Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996.	)	MM Docket No. 98-35

NOTICE OF INQUIRY

Adopted: March 12, 1998 **Released: March 13, 1998**

Comments Date: May 22, 1998

Reply Comment Date: June 22, 1998

By the Commission: Chairman Kennard and Commissioners Ness, Furchgott-Roth, Powell, and Tristani issuing separate statements.

I. Introduction.

1. This Notice of Inquiry is the first step in our biennial ownership review of the broadcast ownership and other rules as required by Section 202(h) of the Telecommunications Act of 1996 ("Telecom Act").[1] That section provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Section 11 of the Communications Act of 1934, as amended,[2] similarly provides that under the statutorily required review, the Commission "shall determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition" and requires that the Commission "shall repeal or modify any regulation it determines to be no longer necessary in the public interest." Additionally, this review is part of the Commission's "top-to-bottom" examination of its rules and procedures to determine which of them need to be revised or eliminated. This examination will review a wide range of Commission regulations in order to eliminate burdensome and unnecessary regulations and streamline the way the Commission conducts

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). Also required by that Section is the biennial review of rules adopted pursuant to Sections 202(a)-(f) of the Telecommunications Act. These include rules pertaining to cable as well as broadcast cross-ownership.

[2] 47 U.S.C. § 161.

business.

2. The context of Section 202(h) of the Telecom Act makes clear that the scope of the required ownership review relates to the Commission's broadcast ownership rules, both those adopted under Section 202 and our other broadcast ownership rules. In this regard, we note that Section 202 is entitled "Broadcast Ownership," as is the corresponding section of the Conference Report.[3]

3. We believe it is appropriate to begin our biennial ownership review by issuing this Notice of Inquiry. We solicit comment on our broadcast ownership rules to determine whether these rules are no longer in the public interest as we have traditionally defined it in terms of our competition and diversity goals. Once this phase is completed, we will review the comments and issue a report. In the event we conclude there is good reason to believe that any of the rules within the scope of the review, or portions thereof, should be repealed or modified, we will issue the appropriate Notice(s) of Proposed Rule Making.

II. Framework for Review.

4. For more than a half century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity.[4] Competition is an important part of the Commission's public interest mandate because it promotes consumer welfare and the efficient use of resources.[5] Diversity, particularly diversity of viewpoints, is the other important part of the Commission's public interest mandate. The Commission's viewpoint diversity objective promotes a goal the Supreme Court has stated underlies the First Amendment. As the Court has said, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...."[6] Promoting diversity in the number of separately owned outlets has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers. Moreover, our diversity concerns are separate from our goal of promoting competition. Indeed, the Supreme Court has recently stated that "[f]ederal policy...has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[7]

5. We also note that the definition of economic markets (i.e., product and geographic markets) is an important step in the assessment of current levels of competition that Section 202(h) and Section 11 require in order to determine whether such competition has eliminated the need for our broadcast rules. The Commission has previously identified three economic markets in which broadcasters operate: the market for delivered video programming; the advertising market; and the program production market. In addition, we tentatively considered that cable television directly competes with broadcast television stations in each of these

3 S. Rep. 104-230, 104th Cong., 2d Sess. 161 (1996).

4 For a short history of the Commission's broadcast ownership regulations, see Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 and 87-8, 10 FCC Rcd 3524, 3526-29 (1995)(hereinafter "TV Ownership Further Notice").

5 Revision of Radio Rules and Policies, 7 FCC Rcd 2755 (1992), recon. granted in part, 7 FCC Rcd 6387 (1992), further recon., 9 FCC Rcd 7183 (1994).

6 Associated Press v. United States, 326 U.S. 1, 20 (1945); accord Federal Communications Commission v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

7 Turner Broadcasting System, Inc. v. FCC, 117 S.Ct. 1174 (1997)(citations omitted).

markets, and that broadcast radio and newspapers compete with television in the local advertising market. While we also sought comment on whether other suppliers of video programming (e.g., Multichannel Multipoint Distribution Service (MMDS), Direct Broadcast Satellite (DBS), etc.) compete with broadcast television stations, we stated that it may not be appropriate to include them because their current market penetration is so low that they are not relevant substitutes to a majority of Americans.[8] Commenters are invited to address the correctness of these tentative considerations, as well as their applicability to the instant proceedings. We acknowledged that this situation may change, especially as a result of the Commission's regulatory stance towards encouraging entry of other delivery media. After exploring the issue of which media compete with broadcasting in each of the economic markets, the competitive analysis then focuses upon whether and to what extent market power exists and is being exercised, and what effect our ownership rules have on the existence and exercise of market power in each of these markets.

6. Our diversity analysis focuses upon the ability of broadcast and non-broadcast media to advance the three types of diversity (i.e., viewpoint, outlet and source) our broadcast ownership rules have attempted to foster. Viewpoint diversity refers to helping to ensure that the material presented by the media reflect a wide range of diverse and antagonistic opinions and interpretations. Outlet diversity refers to a variety of delivery services (e.g., broadcast stations, newspapers, cable and DBS) that select and present programming directly to the public. Source diversity refers to promoting a variety of program or information producers and owners.[9] In the TV Ownership Further Notice we sought comment on whether nonbroadcast outlets contributed to our diversity goals. We tentatively considered that cable television, as well as broadcast television, provides diversity in this market given that cable has the capability for local origination of programming. The TV Ownership Further Notice, however, sought comment on the degree to which fee-based sources for video programming, such as cable, provide true alternatives to over-the-air television for purposes of promoting diversity.

7. We therefore propose to apply this framework to evaluate whether our rules continue to be in the public interest as required by the Telecom Act. We seek comment on this proposal. In performing our Section 202(h) review, we will consider the effect of meaningful competition that has developed and the extent to which this competition has been furthered by our rules. We also seek comment on the relevance to the framework of the Commission's assessment of the state of competition in the multi-channel video programming delivery services (MVPDs) market contained in the Cable Competition Report,[10] which was released subsequent to our TV Ownership Further Notice. Furthermore, we seek comment on how the Commission's assessment of the competitive effects of the Bell Atlantic/NYNEX merger bears on our analysis here.[11] In that decision, the Commission analyzed the likely effect of the merger on unilateral conduct, coordinated interaction, dynamic market performance, and potential entry. In addition, the decision reflects the Commission's recent experience in implementing the Telecom Act in light of the competitive effect of market structure changes. We also seek data, studies and any other information relevant to our consideration of these competition and diversity issues.

III. Rules To Be Reviewed.

[8] TV Ownership Further Notice, supra at 3538.

[9] See TV Ownership Further Notice, supra at 3547-51.

[10] Fourth Annual Report, in the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket 97-141 (adopted December 31, 1997)("Video Competition Report").

[11] See Memorandum Opinion and Order In the Application of NYNEX Corporation, 12 FCC Rcd 19985 (1997).

8. Below, we describe each of the rules that are within the scope of our biennial broadcast ownership review. We seek comment on any other rules commenters believe should be included in this review. The rules are grouped into three categories. The first group are those broadcast ownership rules that are currently being examined in pending Commission proceedings. The second group are those broadcast ownership rules that have recently been changed to implement provisions of the Telecom Act of 1996.[12] Finally, the third group are the remaining broadcast ownership rules.

Rules Currently Subject to Outstanding Proceedings.

9. Several of the Commission's broadcast ownership rules are currently the subject of open proceedings. They are as follows:

- the television "duopoly" rule, which states that a party may not own, operate or control two or more broadcast television stations with overlapping "Grade B" signal contours.[13]

- the "one-to-a-market" rule, which generally prohibits the common ownership of a television and a radio station in the same market.[14] In 1989, the Commission amended the rule to specify that it would "look favorably" on requests for waiver of the restriction in the Top 25 television markets if, after the merger, at least 30 independently owned broadcast voices remained, or if the merger involved a "failed station." Case-by-case review of waiver requests is also provided for in instances where the presumptive waiver criteria are not present. Section 202(d) of the Telecom Act directed the Commission to extend its presumptive waiver policy to the Top 50 television markets if it finds that doing so would be in the public interest.[15]

- the daily newspaper/radio cross-ownership rule[16] which generally prohibits the common ownership of a daily newspaper and a radio station in the same community. The outstanding proceeding examines whether the Commission should modify the existing waiver policy for

[12] We will not be reviewing herein the elimination of national radio ownership limits (Order, 11 FCC Rcd 12368 (1996)) or cable/network cross-ownership restrictions (Order in CS Docket No. 96-56, 11 FCC Rcd 15115 (1996)) because neither is a "rule adopted pursuant to" Section 202(h) or an existing broadcast ownership rule. Additionally, although these subjects are referred to in Section 202(f)(2) of the Telecom Act, the Commission has not revised any rules pertaining to ensuring cable carriage, channel positioning, or nondiscriminatory treatment of broadcast stations by cable systems. Accordingly, these subjects, will not be expressly and separately addressed except as set forth below.

[13] 47 C.F.R. § 73.3555(b). This rule is currently under consideration in MM Docket Nos. 91-221 and 87-8. See Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111(1992); TV Ownership Further Notice, supra; Second Further Notice of Proposed Rule Making in MM Docket Nos. 91-221 and 87-8, 11 FCC Rcd 21655 (1996).

[14] 47 C.F.R. § 73.3555(c). This rule is also currently under review in MM Docket Nos. 91-221 and 87-8.

[15] See note 13, supra.

[16] 47 C.F.R. § 73.3555(d). The rule applies to all newspaper/broadcast cross-ownership situations. Only the waiver policy with respect to newspaper/radio combinations is currently under review in another proceeding.

this rule.[17]

10. We believe that our ongoing review of these rules in the outstanding proceedings satisfies the requirements of Section 202(h) of the Telecom Act.[18] We anticipate taking action in those proceedings during 1998 independently of the instant review. We consequently seek no additional comment on these rules in this Notice of Inquiry. Nor do we seek comment on our attribution standards. Our attribution rules define what the Commission will consider a cognizable interest for purposes of its ownership rules. They do not of themselves establish limits on ownership or restrict cross-ownership combinations. Accordingly, we do not consider them to be broadcast ownership rules subject to biennial review. Furthermore, they are currently under consideration in MM Docket Nos. 94-150, 92-51, and 87-154.[19]

Rules Recently Changed by Section 202 of the Telecom Act

11. The Commission modified/eliminated several of its ownership rules in accordance with Section 202 of the Telecom Act. Section 202(h) of the Act directs the Commission, without limitation, to review its broadcast ownership rules as part of the biennial ownership review. Parties are invited to provide data or other information which would indicate whether some, or all, of the remaining rules are no longer in the public interest. In this proceeding we will review the impact of the remaining rules on competition and diversity and discuss our analysis in the report we issue.

12. In the course of this review, we will examine the effect these rule changes have had, thus far, on the structure and trends in media markets and their impact on our competition and diversity goals. We propose to make this assessment by developing a record examining the changes in the structure of the industry (horizontal concentration and vertical integration) and financial performance in media markets, as well as changes in diversity. As stated above, examining the structure of an industry provides information about the industry's conduct and performance. For example, horizontal concentration can give firms sufficient market power to raise rates above competitive levels or otherwise engage in anti-competitive activity, although it can also result in new efficiencies that accrue to the benefit of consumers. An examination of financial performance sheds light on the health of the industry and its ability to serve the public interest. Examining changes in ownership will provide information on the effects on diversity.

13. Parties are invited to provide us with relevant information, but our review will also be informed by publicly available information, e.g., BIA and Compustat. Toward this end, we include data and a preliminary assessment of some of these effects in the specific rule sections below. We invite parties to comment on the information we present as well as to provide additional data that will shed light on the effects of these rule changes in the media market. For each rule under review, we seek comment on whether the rule should be retained, modified, or eliminated. We also invite comment on the specific questions we raise below.

14. National Television Ownership Rule. Section 202(c)(1) of the Telecom Act directed the

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17 See Notice of Inquiry in MM Docket No. 96-197, 11 FCC Rcd 13003 (1996).

18 In the Conference Report accompanying the Telecom Act, it is stated that the, "conferees are aware that the Commission already has several broadcast deregulation proceedings underway. It is the intention of the conferees that the Commission continue with these proceedings and conclude them in a timely manner." H.R. Rep. 104-458, at 164.

19 See Notice of Proposed Rule Making in MM Docket Nos. 94-150 et al., 10 FCC Rcd 3606 (1995); Further Notice of Proposed Rule Making in MM Docket Nos. 94-150 et al., 11 FCC Rcd 19895 (1996).

Commission to modify its rules to eliminate the numerical limit on the number of broadcast television stations a person or entity could own nationwide and to increase the audience reach cap on such ownership from 25 percent to 35 percent of television households. The Commission amended Section 73.3555(e) of its Rules to reflect this change.[20]

15. The table in Appendix A lists the number of commercial television stations owned by the top 25 group television owners for the years 1996 and 1997 ranked by the national audience reach of these television owners. The information provides a snapshot view of the extent of consolidation in the broadcast television industry in response to this rule change, listed according to the announcement date of the merger. The numbers in this table underestimate, somewhat, the extent of this consolidation because some of the stations attributed to owners in 1996 represent transactions that were announced prior to but finalized after the national rule was relaxed. While it is clear from the table that there has been some consolidation of television stations, most of the television group owners remain significantly below the 35 percent reach cap, with only Fox's and CBS's television stations reaching more than 30 percent of U.S. households. The industry continues to be unconcentrated at the national level, with our estimate of the Herfindahl-Hirschman Index (HHI) still below 1000, increasing from 264 in 1996 to 308 in 1997.[21]

16. We seek comment on the effect of this rule on competition and diversity and whether this rule is no longer necessary in the public interest as the result of competition. What effect has it had on competition in the national advertising market or the program production market at the national level? How does the rule affect existing television networks or the formation of new networks? We also seek information on the extent of economies of scale realized as a result of the consolidation permitted by the Telecom Act.

17. Local Radio Ownership Rules. Section 202(b) of the Telecom Act directed the Commission to relax its radio multiple ownership rules to allow common ownership as follows: in radio markets with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM); in markets with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service; in markets with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service; and in markets with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 such stations, not more than 3 of which are in the same service, except that a party may not own, operate, or control more than 50 percent of the stations in such market. The Commission revised its Rules to reflect this mandate.[22]

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[20] Order, 11 FCC Rcd 12374 (1996).

[21] The HHI is a standard measure of economic concentration. The Department of Justice uses the HHI as part of its evaluation of market competition. They generally consider a market to be unconcentrated if the HHI is below 1000. HHIs are calculated by summing the square of each television owner's percentage of total television station revenues. The data for our estimate of the HHI comes from the BIA database which estimates station, owner, and market revenues. The revenue estimate combines national and local advertising revenue for each station, owner, and market. The 1997 HHI uses 1997 ownership data, combined with 1996 revenues, and the 1996 HHI uses 1996 ownership data, combined with 1995 revenues.

[22] Section 202(a) of the Telecom Act directed the Commission to eliminate its national radio ownership restrictions. The Commission amended its rules so that there are now no limits on the number of radio stations that may be owned nationally. Order, 11 FCC Rcd 12368 (1996).

18. The Telecom Act relaxed the radio ownership rules to a much greater extent than it modified the television ownership rules. We will include in the record of this proceeding an FCC staff report which reviews the response of the radio industry to the revised rules from March, 1996 to November, 1997. We invite comment on the information set forth in this staff report. As the report documents, the number of commercial radio stations has increased 2.5 percent from 10,222 to 10,475. At the same time, there has been a tremendous increase in the number of station transactions since the passage of the Telecom Act resulting in an increase in industry concentration. At the national level, the number of owners of commercial radio stations has declined by 11.7 percent from 5,105 to 4,507. This decline is primarily due to mergers between existing owners. The result of these mergers has been to change the ranking and composition of the top radio station owners.

19. At the local level, there has been a downward trend in the number of radio station owners in Arbitron radio Metro markets. The average number of radio station owners across all radio Metro markets declined from 12 to 11, a loss of about one owner per market. The top 10 radio Metro markets experienced an average loss of 3 owners per market, from about 30 owners to about 27 owners per market. The smallest radio Metro markets (markets 101-265) experienced an average loss of about one owner per market, from about 9 owners to 8 owners. Further, the top owners in each Metro market generally account for an increasing share of total radio advertising revenues in these markets. For example, the top four radio owners in each Metro market, on average, account for about 90 percent of their Metro market's total revenues, compared to about 80 percent in March, 1996. The staff report also indicates that the average number of distinct radio formats across all radio Metro markets is 10, remaining unchanged from March, 1996, to March, 1997.

20. At the industry level, the staff report indicates that publicly traded companies whose primary business is radio broadcasting are experiencing robust financial performance. Operating margins have increased slightly, while their profit margins have varied. This is largely a result of their increased debt loads. Advertising revenues have been sufficient, to date, to generate positive cash flow on an industry-wide basis. This health is reflected in stock returns better than those of the typical S&P 500 company. The market's valuation of radio companies suggests that the market is foreseeing future earnings growth in this industry. The observed consolidation of the radio industry appears to have had positive financial consequences for these radio companies.

21. We invite parties to comment on the effect of the local radio ownership limits on competition in radio. What has been the effect on competition in the program delivery market? What has been the effect on competition in the local advertising market? In this regard, the TV Ownership Further Notice noted that television (broadcast and cable) and newspapers provided some level of competition to radio in the local advertising market.[23] Is there greater efficiency at the local level due to consolidation? We ask commenters to provide data documenting any economic efficiencies and specific cost savings.

22. We also seek comment on the impact on diversity in radio. Are the current ownership limits set forth in our rules no longer necessary in the public interest? For example, has coverage of news and public affairs been enhanced as a result? We also note that there has been a drop in the number of minority-owned radio broadcast stations, as reported in the annual report released by National Telecommunications and

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[23] The program production market is national in scope and is, thus, unaffected by changes in the local radio rule. We further note that in reviewing radio station mergers under the antitrust laws, the Department of Justice has taken the position that radio stations form a distinct local advertising market and that newspapers, cable, and broadcast television stations are not effective substitutes to radio stations in this market. See Address of Joel I. Klein, Assistant Attorney General, Antitrust Division of the Department of Justice, "DOJ Analysis of Radio Mergers" (Feb. 19, 1997) (available at http://www.usdoj.gov/atr/speeches/jik97219.htm).

Information Administration.[24] It has been argued that the change in the radio ownership rules has been detrimental to the enhancement of ownership by minorities and women in the provision of radio service. The Commission has a statutory obligation under Section 309(j) of the Act as well as an historic commitment to encouraging minority participation in the telecommunications industry.[25] We seek comment on the relationship between these ownership limits and the opportunity for minority broadcast station ownership. We also seek comment on any similar effects on female ownership of broadcast facilities. We invite commenters to address judicial considerations in this regard.

23. We invite comment on whether, given the issues raised above, we should modify the local radio ownership rules in any respect. Specifically, we seek comment on whether the way in which we count stations for purposes of applying our local radio ownership rule should remain the same or be modified in order to more realistically account for the number of stations in a market. We ask parties to be specific in any such proposals they advocate.

24. Dual Network Rule. Section 202(e) of the Telecom Act directed the Commission to revise its "dual network" rule.[26] Under the prior dual network rule, the Commission generally prohibited a party from affiliating with a network organization that maintained more than one network of television broadcast stations. The Telecom Act directed the Commission to revise the rule to permit a television broadcast station to affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such networks are composed of: 1) two or more persons or entities that were "networks" on the date the Telecom Act was enacted;[27] or 2) any such network and an English-language program distribution service that on the date of the Telecom Act's enactment provided 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television households.[28] The Commission amended its dual network rule to reflect this directive.[29] We believe, at this time, that no broadcast television network has begun to deliver a dual stream of video programming. We seek comment on whether the current dual network rule is no longer in the public interest.

The Remaining Rules

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[24] Minority Commercial Broadcast Ownership in the U.S., a report of the Minority Telecommunications Development Program, National Telecommunications and Information Administration (August 1997). In this report, the number of minority-owned commercial radio stations declined from 312 in 1995 to 284 in 1996/97. There are no statistics available concerning female ownership of broadcast facilities.

[25] For a brief historic overview, see generally Notice of Proposed Rule Making in MM Docket Nos. 94-149 and 91-140, 10 FCC Rcd 2788 (1995).

[26] 47 C.F.R. § 73.658(g).

[27] A "network" is defined with reference to 47 C.F.R. § 73.3613(a)(1) for this purpose.

[28] The Conference Report stated that the Commission was being directed to revise its dual network rule "to permit a television station to affiliate with a person or entity that maintains two or more networks unless such dual or multiple networks are composed of (1) two or more of the four existing networks (ABC, CBS, NBC, FOX) or, (2) any of the four existing networks and one of the two emerging networks (WBTN, UPN)." S. Rep. No. 230, 104th Cong., 2d Sess. at 163.

[29] Order, 11 FCC Rcd 12374 (1996).

25. The UHF Television Discount. The national television ownership rule states that an entity may own any number of television stations (subject to the restrictions of the local ownership rule) so long as the combined audience reach of the stations does not exceed 35 percent, as measured by the number of television households in their respective ADIs. Under our rules, UHF television stations are attributed with 50 percent of the television households in their ADI market.[30] The Commission has stated that it would review the UHF discount in the biennial ownership review.[31]

26. The Commission adopted the UHF discount in 1985 due to concerns that UHF station signals generally cannot reach as large an audience as VHF station signals.[32] Since that time we have observed in other contexts that this UHF signal disparity has been ameliorated over the years.[33] This is due in part to improved television receiver designs, as well as the fact that many households receive broadcast channels via cable rather than by over-the-air transmission. When the UHF discount was adopted in 1985, cable passed approximately 60 percent of all television households[34] and had approximately 32 million subscribers.[35] Today, the pass rate has risen to 97.1 percent with approximately 64.2 million subscribers.[36] Moreover, the Supreme Court has recently upheld the constitutionality of the "must-carry" rules which require cable systems to carry local television broadcast stations.[37] Parties have nonetheless urged us to continue the UHF discount policy given the significant number of television households that do not subscribe to cable.[38]

27. We request comment in this proceeding on whether the UHF discount should be retained, modified, or eliminated. In this regard, commenters may wish to address whether the discount, at its current level, remains appropriate in light of the decreasing disparity between VHF and UHF television due to improvements in transmission and reception technology, cable carriage of UHF television stations under our must- carry rules, and increasing cable penetration. Is there any evidence that the current UHF discount provides a competitive advantage to networks that own UHF stations? For example, note the Table in Appendix A, which indicates the audience reach of the top 25 TV group owners without the UHF discount. While the audience reach of many group owners are unaffected, the reach of several group owners, including Fox and Paxson, would exceed

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30 47 C.F.R. § 73.3555(e)(2)(i).

31 Notice of Proposed Rule Making in MM Docket Nos. 96-222, 91-221 and 87-8, 11 FCC Rcd 19949, 19956 (1996).

32 See Memorandum Opinion and Order in Gen. Docket No. 83-1009, 100 FCC 2d 74, 92-94 (1985).

33 See Report and Order in MM Docket No. 94-123, 11 FCC Rcd 546, 583-86 (1995) (repealing the prime time access rule); Report and Order in MM Docket No. 87-68, 3 FCC Rcd 638 (1988), clarified 4 FCC Rcd 2276 (1989) (eliminating the policy under which applications to initiate or improve VHF service were considered contrary to the public interest if they threatened adverse economic impact on existing or potential UHF stations).

34 Estimate based on data in Television Factbook (Cable and Services volume, 1986 ed.), pp. A39 and A44.

35 See 1997 Television and Cable Factbook at F-1.

36 Fourth Annual Report, supra at para. 14-15.

37 Turner Broadcasting Systems., Inc. v. FCC, 117 S. Ct. 1174 (1997).

38 See Notice of Proposed Rule Making in MM Docket No. 96-222, 11 FCC Rcd 19952-54 (1996) (summarizing comments on issue of whether UHF discount policy should be retained).

the national reach cap were it not for the discount. Should we decide that the discount be retained in some form for analog television, does it make sense to retain such a discount at all once we have transitioned to digital television transmission? At that time, we expect broadcast television stations will be operating on "core" channels, most of which are currently allotted to UHF television.[39] Finally, if the discount were reduced or eliminated, in what manner should group owners that exceed the new limits be grandfathered?

28. Daily Newspaper/Broadcast Cross-ownership Rule. The daily newspaper/broadcast cross-ownership rule prohibits the common ownership of a broadcast station and a daily newspaper in the same locale.[40] The Commission adopted the rule in 1975.[41] Like all of our multiple ownership rules, the newspaper/broadcast cross-ownership rule rests on the twin goals of promoting diversity and economic competition.[42] The Commission determined that, as a general rule, granting a broadcast license to an entity in the same community as that in which the entity also publishes a newspaper would harm diversity.[43] The Commission ordered divestiture in a number of egregious cases and prohibited the transfer of other combinations to new owners.[44] Although the Commission, in adopting the rule, noted its expectation that there could be meritorious waiver requests, it set forth very stringent waiver criteria.[45] As a result, only two cases, both involving television/newspaper combinations, have been found to warrant permanent waiver of the rule.[46]

[39] See Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order in MM Docket No. 87-268, FCC 98-24 (released February 23, 1998).

[40] The rule provides that: No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or (2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or (3) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published. 47 C.F.R. § 73.3555(d).

[41] Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report and Order, 50 FCC 2d 1046 (1975) ("Second Report and Order"), recon., 53 FCC 2d 589 (1975) ("Recon. Order"), aff'd sub nom. Federal Communications Commission v. National Citizens Committee for Broadcasting, supra. The provisions of 47 C.F.R. § 73.3555 do not apply to noncommercial educational FM and TV stations. See 47 C.F.R. § 73.3555(f).

[42] Second Report and Order, supra at 1074.

[43] Id. at 1075.

[44] Second Report and Order, supra at 1076, 1078-84.

[45] The criteria are: 1) inability to sell the station; 2) the only possibility of the station's sale would be at an artificially reduced price; 3) separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality; and 4) the purposes of the rule would be disserved by its application or application of the rule would be unduly harsh.

[46] Field Communications Corp., 65 FCC 2d 959 (1977); Fox Television Stations Inc., 8 FCC Rcd 5341, 5349 (1993); aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995). In both cases, the combination had previously been owned by the same or substantially the same parties.

29. For several years Congress precluded the Commission from spending authorized funds "to repeal, retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer" the newspaper/broadcast cross-ownership restriction.[47] In the Commission's 1994 appropriation, however, Congress provided that the Commission could "amend policies with respect to waivers" of the broadcast-newspaper cross-ownership rule with respect to newspaper/radio combinations.[48] Subsequently, restrictive language concerning this rule was dropped from Commission related appropriations legislation thereby removing the statutory ban on Commission review of not only its waiver policy under the rule, but also the rule itself.

30. In 1996, the Commission opened an inquiry to consider amending the waiver policy with respect to newspaper/radio combinations.[49] Since the scope of this biennial ownership review encompasses the issues raised in the outstanding NOI, we will place the comments we have already received into the record of this review and take them into account in our review of the broader rule.

31. Additionally, we note that a Petition for Rulemaking seeking elimination of the rule in its entirety was filed by the Newspaper Association of America ("NAA") on April 28, 1997.[50] We will place this filing in the record of this proceeding and invite comment on the merits of the petition.

32. Generally, the NAA Petition argues that in adopting the rule there never was a record of evidence that cross-owned stations engaged in anti-competitive practices. Indeed, NAA states, the record demonstrated that, in general, there was significant diversity or "separate operation" between commonly owned broadcast stations and newspapers and that newspaper-affiliated broadcast stations tended to be superior licensees in terms of locally oriented service. NAA further argues that, whatever the FCC's original reasons for the rule were, "[i]n the abundantly diverse and highly competitive mass media marketplace of the late 1990s, maintenance of these selective cross-ownership restrictions is unnecessary, discriminatory, and unjustifiable."[51] NAA points to relaxation in other Commission ownership rules[52] and argues that the newspaper/broadcast cross-ownership rule unfairly singles out newspaper publishers, denying them the ability to realize efficiencies and synergies while leaving their competitors free to do so.[53] NAA also argues that relaxation of the

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47 See, e.g., Department of Justice and Related Agencies, Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992). These appropriations restrictions were continued in effect through subsequent appropriations legislation and continuing resolutions that funded the agency until April 26, 1996, when a budget was enacted. See Departments of Commerce, State, Justice, the Judiciary and Related Agencies for FY '96, P.L. 104-134, 110 Stat. 1321. The restriction on repealing, retroactively applying or reexamining the newspaper/broadcast cross-ownership rule is no longer contained in this Agency's appropriation legislation.

48 107 Stat. 1167 (1993); see also H. Rept. 103-293, 103rd Cong., 1st Sess (1993), at 2.

49 See Notice of Inquiry in MM Docket No. 96-197, supra.

50 See Newspaper Association of America, Petition for Rulemaking in the matter of amendment of Section 73.3555 of the Commission's Rules to eliminate restrictions on newspaper/broadcast station cross-ownership (April 28, 1997) ("NAA Petition").

51 Id. at 16.

52 Id. at 40.

53 Id. at 38 et seq.

newspaper/broadcast cross-ownership rule will help preserve newspapers and broadcast stations as viable media outlets and enhance diversity. Finally, NAA asserts that the rule is inconsistent with the First Amendment. Although the newspaper/broadcast cross-ownership rule was sustained by the Supreme Court, NAA argues that developments in First Amendment jurisprudence since then,[54] "suggest that the courts today would require a far stronger showing than was made in 1975 to support such a direct limitation on the free speech rights of a particular class of citizens."[55]

33. A number of parties, however, have argued for the continuation of the rule. Supporters of the rule commenting in the Notice of Inquiry on our newspaper/radio waiver policy assert that to give one person or entity both a daily newspaper and a broadcast station in the same community would severely curtail both competition and diversity. Supporters contend that daily newspapers often dominate the local advertising market and to give a party with such dominance a broadcast outlet would allow it to exercise market power with respect to the local advertising market.[56] Supporters also contend that newspaper/broadcast combinations would give a single entity too much of a voice with respect to forming opinion on public issues. The new media pointed to by opponents of the rule, they state, do not add significant local viewpoints, are not locally based, and do not provide news or information on local issues.[57] Although supporters of the rule agree that cable television and the Internet have the potential to facilitate debate on local issues, they dispute that they yet serve that purpose to any significant degree and argue that these media are costly and do not reach large segments of the community.[58]

34. We invite comment on these competing positions with respect to the newspaper cross-ownership restriction. We specifically ask commenters to address whether the rule should be retained, modified or eliminated.

35. *Competitive Effects on the Market for Delivered Programming*. In the TV Ownership Further Notice we tentatively considered that delivered video programming was a sufficiently distinct product so as to represent a different product market relative to radio stations and newspapers for competitive analysis purposes.[59] Since newspapers do not operate in the market for delivered video programming, allowing cross-ownership between television and newspapers in a local market would not appear to harm competition in the market for delivered video programming. Similarly, since newspapers do not operate in the market for delivered audio programming, allowing cross-ownership between radio and newspapers in a local market would not appear to harm competition in the market for delivered audio programming. We invite comment on these

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[54] Citing Chesapeake & Potomac Telephone Co. v. U.S., 42 F.3d 181 (4th Cir. 1994), vacated and remanded sub nom., United States v. C&P, 116 S. Ct. 1036 (1996) and 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495 (1966).

[55] NAA Petition at 46.

[56] See Comments of David E. Hoxeng d/b/a ADX Communications in MM Docket No. 96-197 at 2. Hoxeng provides as an example San Antonio, TX, where, he states, the cost-per-thousand to newspaper advertisers skyrocketed following the buyout and closure of one San Antonio daily by the other. Id. at 2-3. See also Comments of Tennessee Association of Broadcasters filed in MM Docket No. 96-197 at 5.

[57] See Joint Comments of Black Citizens for a Fair Media et al. filed in MM Docket No. 96-197 at 18-19.

[58] Id.

[59] TV Ownership Further Notice, supra at 3536.

views.

36. *Competitive Effects on the Market for Advertising*. In the TV Ownership Further Notice we tentatively considered that the local advertising market includes video advertising (broadcast and cable), radio advertising and newspaper advertising.[60] Total local advertising revenue for radio, television, newspaper, and cable was $68 billion in 1996. Local radio accounted for $12 billion (17.2 percent of the total), television accounted for $21 billion (30.3 percent), newspapers accounted for $34 billion (49.7 percent), and cable accounted for $2 billion (2.9 percent).[61] In contrast to the effect on the markets for delivered programming, permitting the owner of a broadcast TV or radio station to own a newspaper, or vice versa, could give the company the market power to raise local radio, television, and/or newspaper advertising rates, depending on the market share of the combined entity. We invite comment and evidence on this issue, and on the levels of local advertising share that might give rise to competitive concern. Commenters may also wish to comment on NAA's views concerning competition in the advertising market. While newspaper local advertising revenue may be as large as combined television and radio local advertising revenues, NAA argues that it includes newspaper classified advertisements, a market in which broadcast stations do not compete with newspapers.

37. *Competitive Effects on the Program Production Market*. Newspapers, being a print medium, are not a participant in the video and audio program production markets. Thus, relaxing this rule would not appear to harm competition in these supply markets. We invite comment on this view.

38. *Other Economic Effects*. Broadcaster and newspaper interests have long made the argument that the quality of news and public affairs programming to the public, a core concern of the Commission, could be enhanced if broadcasters could share in the expertise of a newspaper's operations. We seek comment on this issue. Could the same beneficial results be achieved through non-attributable joint ventures? Studies documenting and comparing the news and public affairs programming of existing newspaper/broadcast combinations with the news and public affairs programming of broadcast facilities that are not owned by a newspaper in the same geographic market would be particularly informative.

39. Similar claims have been made with respect to efficiencies realized as a result of the combination's advertising sales force. While any realized reduction in expenses could make the joint enterprise more economically viable than the separate operations were before the combination took place, we are most interested in whether such efficiencies would produce benefits for broadcast audiences and advertisers. We seek comment on this view.

40. *Effects on Diversity*. The newspaper/broadcast cross-ownership rule is intended to promote media diversity on the local level. The maintenance of such diversity has been a central Commission objective since its establishment. However, there have been changes since the rule was adopted. For example, the Commission now allows some cross-ownership between television and radio stations in the same local market and Congress has directed us to relax our local radio ownership limitations. In addition, there has been an increase in the number of radio and TV stations and local newspapers. We must examine the rule in this context, but with a full recognition of the importance of diversity in local markets. Clearly, combined operations reduce the number of separately owned outlets. We seek comment on the impact of this reduction on the public interest.

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[60] Allowing such joint ownership should have no effect on competition in the national advertising market because of differences in the geographic dimensions of this market.

[61] "Estimated Annual U.S. Advertising Expenditures 1990 - 1996," Prepared for Advertising Age by Robert J. Coen, McCann-Erickson.

We also seek comment on whether and to what extent, newspapers and broadcast stations under common ownership express contrasting points of view or cover each other in a critical manner.

41. In this regard, we point out that television, newspapers, and radio continue to be America's major source of news.[62] The Roper survey found that more than two-thirds of Americans usually get their news from television, and 37 percent from newspapers.[63] The survey indicated that Americans also rely on radio as a news source, but to a lesser extent than television and newspapers. The survey also found that 69 percent Americans trust television, even more so than newspapers, as their source of news. We consequently wish to proceed cautiously in this area and seek comment on how the public's reliance on these media for news would be affected if we were to relax this rule.

42. The combination of a large daily newspaper and a large broadcast station could have a significant impact on diversity. Nevertheless, most, if not all, television markets have more than one daily newspaper and these vary greatly in size.[64] While the leading daily newspaper in a television market can have more than a 40 percent circulation, most have less than a five percent circulation. We seek comment on whether the impact on diversity depends on the relative size of the newspaper and broadcast facility involved in a potential merger. Commenters should also address NAA's argument that the gain in diversity that animated the newspaper/broadcast rule has been achieved. Are, as NAA argues, various pay video delivery services and other informational media, together with an increase in broadcast stations and weekly newspapers, sufficient to assure diversity in the absence of the rule? Or, as argued by opponents of relaxation of the rule, are such other informational media too limited in availability or use, or do such media provide insufficient information on issues of local concern to offset the loss of diversity on the local level that would accompany elimination or relaxation of the newspaper/broadcast cross-ownership rule? We also seek comment on how diversity is served in suburban markets where the appropriate outlets to be examined may include metropolitan television and radio stations and community or suburban newspapers rather than newspapers in the major city.

43. <u>Cable/Television Cross-ownership Rule</u>. Section 76.501(a) of the Commission's Rules effectively prohibits common ownership of a broadcast television station and cable system in the same local community.[65] The Telecom Act eliminated a similar statutory prohibition.[66]

44. The rule was adopted in 1970 in order to further the Commission's policy of promoting diversity in local mass communications media.[67] It was adopted over the objections of parties including the National

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[62] <u>America's Watching: Public Attitudes Toward Television 1997</u>, Roper Starch Worldwide Inc.

[63] Respondents were permitted to name more than one news source.

[64] <u>DMA Test Market Profiles: Media/Marketing Information by Designated Market Areas (DMA) 1995</u>, A.C. Nielsen Company.

[65] The rule prohibits a cable operator from carrying any broadcast television station if it directly or indirectly owns, operates, controls, or has an interest in a television broadcast station whose predicted Grade B signal contour overlaps any part of the area within which its cable system is serving subscribers.

[66] <u>See</u> Subsection 202(i) of the Telecom Act.

[67] Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, <u>Second Report and Order</u>, in Docket No.

Cable Television Association ("NCTA") and the National Association of Broadcasters ("NAB") -- the NCTA on the ground that the Commission lacked the authority to do so and should leave monopoly considerations to the Federal Trade Commission and the Department of Justice; the NAB on the ground that any resultant contribution to diversification would be *de minimis* and at the expense of public service programming on cable which broadcasters are best qualified to originate.[68] However, the Department of Justice stressed that the rule was "needed to insure that healthy and vigorous competition occurs in markets where entry is limited and the competitive alternatives are necessarily few in number."[69] In adopting the rule, the Commission made clear that it was avoiding any ban on joint ownership of a television broadcast station and cable system not located in the same area. "It is not our desire to keep television broadcasters out of the CATV industry, but to avoid over-concentrations of media control ... we should have no objection to exchange of CATV systems among broadcasters which would maintain their involvement in the CATV industry while eliminating local cross-ownerships."[70]

45. This is the first time since adopting the cable/television cross-ownership rule that the Commission has reviewed the rule. Indeed, since 1984, the rule was required by statute.[71] When the Telecom Act eliminated the statutory provision, the Conference Report clarified that repeal of the prohibition should not prejudge the outcome of any review by the Commission of its rules regarding cable/broadcast cross-ownership.[72] The Telecom Act also eliminated our rule prohibiting broadcast television networks from owning or controlling cable systems.[73] While broadcast television networks are now statutorily permitted to buy cable systems, they are still generally precluded from doing so on any significant basis by the cable/broadcast cross-ownership rule, because the networks are also broadcast television licensees. We seek comment on whether this rule should be retained, modified or eliminated.

46. *Effects on the Market for Delivered Programming*. Television stations compete in the market for delivered video programming with cable system operators, wireless cable operators and possibly with DBS operators serving their "local" market. We note that in its Fourth Annual Report on the status of competition in the market for the delivery of multichannel video programming, the Commission stated that "local markets for the delivery of video programming generally remain highly concentrated and continue to be characterized

18397, 23 F.C.C. 2d 816, 820 (1970).

68 Id. at 818.

69 Id. at 819.

70 Id. at 821.

71 The Cable Communications Policy Act of 1984 added Section 613 of the Communications Act of 1934, as amended (47 U.S.C. § 533). Section 613(a)(1) of the Act provided that "It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system." That provision was eliminated by Section 202(i) of the Telecom Act.

72 House Rep. No. 458, 104th Cong., 2d Sess. at 164.

73 See Subsection 202(f) of the Telecom Act.

by some barriers to entry and expansion by potential competitors to incumbent cable systems."[74] While the ability of the broadcast spectrum to compete as a transmission medium with cable is effectively limited by the amount of broadcast spectrum and channels that are assigned to television markets, the Report notes that DTV has the potential to allow the broadcasters to become more effective competitors with cable companies in the multichannel video programming distribution market.[75]

47. We seek comment on the relevance of our conclusions in the Fourth Annual Report on our consideration of competitors to broadcast television. We seek comment on whether these changed market circumstances render our rule unnecessary. Also, we seek comment on the possible effects that repeal or relaxation of the cable/television cross-ownership rule may have on the market for delivered programming in particular. Would common ownership of a cable system and a television station increase or diminish the program choices, or the preferred programs, available to audiences? Would repeal or relaxation raise competition concerns in this market? Could relaxation of the rule result in public interest benefits? Could the same beneficial results be achieved through non-attributable joint ventures? Should a distinction be made in judging the effect of this rule on local versus national programming?

48. *Effects on the Market for Advertising*. Allowing joint ownership of a television station and a cable system in a local market might give the joint owner the economic power to raise its advertising rates within the local service area if, by virtue of the combination, the local market became concentrated.[76] We stated in the TV Ownership Further Notice that we tentatively consider that the local advertising market includes video advertising (broadcast and cable), radio advertising and newspaper advertising. Evidence on whether significant market power in the local advertising market already exists is mixed. As we stated earlier, total local advertising for these media was $68.5 billion in 1996. Local cable advertising revenues were small ($2.0 billion, 2.9 percent of total local advertising) when compared to local commercial broadcast television station advertising revenues ($20.7 billion, 30.3 percent of total local advertising), but they are increasing in size and importance.[77] Radio local advertising revenues accounted for $11.7 billion (17.2 percent of total local advertising) and newspaper accounted for $34 billion (49.7 percent of total local advertising). Prior studies have found mixed evidence regarding the impact of cable on broadcast TV station advertising revenues.[78] Thus, at this time, it is not clear whether cable system operators offer effective competition to broadcast station

[74] Fourth Annual Report, supra at para. 11. Section 628(g) of the Communications Act of 1934, as amended, requires the Commission to report annually to Congress on the status of competition in the market for the delivery of video programming. Congress imposed this annual reporting requirement as one means of obtaining information on the competitive status of markets for the delivery of multichannel video programming delivery that would aid both Congress and the Commission in determining when there was competition sufficient to reduce or eliminate many of the regulatory restraints imposed on the cable industry.

[75] Fourth Annual Report, supra at para. 95.

[76] Allowing such joint ownership should have no effect on competition in the national advertising market because of differences in the geographic dimensions of this market.

[77] "Estimated Annual U.S. Advertising expenditures 1990-1996," Prepared for Advertising Age by Robert J. Coen, McCann-Erickson. See also Bernstein Research, Network Television Primer, February 1998 at 6 (showing advertising growth rates for cable networks and television).

[78] TV Ownership Further Notice, supra at 3571.

operators in providing local advertising.[79]

49. When considering advertising substitutes, we recognize that while many firms use a mix of video, audio, print, and other media to advertise their products and services, some firms may rely on video advertising almost exclusively and are, therefore, most affected by any market power that might be created by a modification to this rule. We have previously noted that it is not clear how substitutable radio and newspaper local advertising is for broadcast television local advertising.[80] We seek information and data about the appropriate scope of the product and geographic advertising market within which television stations and cable systems compete. Statistical evidence supporting fact-based analysis on the substitutability of these media in the local advertising market will especially be welcome.

50. *Effects on the Program Production Markets*. We specifically seek comment on whether the cable/broadcast television rule is no longer necessary in light of the current state of the program production market. Television networks, broadcast television stations and cable systems purchase or barter for video programming in a national market in the sense that producers of video programming typically create product which is marketed to be delivered in more than one local market. However, broadcast television stations and cable systems also obtain video programming which is marketed to be delivered in local markets only. The program market could be affected if Commission modification or elimination of the cable/television cross-ownership rule permitted a cable/television combination to exercise market power in the purchase of video programming for delivery in the local market. Suppliers of video programming could be forced to sell their product at below competitive market prices in order to gain access to a local market controlled by one or a few local group owners. We seek comment on whether cable/broadcast television combinations could exercise monopsony power -- i.e., the ability of the cable/television combination to artificially restrict the price paid for programming. We solicit evidence on the potential market power in the program production market if we were to eliminate or relax the cable/television cross-ownership rule. Specifically, we seek comment on whether other broadcast stations and alternative providers of delivered video programming (e.g., MMDS and DBS) may mitigate a cable/television combination's potential for monopsony power by providing program producers with additional local outlets for their product. We ask commenters to address whether our analysis of this issue is affected by whether the programming in question is network-provided programming, syndicated programming sold on a national basis, or programming produced for particular local markets. We also seek comment on the potential for a cable/television combination to deny alternative providers of delivered video programming access to the programming of the television station involved in the cable/television combination. On a related matter, we seek comment on whether our channel positioning and must-carry rules provide sufficient protection to ensure that if a cable company owns a local television station, the cable company could not discriminate in favor of its owned television station.

51. *Other Economic Effects*. Allowing cable/television cross-ownership within a local market may permit an entity to realize economies of scale, reducing the costs of operations. Joint ownership may permit cost-sharing in administrative and overhead expenses, sharing of personnel, joint advertising sales, and the pooling of resources for local program production (such as news and public affairs programming). The cost savings from these economies could then be used to provide better programming to the public, better coverage of local issues and possibly lower the cost of advertising and/or increase the quality of service available to advertisers. We seek evidence from commenters of the existence and magnitude of such economies and whether they can be reached through alternatives to common ownership, e.g., joint ventures. In addition, we ask

[79] Id.

[80] Id.

commenters to describe how likely such economies are to be passed on to audiences and advertisers.

52. *Effects on Diversity*. Our concern with diversity is most acute with respect to local ownership issues. Both television and competing video outlets are viewed at the local level. While the existing rule may foster diversity by promoting a larger number of independent video programming outlets in a community, Section 202(h) directs us to solicit comments on whether the rule is no longer necessary in the public interest. We ask commenters to address the impact on diversity if we were to modify or eliminate the cable/television cross-ownership rule. For example, in recent years, the number of outlets providing video programming to consumers at the local level has increased.[81] We seek comment on the impact of the availability or use of such outlets on our assessment of the continuing need for this rule. Would any and all cable/television combinations lead to greater harm to diversity than other ownership combinations that Congress or the Commission permit? Since cable and broadcast television may be the closest substitutes in the video marketplace, should the Commission be especially vigilant in promoting diversity in the context of this rule?

53. Experimental Broadcast Stations. Subpart A of Part 74 of the Commission's Rules[82] provides for the licensing of experimental broadcast stations. These are stations "licensed for experimental or developmental transmissions of radio telephony, television, facsimile, or other types of telecommunication services intended for reception and use by the general public."[83] Licenses for such stations are issued in order to allow them to carry on research and experimentation for the development of new broadcast technology, equipment, systems, or services that cannot be accomplished using a licensed broadcast station.[84] A multiple ownership rule pertaining to experimental broadcast stations prohibits any person (or persons under common control) from controlling directly or indirectly two or more experimental broadcast stations unless it can be shown that the research program requires the licensing of two or more separate stations.[85]

54. Because this is an ownership rule pertaining to a type of broadcast station, we believe that Section 202(h) of the Telecom Act requires the Commission to review the rule as part of its biennial broadcast ownership review. However, experimental broadcast stations generally are prohibited from providing regular program service.[86] Accordingly, it does not appear that they significantly participate in competitive or diversity markets. Nevertheless, we seek comment on whether this rule remains in the public interest.

IV. Waivers

55. As we begin this first biennial review of our broadcast ownership rules, we believe it is important to review and restate our approach to granting conditional waivers of broadcast ownership rules which are under active consideration by the Commission in a rulemaking or inquiry proceeding. Generally, we have not

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[81] The number of television broadcast stations reached 1561 in 1997. In addition, DBS service is available nationwide and the proportion of television homes passed by cable reached 97.1 percent in June 1997. In addition, 252 wireless cable systems are in operation, mainly in urban areas. Fourth Annual Report, supra at para. 11 and 14.

[82] 47 C.F.R. §§ 74.101 - 74.184.

[83] 47 C.F.R. § 74.101.

[84] 47 C.F.R. § 74.102.

[85] 47 C.F.R. § 74.134.

[86] 47 C.F.R. § 74.182.

granted conditional waivers of a broadcast ownership rule simply on the grounds that the rule was the subject of an ongoing rulemaking or inquiry proceeding, believing that such a blanket approach would make our enforcement processes unworkable and would subject our regulatees to undesirable levels of uncertainty. Perhaps more importantly, such an approach would necessarily assume that compliance with the subject rule during the pendency of its review was not in the public interest, an assumption which would ordinarily lack a substantial record basis at the notice of inquiry or notice of proposed rulemaking stage of a proceeding. Nonetheless, there are limited areas of our broadcast ownership waiver practice where we have consciously departed from this general approach.

56. For example, in certain cases in recent years the Commission has granted interim waivers or extensions where a pending proceeding is examining the rule in question, the Commission concludes that the application before it falls within the scope of the proposals in the proceeding, and a grant of an interim waiver would be consistent with the Commission's goals of competition and diversity. This is most likely to occur where protracted rulemaking proceedings are involved and where a substantial record exists on which to base a preliminary inclination to relax or eliminate a rule. An example of this situation involves the TV duopoly rule geographic market standard currently under review in our local ownership rulemaking.[87]

57. In contrast to those situations, in our first biennial review of our broadcast ownership rules, we do not believe it appropriate to provide for conditional waiver of any of the ownership rules under review in this proceeding solely because of the pendency of this review. Here, for example, we do not have a protracted proceeding or substantial record on any of these rules that leads us to initial conclusions about any specific proposals to modify or eliminate any of the rules at issue here. In addition, we do not have substantial waiver experience suggesting an appropriate course of action regarding the rules under review herein. We retain, of course, both the right and the obligation to review any request for waiver of our rules based upon the specific facts in a particular case. What is important is whether the public interest would be served by a grant of the waiver.[88]

58. We are aware that in at least one case a conditional waiver of the radio-newspaper cross-ownership rule has been granted based upon the pendency of a proceeding.[89] To the extent that this decision suggests that the pendency of a proceeding by itself would be sufficient basis for a waiver, it is superseded, although as a matter of equity we do not alter its governance of the situation to which it was addressed.[90]

V. Conclusion

59. By this Notice, we solicit comments on these and any other issues pertinent to our review of our

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[87] See Second Further Notice in MM Docket No. 91-221 & 87-7, 11 FCC Rcd 21655, 21681 (1996) (Commission states that granting waivers satisfying the proposed standard would not adversely affect its competition and diversity goals in the interim).

[88] See WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[89] Letter to Joel Rosenbloom from Chief, Mass Media Bureau concerning ABC/Capital Cities-Disney Company merger, dated October 24, 1996, p. 2.

[90] We note that the staff, on March 6, 1998, granted an extension of the Tribune Company's temporary waiver to commonly own a television station and newspaper in the Miami, Florida market. Stockholders of Renaissance Communications Corporation, DA 98-456 (MMB March 6, 1998). That action was based on special circumstances and does not, in our view, stand in contradiction to the conditional waiver standard we articulate here.

broadcast ownership and other rules. Commenters should frame their discussion and analysis in a manner consistent with our framework for addressing our historic competition and diversity concerns. We ask commenters to provide data and evidence to support their positions so as to facilitate objective analysis of the issues raised.

ADMINISTRATIVE MATTERS

60. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before May 22, 1998, and reply comments on or before June 22, 1998. To file formally in this proceeding, you must file an original plus six copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus eleven copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies may be obtained through the Commission's contract copier, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, DC 20036. ITS can also be reached at (202)857-3800 or by facsimile at (202)857-3805.

61. Subject to the provisions of 47 C.F.R. § 1.1203 concerning "Sunshine Period" prohibitions, this proceeding is exempt from ex parte restraints and disclosure requirements pursuant to 47 C.F.R. § 1.1204(b)(1).

62. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4, 11, 303, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 161, 303, and 403, and Section 202(h) of the Telecommunications Act of 1996, this Notice of Inquiry IS ADOPTED.

63. Additional Information: For additional information regarding this proceeding, contact Roger Holberg [(202)418-2130] or Dan Bring [(202)418-2170], Mass Media Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A
Top 25 Commercial Owners by Percentage of TV Household Coverage - 1998, 1996

	1998				1996			
Rank	Owner	% TV HH w/ Disc.	% TV HH w/o Disc.	# Stations	Owner	% TV HH w/ Disc.	% TV HH w/o Disc.	# Stations
1	Fox Television Stations Inc	34.8%	40.3%	22	CBS Station Group	31.6%	32.5%	16
2	CBS Station Group	30.9%	31.9%	15	Disney/ABC	24.1%	24.3%	11
3	Paxson Communications Corp	27.7%	54.1%	46	NBC/GE	23.2%	23.6%	9
4	NBC/GE	26.5%	27.9%	13	Fox Television Stations Inc	22.0%	27.6%	12
5	Tribune Broadcasting Co	26.0%	35.5%	18	Tribune Broadcasting Company	21.5%	26.4%	10
6	ABC Inc	24.0%	24.2%	10	Silver King Communications Inc	15.2%	30.5%	13
7	Gannett Company Inc	16.0%	16.2%	20	Gannett Company Inc	14.1%	14.3%	15
8	Silver King Communications Inc	16.0%	30.0%	15	Paxson Communications Corp	13.9%	27.8%	11
9	Belo Corporation	13.7%	14.1%	18	New World Communications Group	13.8%	14.3%	12
10	Univision Television Group Inc	13.4%	26.9%	13	Univision Television Group Inc	12.8%	25.6%	11
11	BHC Communications Inc	13.0%	13.0%	3	Telemundo Group Inc	10.7%	21.4%	8
12	Paramount Stations Group	12.4%	23.2%	16	Viacom International Inc	10.2%	18.4%	12
13	Sinclair Communications Inc	11.8%	19.4%	33	Scripps Howard Broadcasting	8.0%	9.8%	9
14	Telemundo Group Inc	10.7%	21.3%	7	Belo Corporation	8.0%	8.0%	7
15	Cox Broadcasting.	9.3%	9.4%	8	Cox Communications	7.6%	7.6%	6
16	Young Broadcasting Inc	9.1%	9.2%	13	Hearst Corporation	7.3%	8.1%	7
17	Hearst-Argyle TV Inc	8.9%	9.5%	12	BHC Communications Inc	7.0%	7.0%	1
18	Scripps Howard Broadcasting	8.0%	9.8%	9	Post-Newsweek Stations Inc	7.0%	7.0%	6
19	Post-Newsweek Stations Inc	7.1%	7.1%	6	Chris-Craft Industries Inc	6.1%	6.1%	2
20	United Television Inc	5.7%	8.5%	7	LIN Television Corporation	5.6%	6.2%	8
21	Meredith Corp	5.6%	6.4%	8	Providence Journal Broadcasting Co	5.4%	5.8%	9
22	Raycom Media Inc	5.4%	6.4%	22	Pulitzer Broadcasting	5.2%	5.5%	9
23	Pulitzer Broadcasting Co	5.2%	5.5%	9	Sinclair Communications Inc	5.1%	10.2%	16
24	Media General Broadcast Group	4.5%	5.4%	14	Christian Network Inc	4.9%	8.2%	8
25	LIN Television Corporation	4.4%	4.9%	8	River City Broadcasting	4.7%	5.8%	8

Source: BIA Database 1/17/98; 4/5/96.
Stations does not include Satellite or LPTV stations.

SEPARATE STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

In the Matter of 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

Today the Commission launched one of the keystone proceedings of the Biennial Review, the review of the Commission's broadcast ownership rules. In conducting this review, we will be guided first and foremost by the Biennial Review provisions of the 1996 Act, which require that the Commission review its broadcast ownership rules and repeal or modify any regulation that it determines is no longer in the public interest.

In assessing the public interest, we must stay focused on the two key aspects of the public interest: promoting competition and promoting diversity. Not only are both of these goals rooted in nearly half a century of communications law and policy but these goals remain relevant because broadcasters still serve as the most important source of news and information for Americans.

Both competition and diversity are all the more important today because we recently have experienced the most dramatic increase in consolidation in the broadcast industry in our history. We need to understand how this consolidation has affected our competition and diversity goals. We also need to understand the impact of consolidation on small businesses, including small businesses owned by minorities and women. Broadcast remains the way that most Americans get vital information about their local communities. So retaining diversity of ownership of broadcast outlets is, in my view, vital to the democratic process.

The proceeding we launch today will begin a very important dialogue about the competitive structure of the broadcast industry today. I encourage the broadcast industry and the public to participate fully in this dialogue in order to inform our decisions regarding the competitive structure of the industry. I look forward to working with the broadcast industry, the public, and my colleagues as we, together, take a critical look at our ownership rules.

Separate Statement
of
Commissioner Susan Ness

Re: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

Today, we launch our first biennial review of the broadcast ownership rules pursuant to the Telecommunications Act of 1996. Just as it is a good idea to clean out the attic or basement periodically, I believe the Commission should and will take a hard look at its regulations and follow the statutory directive to "repeal or modify any regulation it determines to be no longer necessary in the public interest" (Sec. 202 (h) of the Telecommunications Act).

The Commission has long held the view that the public interest is served by the twin goals of promoting competition and diversity of voices. I subscribe to that view.

Some argue that media consolidation does not have an adverse effect on diversity. I disagree. What's needed are independently owned outlets -- not a variety of content controlled by one owner. In 1945, the Supreme Court counselled that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse *and antagonistic* sources is essential to the welfare of the public..." (Associated Press v. United States, 326 U.S. 1, 20 (1945)(emphasis added). The wisdom of the Court's opinion is as valid today as it was when it was penned in 1945.

"Antagonistic" sources can only be truly antagonistic (in the best sense of the word) if they are separately owned and genuinely compete in the marketplace of ideas. We should not confuse "multiple" choices with "independent" choices. For example, we now have "multiple" sources of news and information offered by NBC -- the national broadcast network, CNBC, and MSNBC -- which is all to the good. However, by contrast, "independent" choices are available to viewers by the emergence of competitors to CNN -- MSNBC and Fox News.

As we look at the specific rules under review in this proceeding, I urge commenters to help us assess the cumulative effect of the sweeping changes in radio and television since the Congress relaxed the national ownership rules and the local radio ownership rules.

Local Radio Ownership: I note the Commission's finding that control by the top four radio group owners over total radio advertising dollars in markets across the country has gone from 80 percent in 1996 to a whopping 90 percent in 1997. In just one year, the other stations in those markets -- and that could be dozens of stations -- have seen their combined market share cut in half!

This stark fact must have consequences that need to be spelled out in this proceeding. How are smaller stations able to compete? How are they able to take a risk on new services or talent? How are they able to continue providing community and charitable support, which rarely contributes to the bottom line? Are our ownership rules inadvertently causing the financial suffocation of small entrepreneurial broadcasters? What is the impact on the number of minority and female-owned outlets?

Video Programming: I want to explore the relationship between ownership of local stations and programming. Does structural independence among local stations contribute to a competitive and diverse marketplace for programming? What impact, if any, does the ever-increasing web of relationships between program suppliers and station owners have on the independence of news and information as well as on entertainment programming?

Newspaper-Broadcast Cross-Ownership: Our long standing ban on common ownership of daily newspapers and local broadcast stations is due for review. As we think about changes in this rule, we should consider whether we take for granted the importance of critical reporting between and about newspapers and television/radio. We assume our newspapers will take a TV or radio station to task on errors, omissions, and editorial points of view -- and generally they do. Likewise, TV and radio stations challenge local newspapers every day. This healthy antagonism aids viewers and readers as they become informed and then form their opinions. The critical question we need to ask is whether such a dynamic will continue to exist if common ownership of these traditional adversaries is permitted.

As our country has changed and our population has become more suburban over the last fifty years, new questions arise in our diversity analysis. As city populations have migrated to metropolitan and suburban areas and even "ex-urban" areas, we may need to consider how to measure diversity within different parts of large markets. Many communities situated in the shadow of the major metropolitan city are served primarily by the large TV and radio stations in the major city, along with a community or suburban newspaper. In my experience, only a handful of these media outlets truly focus on issues of special concern to these outlying communities. Where proposed combinations involve stations or papers serving the suburban community, in addition to evaluating diversity choices for the urban population, we should also focus on the impact of the acquisition on suburban communities.

Conclusion

At the heart of my deep and abiding concern about diversity of ownership of America's media is my view that such diversity is an "insurance policy for democracy." The free market of ideas and information is essential to self-governance.

We must not be lulled into a sense of complacency by having more channels, more formats, and the Internet. Is it in the public interest if the overwhelming number of significant outlets are owned by a small handful of players? We need to insure that there are enough truly independent and *antagonistic* providers of information at each level of content development and distribution.

SEPARATE STATEMENT OF COMM. HAROLD W. FURCHTGOTT-ROTH

In the Matter of 1998 Biennial Regulatory Review: Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act

I am pleased to support this Notice of Proposed Rulemaking. It puts us on the right track toward meeting our obligation under section 202(h) to assess the continued necessity of our ownership rules in light of competitive developments since their adoption and, if they are indeed unnecessary, to eliminate or modify them.

As an initial matter, I express my agreement with the separate statement of my colleague Commissioner Powell. Like him, and for the reasons he gives, I believe that a reevaluation of our traditional regulatory goal of "diversity" is a critical part of this biennial review. As he observes, this sometimes amorphously-defined goal and the assumptions upon which it rests must be clearly articulated and supported by facts, not conjecture, in order to withstand judicial review. Below, I set forth the additional questions that I see as relevant to our section 202(h) inquiry.

First Amendment As An Affirmative Basis for Ownership Rules

I would like to make clear my belief that the First Amendment is no source of affirmative authority to regulate mass media ownership, as parts of this item might be construed to suggest. For the time being, I would simply note that a quick refresher on the text of the First Amendment should be enough to establish that proposition: "Congress shall make no law . . . abridging the freedom of speech," U.S. Const., Amdt. 1. Phrased entirely in the negative, this provision is by its terms a *limitation on* -- not an *expansion of* -- governmental power.

Analysis Under Section 202(h)

Although today's item does not spell out what it means to assess whether a regulation is "necessary in the public interest as the result of competition," as the statute requires, it seems to me that in analyzing that issue it would be useful for commenting parties to consider: (i) the original purpose of the particular rule in question; (ii) the means by which the rule was meant to further that purpose; (iii) the state of competition in the relevant market at the time the rule was promulgated; (iv) the current state of competition as compared to that which existed at the time of the rule's adoption; (v) and, finally, how any changes in competitive market conditions between the time the rule was promulgated and the present might obviate, remedy, or otherwise eliminate the concerns that originally motivated the adoption of the rule.

Such considerations are directly related to the language of the statute, which clearly indicates that Congress wanted the Commission to consider the very real possibility that competitive forces have eliminated or decreased the need for ownership regulation and that our rules should keep pace, as near as possible, with the times.

Spectrum Scarcity

The congressional goal embodied in section 202(h) of eliminating anachronistic regulation, described above, brings me to my next topic. Many, if not most, of the rules under review in this proceeding are based upon a theory well known to those in the communications world: the "spectrum scarcity" rationale. I believe the Commission is obliged to review the factual underpinnings of this fifty-five year-old rationale to see whether they hold true in today's day and age. I accordingly encourage interested commenters to address this issue.

The empirical basis of the "spectrum scarcity" argument has been roundly criticized by some of America's most distinguished jurists and commentators, even by former members of this Commission.[1] To be sure, the Supreme Court has not overruled its decisions that rely upon the spectrum scarcity rationale in affirming the constitutionality of FCC regulations, *see, e.g., Red Lion*, 395 U.S. 367 (1969); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984), and of course it goes without saying that it is not the job of this agency to make constitutional law or to question Supreme Court precedent. But the underlying premise of those judicial decisions is that, as a factual matter, communications outlets are sparse. The empirical validity of spectrum scarcity is something quite different than the constitutional jurisprudence based thereupon.

When it comes to empirical questions relating to an administrative agency's area of expertise, courts have traditionally deferred to agency judgments on those matters. *See Syracuse Peace Council v. FCC*, 867 F.2d 654, 660 (D.C. Cir. 1989). The flip side of that judicial deference, however, is the agency's continuing responsibility to reexamine its judgments as time goes by and circumstances change. As the United States Court of Appeals for the D.C. Circuit has explained: "The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise implies a correlative duty to evaluate its policies over time." *Bechtel v. FCC*, 957 F.2d 873, (D.C. Cir. 1992) (citation omitted); *see also Geller v. FCC*, 610 F.2d 973 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears. It can hardly be supposed that the vitality of conditions forging the vital link between Commission regulations and the public interest is any less essential to their continuing operation."); *National Ass'n of Regulatory Utility Com'rs v. FCC*, 525 F.2d 630, 638 (1975) ("The [Federal Communications] Commission retains a duty of continual supervision."), *cert. denied*, 425 U.S. 992.

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[1]*See e.g., Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n. 2 (D.C. Cir. 1997) (Williams, J., dissenting from denial of rehearing *en banc*) ("[P]artly the criticism of *Red Lion* rests on the growing number of broadcast channels."); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (1995) (Edwards, C.J., dissenting) (spectrum scarcity is "indefensible notion" and "[t]oday . . . the nation enjoys a proliferation of broadcast stations, and should the country decide to increase the number of channels, it need only devote more resources toward the development of the electromagnetic spectrum"); *id.* at 684 (Wald, J., dissenting) ("[T]echnical assumptions about the uniqueness of broadcast . . . have changed significantly in recent years."); *Telecommunications Research and Action Center v. FCC*, 801 F.2d 501, 508 n.4 (D.C.Cir. 1986) ("Broadcast frequencies are much less scarce now than when the scarcity rationale first arose in [1943]."), *cert. denied*, 482 U.S. 919 (1987); Glen O. Robinson, *The Electronic First Amendment: An Essay for the New Age*, Duke L. J. at 5 (forthcoming Spring 1998) ("By the 1980s . . . the emergence of a broadband media, primarily in the form of cable television, was supplanting traditional, single-channel broadcasting and with it the foundation on which the public interest obligations had been laid. If it ever made sense to predicate regulation on the use of a scarce resource, the radio spectrum, it no longer did."); Laurence H. Winer, *Public Interest Obligations and First Principles* at 5 (The Media Institute 1998) ("In a digital age offering a plethora of electronic media from broadcast to cable to satellite to microwave to the Internet, the mere mention of 'scarcity' seems oddly anachronistic."); Rodney M. Smolla, *Free Air Time For Candidates and the First Amendment* at 5 (The Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet resources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes -- through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); J. Gregory Sidak, *Foreign Investment in American Telecommunications: Free Speech* at 303-04 (AEI 1997) ("On engineering grounds, the spectrum-scarcity premise . . . is untenable."); Lillian R. BeVier, *Campaign Finance Reform Proposals: A First Amendment Analysis*, CATO Policy Analysis, No. 282 at pp. 1, 13, 14 (September 4, 1997) ("There is no longer a factual foundation for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech."); Fowler & Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 Tex. L. Rev. 207, 221-26 (1982).

Not only are we duty-bound to reexamine the facts upon which we have in the past based our regulatory judgments about broadcasting, but the Supreme Court has clearly indicated that it might revisit its constitutional jurisprudence in this area if the FCC "signal[ed] . . . that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." *FCC v. League of Women Voters*, 468 U.S. 364, 377 n.11 (1984); *see also Telecommunications Research and Action Center*, 801 F.2d at 509 n.5 (explaining that, in *League of Women Voters*, "the [Supreme] Court . . . suggested that the advent of cable and satellite technologies may soon render the scarcity doctrine obsolete.").[2] The D.C. Circuit recently ventured to say that the Court's "suggestion" in *League of Women Voters* "may impose an implicit obligation on the Commission to review the spectrum scarcity rationale." *Tribune Co. v. FCC*, 133 F.3d 61, 68 (1998).

The biennial review required by 202(h) of the Communications Act provides the perfect opportunity for us to carry out this duty. Indeed, as the *Tribune* court observed upon the heels of its comment about our "implicit obligation" to reconsider spectrum scarcity, Congress in section 202(h) "directed the FCC to review all of its media ownership rules." *Id.* at 69. To my mind, the factual validity of spectrum scarcity is a critical element of the analysis required by 202(h). By its plain terms, that section mandates that we ask whether changes in competition have obviated the "public interest" need for our regulations. One of the most fundamental ways in which the broadcast landscape may have changed is that, due to increased competition, there are significantly more outlets for communication than there once were.[3]

To be sure, a great deal of our existing regulatory scheme depends upon the validity of spectrum scarcity. That, however, is no reason not to undertake a thoughtful review of the matter. If the world around us has changed to such a degree that our past assumptions no longer make sense, then we must acknowledge that truth. We cannot stick our heads in the regulatory sands, hoping that no one will notice the eroded foundation of our rules.

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[2]Also, in its most recent statement regarding spectrum scarcity, the Supreme Court noted the "scarcity of available frequencies [for the broadcast medium] *at its inception*," *Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2342 (1997) (emphasis added), seeming to distinguish between past and present scarcity.

[3]In the mid to late 1980s, the Commission undertook this very inquiry. *See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning Alternatives to the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 FCC 2d 145 (1985) ("1985 Fairness Report); *In Re Complaint of Syracuse Peace Council*, 2 FCC Rcd 5043 (1987). The Commission concluded that "our comprehensive study of the telecommunications market in the 1985 Fairness Report has convinced us that [the spectrum scarcity] rationale that supported the doctrine in years past is no longer sustainable in the vastly transformed, diverse market that exists today." *Id*. at para. 64. These decisions have not been vacated or reversed, and they are still good administrative law. At the same time, they are now over ten years old, and the communications industry has undergone even more change in the interim. If these decisions do not already provide the basis for applying a higher level of scrutiny to broadcast regulation, as might very well be, they are at least an excellent starting point for a reassessment of the current state of the communications market.

SEPARATE STATEMENT OF COMMISSIONER MICHAEL POWELL

Re: *1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-*35

In the 1996 Telecommunications Act, Congress directed the FCC to review all of our ownership rules every two years and repeal or modify any regulation that is "no longer in the public interest." I support this Notice of Inquiry initiating the review. It is indeed time to take a sober and realistic look at our broadcast ownership rules in light of the current competitive communications environment.

Ownership rules have a long history in telecommunications regulation. At various times, we have justified these rules out of concern over possible competitive harms that might befall viewers and listeners (monopoly prices and restricted output). More often, however, many of the rules we propose to re-evaluate today are hinged on considerations we loosely call diversity.

In mandating that we review these ownership rules every two years, Congress appeared primarily concerned that we adjust or eliminate these rules if, as is anticipated by the Telecommunications Act, sufficient robust competition develops. We have a duty to take a hard look at our ownership rules in light of the current state of competition and to ask and answer whether in light of significant changes in competitive conditions these rules continue to have vitality. In this regard, I endorse fully Commissioner Furchtgott-Roth's clearly enumerated framework for considering these issues, as well as his call to address squarely the validity of spectrum scarcity rationales for our rules.

In all likelihood, however, the pivotal issues in this proceeding are likely to revolve around diversity. While competitive concerns are traditionally evaluated using well-established analytical standards, diversity is a much more visceral matter -- bathed in difficult subjective judgments and debated in amorphous terms. It has always been difficult to articulate clearly the government's interest in "diversity," and it has become even more difficult to do so in light of current judicial precedents. Yet we must do so, if we are to affirm any of our ownership rules based on such an interest, and we must do so with adequate rigor and clarity in order for such rules to withstand judicial scrutiny.

What do we need to know in order to complete this difficult task? At various times there have been a number of distinct expressions of diversity, which serve as a useful beginning framework for evaluation:

(1) **Diversity of ownership**: What should this mean? Merely a variety of owners, regardless of ethnicity or gender? Adequate representation among owners of minorities and women? If so, how great should that representation be to meet the public interest standard? Is diversity of ownership a legitimate government interest standing alone, or only in combination with other objectives, such as diversity of programming?

(2) **Diversity of programming**: What is the objective here? A variety of fare? Programming that is tailored to local communities? Programming that is targeted to particular minority or gender groups within a community? And, what is the relationship between ownership and programming, if any?

(3) **Diversity of outlets**: This can mean many different things as well. Do we wish to maximize the number of diverse outlet mediums (e.g., T.V., radio, newspapers, internet, etc.)? Do we wish to promote multiple outlets of the same type, and if so for what purpose (ownership opportunity, diversity of programming and viewpoint)? How do we measure the adequate number of outlets under the public interest standard?

In the end, we will have to evaluate each of these diversity objectives alone and in combination and consider carefully whether government-imposed prophylactic ownership restrictions actually serve to advance any or all of these objectives, and if so, whether such restrictions are narrowly tailored to meet our objectives. We must be capable of explaining the link between ownership restrictions and our asserted diversity objectives. I urge commentators to provide comments with sufficient depth and sober analysis to allow us to do so.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

In the Matter of 1998 Biennial Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

I welcome the opportunity to initiate this biennial review of our broadcast ownership rules. In addition to our statutory mandate to conduct such a review, I believe it is healthy to re-examine our rules periodically to ensure that they are still in the public interest.

The Commission's mandate in this proceeding is to determine whether any of our broadcast ownership rules are no longer necessary in the public interest as a result of competition. I write separately to state my belief that our twin interests of competition and diversity must be analyzed separately and subject to different standards of proof. Competition focuses on issues of market power. Market power can be constrained by competition even where there are only a handful of competitors in a market, and even though such competition does not reach all segments of society. In the cable context, for example, competition is deemed "effective" (and hence rates are not regulated) if a cable operator faces at least one competitor that passes 50% of the homes in its service area and 15% of subscribers take service from such competitor(s). In this context, those residents who may not have a competitive choice can benefit from those that do.

Diversity, in my mind, is different. Diversity promotes democratic values by ensuring that people are exposed to a range of views on issues of public concern. Unlike our interest in competition, I believe that our interest in promoting a diversity of voices and viewpoints can be satisfied only through a large number of separately-owned competitors in a market. Similarly, unlike our interest in competition, I do not believe that our interest in diversity can be satisfied if large segments of society do not have access to such diversity. When it comes to issues of self-governance, we cannot afford to become a nation of information haves and have-nots. Thus, I would ask those commenters who believe that our interest in diversity has been satisfied to adduce evidence not only that diverse sources of comparable information exist, but also that all segments of society -- rich and poor, urban and rural, minority and non-minority, apartment dwellers and single family home owners -- have legal and practical access to such diversity and are actually making use of it. For instance, it could be stipulated that the Internet provides diverse sources of information. But if a large number of people do not have access to a computer, or if those who have a computer find that accessing these sources is too cumbersome or too expensive, I would find it difficult to conclude that the Internet has rendered unnecessary our interest in promoting broadcasting diversity.

I stress that I have not prejudged the outcome of this inquiry. I thought it appropriate, however, to apprise commenters of the general standard by which I will ultimately decide whether our broadcast ownership rules are no longer necessary.