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Freedom of Expression and Social Responsibility

Buenos Dias! I want to thank the Chamber for the opportunity to be here with you at this important conference and, hopefully, to be able to add something meaningful to the debate on how to balance the overriding objective of preserving free expression and the need, in some limited circumstances, to impose particular social responsibilities on those whose business it is to exercise this right. This "balancing act" has been ongoing in the United States since the founding of the Republic over 220 years ago. But, in the area of telecommunications regulation, as often as not, the U.S. has made some mistakes in this regard. Other countries, including Mexico, need not -- and should not -- repeat those mistakes.

The last Mexican Revolution led to a new nation in the early part of this century, which opened the door for the country's current democratic constitutional system. In the past decade, Mexico has been undergoing another revolution, this one economic, with a focus on both privatization and deregulation of its business enterprises, including the country's telecommunications industries. Before instituting further changes in the way it regulates its media enterprises, Mexico and other nations might well benefit from examining the successful path the United States has more recently taken to liberalize the governance of its media enterprises.

Over the past two decades, both Congress and the U.S. courts have fostered a relaxation of governmental oversight of U.S. telecommunications which has led to greater competition and diversity of programming, benefitting both consumers and media companies alike. Mexico's challenge is not to implement new regulation simply because that, historically, is what governments do -- including the United States in the period from 1950 to 1980 -- but to adopt only those policies which today best fit a modern era in telecommunications, one characterized by a multiplicity of services provided in a variety of technological modes. These policies must not sacrifice free expression at the altar of perceived social good.

I. Introduction

Today, I will briefly discuss two specific areas that directly concern this balancing of free expression and social responsibility -- media content regulation and ownership restrictions which also impacts freedom of expression. It is becoming increasingly clear -- if it was ever in doubt -- that central to the media's ability to compete -- and serve the public -- is freedom from regulatory burdens in both of these areas. In the United States, for example, the 1996 Telecommunications Act is the most recent in a series of signals that Congress wishes to promote such regulatory freedom. It reflects a realization that a hands-off approach, not overbearing social regulation, best allows communications businesses to flourish and the public to reap the corresponding benefits.

The benefits of deregulation and open markets in the U.S. have included lower prices, increased choices of programming and program providers, and increased technical innovation. In order for Mexico (and other nations) to receive similar benefits, it is important for their governments to reduce their oversight of program content to the minimum level necessary to protect the public *from direct, cognizable harm*, and, at the same time, minimize potential restrictions on the ability of companies to own media outlets. This, in my view, is the correct "balance" and "co-accountability" that Ms. Rohmer of the Counsel of Europe and Minister Labastida spoke of yesterday.

II. Program Content Regulation and Free Speech

In the U.S., as in other nations, there has historically been a tension between the goal of free speech and the widely-held view that the government is not only authorized to, but should, regulate broadcast programming content for the benefit of the public. However, the clear and pronounced trend since the landmark *Red Lion* decision in 1969, mentioned by Mr. Goodman this morning, has been to restrict the government's ability to inhibit editorial decisions, and instead place a greater reliance on the marketplace to ensure programming in the public interest. In 1973 our Supreme Court stated: "Congress appears to have concluded...that of [the] two choices -- private or official censorship -- Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided."

Today, thousands of broadcast stations and dozens of cable and broadcast networks exist, as opposed to the few that existed when the FCC initiated its first regulations. In addition, the widespread availability of news and information from a host of other media sources ensures that the public is exposed to many different viewpoints. Given technological advances and the increased number of competing media outlets, including not only radio and TV but also newspapers, magazines, periodicals, cable TV, wireless cable, direct broadcast satellites, and the Internet, the courts in the U.S. have become increasingly skeptical about the continuing validity of the *Red Lion* scarcity rationale for regulating programming content. The spectrum scarcity arguments of the past justifying content regulation have been seriously weakened, if not now largely discredited. Thus, only minimum levels of government regulation are needed, and should be accepted, to achieve viewpoint diversity today and provide the "social protections" desired by government. As U.S. Supreme Court Justice Souter observed, while "the law is free to promote all sorts of conduct in place of

harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."

III. Ownership Regulation to Promote Viewpoint Diversity and Economic Competition

In addition to content regulation, the U.S. and other governments have addressed these issues by promoting diversity of ownership. Thus, the FCC has operated under the assumption that each new media owner will add a different "voice" to the marketplace of ideas, thus, promoting free expression.

Moreover, the Commission has historically limited the number of media outlets a single licensee can own, for a second reason: to promote economic competition. But, by placing restrictions on who could enter the market, this policy did not necessarily increase the number of entities competing in the communications industry. As the Commission itself has over time come to realize, excessive government regulation was actually counterproductive, and it began to relax its rules dealing with ownership restrictions, just as it also relaxed its programming content regulations, as we have seen.

As I have noted, this new "marketplace" approach to communications regulation reached its apex when Congress passed the landmark 1996 Telecommunications Act.

The 1996 Act, for example, *eliminated* limits on the number of radio and TV stations a broadcaster can own nationally and, to a great extent, locally. One Congressional Report associated with the Act states that "arbitrary limits on broadcast ownership ... are no longer necessary."

In stark contrast to the "marketplace" approach that exists today in connection with U.S. communications regulatory policies, beginning more than fifty years ago the FCC and Congress adopted a series of complex ownership restrictions which created regulatory barriers to market entry into the broadcasting industry, *despite any specific evidence that increased regulation would increase competition or diversity of expression.*

It was not until the late 1970s and early 1980s that the FCC began to question its then expansive list of ownership rules and policies. In granting a large-scale merger in 1979, the FCC observed that the resources associated with large and concentrated ownership may afford higher quality radio and television programming than is provided by less well-capitalized ownership, and pointed out as well that the financial health of a media chain may encourage initiative and risk taking in news reporting, as well as provide a major challenge to other national news media.

Then in 1980 and 1981, two high level FCC staff inquiries found media ownership limitations to be pointless and contrary to free speech and competition objectives. First, the FCC's Network Inquiry Special Staff concluded that the FCC's "rules respecting the number of communications outlets one firm may own within a single local market, and ... its rules limiting the number of television stations one firm can own throughout the

nation are arbitrary and capricious ... and have no apparent relationship to the distinct conditions of competition and diversity." The Special Staff also found that excessive government regulation actually inhibited competition in communications markets, and expressed the view that open markets, not regulation, would foster competition and increase viewpoint diversity. Then, the FCC's Office of Plans and Policy issued a report concluding that the Commission's cross-ownership regulations affecting broadcast stations and cable television systems should be rescinded, leaving it to the antitrust laws to remedy those few situations lacking in competition." Unfortunately, it has taken years for the FCC to follow the recommendations of its own experts. But with the 1996 Telecommunications Act, the trend in the direction of less regulation is thus very likely to continue.

IV. Conclusion

In sum, both Congress and the FCC have decided to eliminate many media ownership restrictions and reduce content regulation in order to increase competition and diversity in the media. To date the FCC and Congress have concluded that reliance on market forces and on licensee discretion -- with respect to both areas -- is the best way to serve the "public interest." As a direct result of this recent deregulation of the FCC's content and ownership rules, the U.S. telecommunications industry is currently enjoying a boom. Most importantly, the success is being driven by consumers making choices in open markets, as opposed to government regulators attempting to dictate consumer choice.

Mexico, too, has enjoyed recent success in deregulating its communications industry. Fundamental to the continued success of the telecommunications revolution occurring in both Mexico and the U.S. is a solid commitment to free expression as well as to continued government *deregulation*. As former Supreme Court Justice Douglas has stated, excessive government regulation is only "agreeable to the traditions of nations that have never known freedom."