues.

So we've asked that committee to try to come together and help us to come up with good ideas. The committee's always working. I've been talking to many of the members, and they're coming up with all

77. FCC, MEDIA OWNERSHIP WORKING GROUP STUDIES (Dec. 12, 2002) (compiling data from various studies done relating to media ownership), *available at* <http://www.fcc.gov/ownership/studies.html>.

78. Press Release, FCC, FCC Releases Ninth Annual Report on Competition in Video Markets 7 (Dec. 31, 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-338A1.pdf.

79. *See generally* GEORGE WILLIAMS & SCOTT ROBERTS, RADIO INDUSTRY REVIEW 2002: TRENDS IN OWNERSHIP, FORMAT, & FINANCE 2-3 (Sept. 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A20.doc (noting the total number of radio stations that are not commercial).

kinds of ideas. Some of them will be implemented; some of them won't. Among the ideas one of the groups came up with was to say, you know what? You've got this AM radio stuff out there, this AM radio market you've had a freeze for the last three and a half years.⁸⁰ Why don't you do something to allow those who have AM radios to be able to modify their signals so that they can reach a better part of the audience, and why don't you open up a window so that somebody can apply for a new AM radio station? And we thought about that and said, yeah, that's not a bad idea; can we do it? We kind of looked at it and said, yeah.

And so just the other day the chairman announced that he was directing the media bureau to open up a window that would make more of those outlets available. In fact, the numbers show that the number of AM radio stations are inordinately owned by minorities. Hopefully we will have some more, which is one way of helping diversity to increase.⁸¹

We're also trying to look into the low-power FM. That was one of the ways that we tried to increase the ability of various minority groups to be able to reach their audiences. We're trying to figure out ways that we can get that going more. There's 177 low-power FM stations that are out there right now,⁸² and we're trying to figure out if we can do better on that. We're also looking for additional ideas and are always ready to try and think about them. So I think those are all kind of positive steps that the commission is trying to do to take on to tackle these types of problems.

Michael Powell is a nice man. I like him a lot. He does think about things. He's one of the most well-read individuals that I have ever come across in my entire life. He thinks more carefully about anything than anyone that I think I have ever come across. I would be very remiss if I did not say that.

Can you rely on market forces to try to produce good? Yes, I think you can. I think it's the way that the American society has worked. Is it perfect? No. But in terms of where your alternatives are, if your

80. Guy Giuliano, *Part 15 AM Radio*, Digital Syndicate TV (explaining that the FCC suspended applications for low power broadcasting markets), at <http://www.digitalsyndicate.tv/part15.html>.

81. Press Release, William E. Kennard, Statement of FCC Chairman William E. Kennard on Broadcasters' Leadership in Creating Major Investment Fund to Boost Women and Minority Ownership (Nov. 3, 1999), available at <http://ftp.fcc.gov/Speeches/Kennard/Statements/stwek965.html>.

82. FCC, LOW POWER FM BROADCAST RADIO STATIONS, available at <http://www.fcc.gov/lpfm/>. An updated search through the FCC website revealed that there are now 228 low-power FM stations in the United States. See <http://www.fcc.gov/fcc-bin/fmq?state=&serv=FL&vac=3&list=2>.

alternative is that you want to have government start to control content and what is available to the public, I think you start down a very, very dangerous road. And thank goodness, I do believe that our First Amendment prevents us from going there.

It should not be the role of the Federal Communications Commission to get into specific content regulation. There are a few places where we have to, but this would not be one where I would advocate that in any way.

Can we say that we should have more ownership? Can we say that when you have different owners that you automatically deal with the various issues of stereotyping and the different things that happen in society? I don't think there's evidence to prove that, but it's certainly something that we ought to be considering, something that we ought to be thinking more carefully about in trying to find ways to open up ownership.

Let me just summarize. I've been at the FCC for twenty-five years. My view of what we do and how we approach things is very much shaped by all of the experiences that I've had at that agency for twenty-five years. Some of the ones that come back to me most hauntingly are the various beatings that I've taken in federal court in attempts to defend the Federal Communications Commission's decisions. When the court looks at you and says, "Ms. Mago, that's the stupidest thing I've ever heard," you really don't feel real good about yourself. But you do have to walk in and try to say that, yes, the agency has considered this issue, we have a record on which to defend ourselves, and that we've done the best that we can. And I think that with regard to the media ownership rules, that's what we've done here.

MS. PHILLIPS: Thank you, Jane. Given our time crunch here, I want the panelists to be able to ask questions of each other, but I want to see if there is anyone in the audience who wants to throw a couple of questions up here before I do that. Cecilia?

AUDIENCE Yeah, I have a question. What are your thoughts on the FCC's decision to maintain the UHF Discount, especially given the prevalence of cable in homes today? I believe the most recent figures are eighty-six percent of American households watch TV over cable, and cable "passes" through ninety-seven percent of homes. Isn't this rule outdated, and isn't it only encouraging greater concentration for the biggest media companies?

MS. PHILLIPS: Jane and then Peter.

MS. MAGO: I'm just trying to think exactly how to answer that. What it comes down to is that those who own the UHF stations, the

number of the stations that they have and the percentage reach across the country, it doesn't really fit right. I'm thinking about Sinclair which owns sixty-three stations.⁸³ Their homes reach is fourteen percent of the country.⁸⁴ They're nowhere near that percentage, and they don't get anywhere near the thirty-five or the forty percent. Paxson which owns sixty-one stations, they get a lot closer.⁸⁵ They're at 30.9%.⁸⁶ They have seventy percent reach of the country I suppose if you took away the UHF discount on the number of stations that they had. But that's not who most folks are trying to say shouldn't be owning all of the stations.

MR. TANNENWALD: If you're dealing with an over-the-air environment, there is clearly a UHF disadvantage. If you take Chairman Powell's view that everybody watches over wire, there is no excuse for keeping the discount any longer. I think the discount is kept because the commission doesn't want to force divestiture for reasons like Jane says, which is to protect people like Sinclair; we should only be restricting the old-time owners, not the new-time owners. And I don't agree with that philosophy, and I think the discount should be eliminated.

MS. PHILLIPS: Anyone else have any thoughts on this? Any other questions?

AUDIENCE: In terms of trying to promote minority ownership and so forth, what's the current status of the tax deferral that was in a while back? Is that still going in Congress? Has the commission done anything about it?

MS. MAGO: We've been fighting for it for the last five years. That was one of the very first things that the chairman asked me to try to see if we couldn't do something about, and we've gotten the bill dropped in every Congress since then, and it has not gone anywhere. The problem is that this is the former Tax Certificate program, what Congress eliminated in '95.⁸⁷ Part of the concern was that there were abuses and problems with that program. We tried to work with the staff on the Hill, particularly Senator McCain's staff, in order to draft some legislation that could survive and deal with what we perceived as

83. Michele Berk, *FCC Gives Thumbs Up For Sinclair Acquisitions*, BALT. BUS. J., Dec. 12, 2001, at <http://www.bizjournals.com/baltimore/stories/2001/12/10/daily22.html>.

84. Michael K. Powell, *New Rules, Old Rhetoric*, July 28, 2003, available at http://www.fcc.gov/commissioners/powell/mkp_072803.pdf.

85. See Pax Communications Corp., at <http://www.pax.tv/about>.

86. Oligopoly Watch, *FCC Ruling on TV Station Ownership Slips Through* (Jan. 28, 2004), at <http://www.oligopolywatch.com/2004/01/28.html>.

87. 26 U.S.C. § 1071 (1994) (repealed 1995).

the abuses and survive in the current legal environment. That bill's been presented several times. And we're still working and still hopeful that we'll be able to get enough folks on it to be able to get it through.

MS. PHILLIPS: Any other questions?

AUDIENCE: Over and over again, I've heard that there's a correlation between the concentration of markets and the attraction of the minority businesses and women's ownership. I'm curious as to a more specific explanation as to "What's the mechanism?" When you talk about "can we rely on market forces," I listen to that. I'm not satisfied with the claim that, well, it's either the market or the government. In the absence of government intervention, market [portion of question inaudible], and that's why we have antitrust laws. Markets function in the way that they're supposed to function only under circumstances that don't exist. As the markets become more and more concentrated, you have many, many different people competing with each other. And so you can't really rely on the markets when the markets are [portion of question inaudible]? I know that's abstract. I would want to have a better sense of, well, what is it that the market should rely on and what should government rely on with respect to ensuring that the markets, to the extent that they do become concentrated, don't eliminate all the goods that competition [portion of question inaudible].

MS. MAGO: In fact, no one's thrown out competition. When you start talking about the public interest in the FCC world, there are really three elements to it—competition, localism, diversity. No one has thrown out any of the antitrust laws. We still look at all of the antitrust principles in making decisions about whether we can approve any specific combination in a market. The cross-ownership rules that I talked about or alluded to earlier were intended to make sure that there was still a competitive marketplace out there. So those principles have not gone away.

DR. PRIEST: Your point is very well taken. It was one of the things I wanted to respond to. Jane, you inferred and moved into, well, we don't want government in our lives. Government is in our lives everywhere. For example, when I plug in a plug in the wall, that electrical box is defined by an electrical code. And that this is defined by a government-related agency, and it just goes on and on.

So, coming back to what you said, I think we've forgotten as a country how serious monopolies can be. For example, we just gave a small slap on the hand to Bill Gates? You've got to be kidding me. You own a monopoly, and Massachusetts has one remaining attorney

general who's prosecuting that still. And I've written that judge in the circuit here three times, saying, "It is your role to really see what a monopolist they are." Back in the times of Rockefeller, back in the times of Carnegie, they understood. And the railroads were just soaking people for money and so forth. "We don't understand that," or "we've forgotten it." So in terms of government, think of it this way. You have a bunch of crabgrass. If you pull the crabgrass out, something more beautiful can now grow.

MR. TANNENWALD: May I give a more practical answer?

MS. PHILLIPS: Peter, another answer.

MR. TANNENWALD: If you allow one owner to own more than one station, that owner can operate the stations at a less[er] cost per station. He's more efficient. That has three results. One, it drives the price of stations up because he can afford to pay more for his station because it costs him less to own it, making it more difficult for small business owners to buy. Two, it makes it more difficult for a single station owner to compete because a single station owner doesn't have the same efficiencies. And then three, because the value of the station goes up, the minority or female owner is more likely to sell to the consolidator.

PROF. BAYNES: Market forces sometimes don't work. There's sometimes market failure. Especially when it comes to selling products or to consumers of color, the market doesn't work. And I'll give you several examples. Everyone talks about the *Cosby Show*. NBC broadcast the *Cosby Show* from the 1980s or the early 1990s. The *Cosby Show* was originally rejected by another network, and NBC was actually reluctant to put it on because it felt that the public would not buy a story about a successful African American family.⁸⁸

It is like how CBS didn't initially want to air *I Love Lucy* in the 1950s. Why? Because Desi Arnaz was from Cuba.⁸⁹ They thought, oh, my God, you have this interracial marriage. Here you have two of the most successful shows of all times that the networks misjudged. They misjudged. They didn't know what the market would entail. And then you have *Cosby*, one of the most successful shows focusing on a black, middle-class family. How long ago was that on? That's been almost ten years since that's been off the air, and nothing has replicated.

88. Don Aucoin, *TV Networks Under Fire for Diversity Gap*, BOSTON GLOBE, July 15, 1999, at A1, available at 1999 WL 6072126.

89. RICK MITZ, THE GREAT TV SITCOM BOOK 41, 43 (Richard Marek Publishers 1980).

Meanwhile, we have all these shows in New York like *Friends* and *Seinfeld*. Everybody says, well, they're all successful. That's the new formula. Let's follow that formula. Well, how come we haven't followed the formula for *The Cosby Show* even though it's successful? It's because many times these broadcasters don't know the minority community. They don't know what the minority community may want. They put on schlock and people aren't watching.

There was a study recently of Fox network. And you indicated that you watched Fox.

MR. TANNENWALD: Reluctantly.

PROF. BAYNES: Reluctantly. But recently they polled viewers of Fox, people who watched Fox, and they found out they were particularly uninformed about what was really going on.⁹⁰ Surprise, surprise, surprise. So I think that part of the issue is that you can't rely completely on the market. And as Jane said, well, we don't want to regulate content, the FCC says. But the FCC does regulate content. When you talk about indecency, the FCC says, we want to find what's indecent. This is indecent; this isn't indecent. So if they can do that with respect to indecency, I think when they have harmful stereotypes or no representations for Asian Americans or Latinos, or very little, and very stereotypical representations for African Americans, I think that's indecent. The FCC should be able to define it as indecent and take measures to make sure those sorts of things don't happen.

DR. PRIEST: I agree with that, very much.

AUDIENCE: May I make two brief comments? With respect to Professor Baynes, I agree wholeheartedly with him. The problem of minority and women access to ownership in the media is a very serious issue as is stereotypical programming. These are very serious issues, perhaps among the most important that we've talked about today because this country has to come together. On the other hand, I think we need to unbind, as Jane made those suggestions and I suggested this morning, these issues. We need to deal with them one at a time. The commission has indicated that it's going to look at this issue, and I hope it does. And I hope it makes a serious effort to do so. My concern with binding it up with structural questions is that it makes the whole thing indigestible.

Now, with respect to Mr. Tannenwald, who recited for you three downsides to allowing an owner to have more than one station in the

90. THE PIPA/KNOWLEDGE NETWORKS POLL, MISPERCEPTIONS, THE MEDIA AND THE IRAQ WAR 12 (Oct. 2, 2003).

market, that may all be true, but he omitted the upside, which is that the more efficient operation may be able to—and one would expect it would following principles of the private market entrepreneurship—provide a better service to the public. If it doesn't, the public won't listen to it or won't buy the stuff that's advertised on it.

PROF. BAYNES: Thank you for your comments. With respect to the bindings that will make it indigestible, I think the commission has always said, or felt, that ownership dictated content; that part of the issue is that by having this ownership that's becoming more and more consolidated, the diversity of content is less likely to exist. That's where I would answer your question there. I don't know if Mr. Tannenwald wants to answer.

MR. TANNENWALD: What ever happened to the theory that if one guy owned all the stations in town, he'd put a different format on everyone because that's how he maximizes his audience? And if everybody owns only one station, they'll all go for the lowest, common denominator? It's an old argument. It's debated in class all the time.

MS. PHILLIPS: Jane Mago needs to leave, so I just wanted to thank her.

MS. PLASENCIA: The comment that you made about the Internet sort of being a one-to-many format, and that it's a new format; that it allows many people to participate, and it changes the one-to-many format. My response really is following-up on Commissioner Ness' comments of the ventriloquism act, where the Internet is beginning to look like television to the extent that the content that's online is beginning to look like the stuff that's on television. So when you open your Internet browser, MSN or whatever pops up, it looks like the guide to television, that weekly thing you get.

MS. MAGO: TV Guide.

MS. PLASENCIA: In other words, the problem is that it's not really a forum that has a diversity of viewpoints that it might have if more folks who are minorities were online participating as both senders and receivers of information, such as Weblogs. The Internet is starting to look very commercialized, and that's the problem, that the Internet doesn't really step up and fill the void.

PROF. BAYNES: Getting back to whether you have smaller ownership or not, I think that all this has to be taken into account from the standpoint of the fact that a lot of the regulations have changed in the past two years and have given the broadcasters a lot more authority to determine what's on the air. And the only

agreement—you have to look at it in terms of the fact that there's consolidation with respect to the number of stations they own. But also the fact that many of the broadcasters now produce their own programming. And so for anyone to get in to the amount of diversity that you want—for producers to get in, to sort of have different. That's usual.

There's also been a recent study that showed that for some reason this year, broadcast viewership of white men has declined. They don't know where they are. I think a lot of it is because the quality of the programming. If they're producing their own programming, which they are, they're likely to favor them, no matter how bad they are. So I think that's another factor that we have to look at.

DR. PRIEST: Jane talked about merits possibly of low-power FM. I've worked closely with a low-power FM Station called A.B. Alston through the radio.

Two problems. One is it's low power, so it doesn't go everywhere. So anybody who tries to put any amount of energy gets burnt out right away. Well, this one fellow I work with closely burned out right away, he burned out in seven years. He was one of the pioneers, so that's a really serious problem. And then coming to what you said about where the net is going in terms of public discourse or supporting communities and so forth. One of the very first lists on the Internet was "Community Networking" Communet. It's still out there, but we went through a phase. Every time there's a new technology, people say, oh, yeah, we're going to solve community problems. Back thirty years ago, it was computer teleconferencing.

A fellow I dearly love, he ran twice and was elected twice as an independent. The Massachusetts state legislature went to computer teleconferencing and actually got legislators to sit at terminals and share ideas via computer teleconferencing, and that just kind of just died. I see the same thing. I'm on multiple lists, all with the interest of promoting community, doing well and so forth, and nobody has any funding. It just doesn't go anywhere.

The one thing I saw that was just wonderful to see was when Adelstein and Copps made their spring journey—because they didn't hold those public forums—there was one in Philadelphia, Drexel, and there was another one in San Francisco and so forth. Those events I helped webcast and they made a difference. But that's kind of a spot use. You've got to know. You've got to send the e-mails. I think that's the most par aspect of the Internet. Think about it. The most you've learned in the last year is out of e-mails.

MS. PHILLIPS: I think our time has run, correct, Bill? I want to thank all the panelists and thank all of you guys.

(Whereupon, at 3:10 p.m., the PROCEEDINGS were adjourned.)