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) MM Docket No. 98-35
and Other Rules Adopted Pursuant to Section)
202 of the Telecommunications Act of 1996.)

BIENNIAL REVIEW REPORT

By the Commission: Chairman Kennard and Commissioner Ness issuing separate statements; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements; Commissioner Tristani approving in part, dissenting in part and issuing a statement.

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I. INTRODUCTION

1. This Report reviews our broadcast ownership 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.[2]

More recently, Congress has prescribed a period of 180 days from November 29, 1999, in which the Commission is to complete the 1998 biennial review of its broadcast ownership rules.[3] The Conference Report for this 1999 Act states that within the subject period the Commission shall issue a report and if it concludes that it should retain any of the rules unchanged, it "shall issue a report that includes a full justification of the basis for so finding."[4]

2. Six rules are reviewed in this Report: (1) the national TV ownership rule (including the "UHF discount"); (2) the local radio ownership rules; (3) the dual network rule; (4) the daily newspaper/broadcast cross-ownership rule; (5) the cable/television

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). 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. House Rep. 104-458, 104th Cong., 2d Sess. 161 (1996). Also required by Section 202(h) is the biennial review of rules adopted pursuant to Sections 202(a)-(f) of the Telecom Act. These include rules pertaining to cable as well as broadcast cross-ownership.

[2] Section 11(a) of the Communications Act of 1934, as amended, 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." 47 USC § 161.

[3] Section 5003, Pub L. 106-113, 113 Stat. 1501 (1999), Making consolidated appropriations for the fiscal year ending September 30, 2000, and for other purposes.

[4] Joint Explanatory Statement of the Committee of Conference on the "Intellectual Property and Communications Omnibus Reform Act of 1999," at 59.

cross-ownership rule; and (6) an experimental broadcast station ownership rule. The Report provides a regulatory history of each rule, followed by a discussion of the competitive and diversity issues that justify our decision as to whether the rule remains in the public interest.

3. On March 12, 1998, we adopted a Notice of Inquiry ("NOI")[5] in this proceeding seeking comment on the six rules included in this biennial ownership report. The NOI did not seek comment on the local television ownership rule or one-to-a-market ownership rule because these rules were already the subject of pending proceedings and we reasoned that their examination in those proceedings complied with Congress' mandate that we review all of our ownership rules biennially beginning in 1998.[6] On August 5, 1999, we adopted a Report and Order[7] relaxing our local television ownership rule and one-to-a-market ownership rule. Those decisions provided broadcasters with expanded opportunities to realize the efficiencies of television duopolies and local radio/television combinations in markets where an essential level of competition and diversity would be preserved. More specifically, we narrowed the geographic scope of the television duopoly rule from the Grade B contour approach to a "DMA" test. This new approach allows the common ownership of two television stations without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas ("DMAs"). Additionally, it allows the common ownership of two television stations in the same DMA if their Grade B contours do not overlap or if eight independently owned, full-power and operational television stations will remain post merger, and one of the stations is not among the top four ranked stations in the market based on audience share. Furthermore, we adopted waiver criteria presuming, under certain circumstances, that a waiver to allow common local television station ownership is in the public interest where one of the stations is a "failed station," is a "failing station," or where the applicants can show that the combination will result in the construction and operation of an authorized but as yet "unbuilt" station. We also substantially relaxed the radio/television cross-ownership ("one-to-a-market") rule to permit more such combinations, including allowing a party to own as many as one TV station and seven radio stations under certain circumstances. These actions were taken in fulfillment of our obligations under Section 202(h) of the Telecom Act and satisfy its requirements as to the subject rules.[8]

[5] Notice of Inquiry, 13 FCC Rcd 11276 (1998) ("NOI").

[6] NOI, supra at 11279-80.

[7] Report and Order in MM Docket Nos. 91-221 & 87-8, 14 FCC Rcd 12903 (1999) (hereinafter "TV Ownership Order").

[8] The Conference Report accompanying the Telecom Act, states that the, "conferees are aware that the Commission already has several broadcast deregulation proceedings underway. It is the intention of the

4. In the instant phase of our biennial review of broadcast ownership rules, we conclude that the local radio ownership rules, the national television ownership rule (including the UHF discount), and cable/TV cross-ownership rule continue to serve the public interest and so retain these rules. As noted above, we have just recently substantially relaxed our local television ownership and one-to-a-market rules. It is currently too soon to tell what effect this will have on consolidation, competition and diversity. Until we have further information in this regard we believe that these rules remain necessary in the public interest in their current form. However, we will issue Notices of Proposed Rule Making proposing modification of the dual network and newspaper/broadcast cross-ownership rules. Additionally, in the case of the local radio ownership rule, we will issue a Notice seeking comment on alternative methods of correcting certain anomalies in the way we currently define radio markets and the way we count the number of stations in a radio market and the number of radio stations that an entity owns in a market. Finally, we conclude that the experimental broadcast station multiple ownership rule may no longer be in the public interest and will issue a Notice of Proposed Rule Making proposing its elimination.

II. BACKGROUND

5. For more than a half century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity.[9] These goals are separate and distinct, yet also related. Indeed, as recently as 1997, the Supreme Court noted that "[f]ederal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[10] The Supreme Court has also held that both of these goals are important and substantial public policies for First Amendment purposes.[11] Competition is an important part of the Commission's public interest mandate, because it promotes consumer welfare and the efficient use of resources and is a

conferees that the Commission continue with these proceedings and conclude them in a timely manner." H.R. Rep. 104-458, at 164.

[9] For a more extensive discussion of the Commission's competition and diversity goals see TV Ownership Order, supra at 12910-12924.

[10] Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180, 117 S.Ct. 1174 (1997)("Turner II"). (Citations omitted.)

[11] Turner Broadcasting System v. FCC, 512 U.S. 622, 662 (1997)("Turner I").

necessary component of diversity.[12] Diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles. As the Supreme 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 . . . ."[13] 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.

6. This Report uses the framework for reviewing competition and diversity outlined in the NOI to evaluate, as required by the Telecom Act, whether the six rules included in this biennial review continue to be in the public interest.[14] Thus, we assess current levels of competition in the market for delivered video programming, the advertising market, and the program production market to determine whether such competition has eliminated the need for the six rules. Our diversity analysis focuses upon the degree to which broadcast and non-broadcast media, operating within the framework of our ownership rules, advance the three types of diversity (i.e., viewpoint, outlet and source) that our broadcast ownership rules have attempted to foster. Viewpoint diversity refers to the range of diverse and antagonistic opinions and interpretations presented by the media. Outlet diversity refers to a variety of delivery services (e.g., broadcast stations, cable and DBS) that select and present programming directly to the public. Source diversity refers to the variety of program or information producers and owners.[15]

III. STATUS OF MEDIA MARKETPLACE

7. Our decision here concerning the broadcast ownership rules takes account of the ongoing changes in the structure of the broadcast industry. The UHF television discount, the daily newspaper/broadcast cross-ownership rule, the cable/television cross-ownership rule, and the experimental broadcast station ownership rule have not been examined for many years. In reviewing these rules, we recognize that there has been

[12] 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).

[13] 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).

[14] NOI, supra at 11277-78.

[15] See TV Ownership Order, supra at 12911-12, n.29; see also TV Ownership Further Notice, 10 FCC Rcd 3524, 3549-50 (1995).

substantial growth in the number and variety of media outlets in local markets. In contrast, the national television ownership rule, the local radio ownership rules, and the dual network rule were modified in 1996 in accordance with Section 202 of the Telecom Act. While there has been growth in the number and variety of media outlets since the Telecom Act, there have also been significant changes in the ownership structure of the broadcast industry during that period, chiefly consisting of extensive consolidation in the radio and television industries.

8. Section 202(h) of the Telecom Act requires us to determine whether any of our broadcast ownership rules "are necessary in the public interest as the result of competition." We note that some commenters express the belief that this limits our review only to competitive matters and that our analysis must be devoid of diversity considerations. Because the statutory language requires reference to the public interest standard, and because diversity and competition have both been critical components of that standard,[16] our review must consider diversity issues as well. Indeed, the United States Supreme court has identified as a "governmental purpose of the highest order" ensuring the public's access to "a multiplicity of information sources."[17] Also, there is support for our consideration of diversity in this context in the legislative history of the Telecom Act itself. As discussed in our recent local television ownership decision,[18] Congress expressed diversity concerns with regard to at least two of our rules and, with respect to our review of the radio/television cross-ownership rule, expressly instructed the Commission to take into account not only the increased competition facing broadcasters but also "the need for diversity in today's radio marketplace."[19] Finally in this regard, the statutory language appears to focus on whether the public interest basis for the rule has changed as a result of competition, and does not appear to be intended to limit the factors we should consider. Therefore, our public interest determination for each rule is based on an examination of both competition and diversity issues in light of competitive market conditions. The material below provides a brief overview of the number of outlets, ownership structure, and other information relevant to the current status of competition in the video, audio, and newspaper industries. The numbers alone, of course, are not sufficient to determine whether particular media compete with one another in relevant markets or whether different media are adequate substitutes for one another from a diversity perspective.

[16] See, e.g., United States v. Storer Broadcasting Company, 351 U.S. 192, 203 (1956); FCC v. National Citizens Committee For Broadcasting, 346 U.S. 775, 780-81,794 (1978).

[17] Turner II, supra at 190.

[18] TV Ownership Order, supra at 12913.

[19] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996).

9. Video. There are currently over 100 million TV households in the U.S.[20] served by a variety of video outlets. Over-the-air outlets include: 1,243 commercial TV stations (682 UHF, 561 VHF); 373 non-commercial, educational TV stations (248 UHF, 125 VHF); and, over 2,100 low-power TV stations.[21] Sixty percent of commercial TV stations are affiliated with one of the top four networks (ABC, CBS, Fox, & NBC). Another 18 percent are affiliated with the newer national networks: United Paramount (UPN), Warner Brothers (WB) and the Paxson Network (Paxnet).[22] The remaining commercial stations are affiliated with smaller networks or are independents. The average TV household in the U.S. can receive 13 over-the-air TV stations, while 36 percent of all homes can receive 15 or more stations and 9 percent can receive 20 or more stations over the air.[23]

10. There are over 10,400 cable systems passing 96+ million homes and serving almost 67 million TV households.[24] This represents sixty-six percent cable penetration.[25] Sixty-four percent of all subscribers have at least 54 channels and over 98% have a minimum of 30 channels.[26] Today there are over 170 national cable programming networks and 50 regional networks.[27] Many cable systems offer PEG access channels, and some, albeit fewer than a dozen, offer local cable news, educational and public affairs programming. Most, if not all, of these latter type of channels are owned by a local television station or newspaper.

[20] U.S. Television Household Estimates, Nielsen Media Research, September 1999.

[21] FCC Press Release, Broadcast Station Totals as of September 30, 1999, (issued November 22, 1999).

[22] BIA Research Inc., MEDIA Access Pro Data Base, May 22, 2000.

[23] Nielsen Media Research, Television Audience 1996, 1997.

[24] Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket 99-230, ("Sixth Cable Report"), 15 FCC Rcd 978, Appendix B (2000).

[25] Broadcasting & Cable, April 24, 2000, at 62.

[26] Id. at Table B-4.

[27] NCTA, Cable Television developments, Fall 1998/Winter 1999, at 28-136.

11. Other video providers include Direct Broadcast Satellite (DBS), which currently provides up to 350 channels to over 10 million subscribers. Multichannel Multipoint Distribution Service (MMDS) serves over 800,000 subscribers; Satellite Master Antenna Television (SMATV) has approximately 1.5 million subscribers; Home Satellite Dishes (HSD) serve over 1.7 million households; Open Video Systems (OVS) have 60 thousand subscribers.[28] By 1999, fifty percent of households owned a PC and over 100 million Americans were Internet users.[29]

12. Audio. Over 12,600 radio stations are currently on the air (4,783 AM, 5,766 commercial FM and 2,066 educational FM).[30] The average radio market has 22 commercial radio stations. Of 270 Arbitron radio markets, 128 markets (47 percent) are served by more than 20 stations and 90 percent of markets (244 of 270) have over 10 stations.[31]

13. Newspapers. In 1998, there were 1,489 daily newspapers in the U.S. The total circulation for those dailies was about 56 million.[32] There were also 8,193 weekly newspapers with a combined circulation of over 74 million, and a Sunday circulation of over 60 million.[33] There are also a number of special interest newspapers available to readers, catering to a wide variety of audiences. There are 185 African-American newspapers in 35 states and the District of Columbia, 107 Hispanic newspapers published in 35 states and the District of Columbia, 98 Jewish newspapers in 31 states, 159 other "ethnic" newspapers published in the U.S., 43 gay and lesbian newspapers published in 24 states and the District of Columbia, 134 military newspapers published in 38 states, 132 religious newspapers published in 40 states and the District of Columbia, and 1,236 college newspapers published in all 50 states and the District of Columbia.[34] Many of

[28] Sixth Cable Report, supra at Table C-1.

[29] Id. at p.8.

[30] FCC Press Release, Broadcast Station Totals as of September, 30, 1999, (issued November 22, 1999).

[31] These station counts include all in-market stations and selected out-of-market stations based on BIA's "Investing in Radio," 1999 Market Report, 4th Edition.

[32] Newspaper Association of America, Facts About Newspapers 1999, at 15.

[33] Id. at 16, 27, 31.

[34] Editor and Publisher Yearbook 1998, at II-1 to II 124.

these newspapers, however are not published daily, are not in the English language, and are not circulated generally in the community of publication, or have insufficient circulation in the DMA.

IV. RULES

A. National TV Ownership Rule and UHF Discount

1. Regulatory History

14. Section 73.3555(e)(1) sets forth the current national TV ownership rule. That section states:

> No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent.[35]

15. Section 73.3555(e)(2) sets forth the "UHF discount." That section explains that "national audience reach" is based on the number of TV households in Nielsen Designated Market Areas (DMA), and that UHF TV stations are attributed with only 50% of the TV households in the DMA.[36]

16. The Commission first adopted a national ownership limit for television broadcast stations in the 1940s by imposing numerical caps on the number of stations that could be commonly owned, and originally limited common ownership to no more than three stations nationwide.[37] Several years later this was expanded to allow ownership of no more than five stations.[38] In retaining the five station rule in 1953, the Commission

[35] 47 C.F.R. § 73.3555(e)(1).

[36] 47 C.F.R. § 73.3555(e)(2). The UHF discount is intended to recognize the deficiencies in over-the-air UHF reception vis-a-vis VHF reception. As a result, UHF stations are not “credited” with reaching their entire market but, instead, their coverage is “discounted” by 50 percent.

[37] 6 FR 2284-85 (Tuesday, May 6, 1941).

[38] 9 FR 5442 (Tuesday, May 23, 1944).

explained:

> The purpose of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoint as well as to prevent any undue concentration of economic power contrary to the public interest and thus to carry out the underlying purpose of the Communications Act to effectuate the policy against monopolization of broadcast facilities and the preservation of the broadcasting system on a free competitive basis.[39]

17. In 1954, the Commission adopted the "Seven Station Rule" by raising the multiple ownership limit from five stations to seven, with no more than five being VHF stations.[40] The Commission believed that the more rapid and effective development of the UHF band warranted permitting the ownership of additional UHF stations.[41] The Commission noted that it was aware of the serious problems confronting the development of the UHF service, especially in markets with VHF-only set saturation, and that it was in these areas particularly where the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF.[42]

18. Thirty years later, in 1984, the Commission eliminated the Seven Station Rule and established a six-year transitional period during which common ownership of twelve television broadcast stations would be permitted.[43] The Commission determined that repeal of the Seven Station Rule would not adversely affect the Commission's traditional policy objectives of promoting viewpoint diversity and preventing economic concentration.[44] The Commission explained that: 1) changes in the broadcasting and

[39] Amendment of Multiple Ownership Rules, 9 RR 1563 (1953). See Federal Communications Commission v. Sanders Brothers Radio Stations, 309 U.S. 470 (1940).

[40] Amendment of Multiple Ownership Rules, 43 FCC 2797 (1954).

[41] Id. at 2801.

[42] Id.

[43] Amendment of Multiple Ownership Rules, (Gen. Docket 83-1009) 100 FCC 2d 17 (1984).

[44] See id. at 24-46 for a discussion of the effects of eliminating the rule on viewpoint diversity and economic competition.

communications markets,[45] 2) new evidence of the positive effects of group ownership on the quality and quantity of public affairs and other programming responsive to community needs,[46] and 3) the lack of relevance of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets[47] led to the conclusion that the rule was unnecessary to ensure diversity of viewpoints.[48] The Commission determined that the better focus for addressing viewpoint diversity and economic competition concerns was the number and variety of information and advertising outlets in local markets.[49] Nevertheless, the Commission recognized the concerns of some commenters that, if the rule were repealed immediately and in its entirety, a significant restructuring of the broadcast industry might occur before all ramifications of such a change became apparent. Therefore, the Commission established a transitional limit of twelve television broadcast stations.[50] The transitional limit would automatically sunset in six years unless experience showed that continued Commission involvement was warranted.

19. On reconsideration, the Commission, modified its decision.[51] Specifically, the Commission 1) established an audience reach cap of 25 percent,[52] in addition to the

[45] Id. at 18, 28.

[46] Id. at 20.

[47] Id. at 37.

[48] Id. at 19.

[49] Id. at 20. Regarding the possibility of competitive harm, the Commission noted the conclusions of the Department of Justice that "elimination of the Seven Station Rule will raise little risk of adverse competitive effects in any market." The Department concluded that elimination of the rule would not increase concentration in the national network advertising market, because each network has already achieved access to almost every local market through its affiliation agreements. In the local spot market, the Department concluded that "[s]ince spot advertising is sold in local geographic markets, and the rule does not address concentration in those markets, a rule change should not affect competition in spot advertising." Id. at 38, 41. The Commission also noted that elimination of the rule may allow group owned television stations to exploit important efficiencies. Id. at 44.

[50] Id. at 18, 55.

[51] Memorandum Opinion and Order in MM Docket No. 83-1009, 100 FCC 2d 74 (1985).

[52] Defined as 25 percent of the national audience, calculated as a percentage of all Arbitron ADI television households.

twelve station limit, to better account for the effect that relaxation of the rule would have on population penetration; 2) attributed owners of UHF stations with only 50 percent of their ADI audience reach to take cognizance of the limitations inherent in UHF broadcasting; 3) permitted common ownership of an additional two television stations, provided that they were minority controlled; and 4) eliminated the automatic sunset provision. The stated objective was to permit reasonable expansion so as to capture the benefits of group ownership while avoiding the possibility of potential disruptive restructuring of the national broadcast industry.[53] The Commission explained that a numerical cap would prevent the acquisition of a tremendous number of stations in the smaller markets, thus reducing the possibility of disruptive restructuring in small markets, while an audience reach cap would temper dramatic changes in the ownership structure by the largest group owners in the largest markets.[54] The Commission noted that its decision to use both a numerical cap and an audience reach cap was also predicated on concerns regarding the potential impact on industry structure.[55] The Commission further explained that attributing UHF stations with 50 percent of an ADI market's audience reach was intended to address the fundamental disadvantage of UHF television in reaching viewers.[56] The Commission found it inadvisable to terminate the multiple ownership rules for television broadcast stations automatically at the end of six years. The Commission explained that 1) it was appropriate to proceed cautiously in relaxing the rules and 2) an automatic sunset of the ownership rules was unnecessary to achieve the Commission's policy objectives.[57]

20. On March 7, 1996, the Commission amended the national television station multiple ownership rules to conform to the provisions in Section 202(c)(1) of the Telecom Act.[58] Specifically, the Commission eliminated the numerical limit on the

[53] Memorandum Opinion and Order, (Gen. Docket 83-1009) supra at 98.

[54] Id. at 89 and 91.

[55] Id. at 87-88 n. 38.

[56] The UHF Comparability Task Force found that: "Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF. It should be recognized that actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength." Id. at 93.

[57] Id. at 96-97.

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

number of broadcast television stations a person or entity could own nationwide and increased the audience reach cap on such ownership from 25 percent to 35 percent of television households.

21. In our Notice of Inquiry in this proceeding we sought comment on this rule. Particularly, we asked about its effect on competition in the national advertising market and the program production market at the national level. We also sought comment on the rule's effect on existing television networks and the formation of new networks and sought information on the economies of scale that may have been realized as a result of the consolidation permitted by the Telecom Act.[59] Finally, we asked whether the UHF discount should be retained, modified or eliminated in view of the decreasing disparity between VHF and UHF television and, in the event of a decision to modify the rule, whether and, if so, how group owners that exceed any new limits should be grandfathered.[60]

2. Comments on National TV Ownership Rule

22. All of the major networks (ABC, CBS, Fox, and NBC) support total repeal of the national television ownership rule. These networks argue that abolition of the rule would have no effect on the level of diversity and competition in local markets,[61] and retention of the rule hinders broadcasters from achieving economic efficiencies.[62] These networks maintain that group owned stations provide more news and public affairs programming than non-group owned stations.[63] They also argue that removal of the audience reach cap would promote the development of new broadcast television networks.[64] Finally, they argue that the only two markets that may be affected by elimination of the rule, the national advertising market and the market for national

[59] NOI, supra at 11281.

[60] Id. at 11285.

[61] ABC Comments at 5, CBS Comments at 8, Fox and USA Broadcasting Comments at 13, and NBC Comments at 11.

[62] ABC Comments at 6, CBS Comments at 13, Fox and USA Broadcasting Comments at i-ii, and NBC Comments at 15-16.

[63] ABC Comments at 7, CBS Comments at 14-15, Fox and USA Broadcasting Comments at 16-19, NBC Comments at 15.

[64] Fox and USA Broadcasting Comments at i-ii, and NBC Comments at 14-15.

exhibition rights to video programming, would remain unconcentrated.[65]

23. Two group owners (Paxson and Council Tree) support relaxation of the rule. Paxson proposes facilitating the construction of new television stations by allowing group owners to take an equity interest in the new stations in exchange for financing the construction of new stations.[66] The ownership interest would not count for purposes of the audience reach cap. Council Tree suggests permitting group owners that have reached the 35 percent cap to take an equity interest in additional stations, as long at the stations are controlled by small businesses.[67] Again, the ownership interest would not count for purposes of the audience reach cap.

24. A number of commenters support retaining the national television ownership rule.[68] NAB argues that the new television ownership limits have not been in effect long enough to warrant any modification at this time.[69] Network Affiliated Stations Alliance (NASA) asserts that an increase in the audience reach cap will increase the bargaining power of networks and, therefore, diminish localism by making it more difficult for affiliates to program their stations in the interests of the communities they are licensed to serve.[70] Center for Media Education (CME), et al., contend that the recent increase in the cap has led to unprecedented concentration and diminished competition that may enable networks to exercise monopsony power in the program production market.[71] According to CME, et. al., the public is receiving less news and information from fewer

[65] CBS Comments at iv.

[66] Paxson Communications Corporation's Proposal to the FCC to Increase Broadcast Diversity (submitted July 24, 1998).

[67] Council Tree Communications Comments at 9.

[68] National Association of Broadcasters (NAB) Comments at 11-12; Network Affiliated Stations Alliance (NASA) at 6-15; Center for Media Education (CME), et. al. Comments at 2-17; Office of Communication, Inc., United Church of Christ, and Black Citizens for a Fair Media Comments at 4-6; American Federation of Television and Radio Artists (AFTRA) Comments at 3-6; and Gallium Communications, Inc. Comments at 2 and Reply Comments at 2-3.

[69] NAB Comments at 11.

[70] NASA Comments at 2, 5, 12 and 14.

[71] CME, et. al. Comments at 14-16.

sources.[72] American Federation of Television and Radio Artists (AFTRA) asserts that maintaining the existing 35 percent cap will not harm competition and is essential to protect diversity on the airwaves.[73] AFTRA argues that group owners recycle news and public affairs programming from one reporter or news writer, whereas the public interest is better served by having different reporters and news writers in separate markets provide different angles and perspective on the news.[74] One commenter wants the Commission to increase viewpoint diversity by reducing the number of stations a company may own if group owners do not spin off properties on a voluntary basis.[75]

3. Discussion of National TV Ownership Rule

25. We believe that the audience reach cap should be retained at its current level for the present. As an initial matter, Congress prescribed an increase in the cap from 25% to 35% in the Telecom Act. Several considerations motivate our decision not to change the national TV ownership rule. First, we believe that the effects of our recent change to the local television ownership rule should be observed and assessed before we make any alteration to the national limit. Second, the existing reach cap has already resulted in many group owners acquiring large numbers of stations nationwide since the cap was increased to 35 percent in 1996. We also believe that this trend needs further observation prior to any change in the cap.[76]

[72] Id. at 16. As examples, CME, et al. point to situations in Florida and Pennsylvania where commonly owned affiliates of different networks air the same local newscasts.

[73] AFTRA Comments at 3.

[74] Id. at 4-5.

[75] Gallium Communications, Inc. Comments at 2-3.

[76] We note, however, that on November 18, 1999, Fox Television Stations, Inc., filed an "Emergency Petition for Relief and Supplemental Comments" in this proceeding seeking, among other things, repeal of the national broadcast ownership rule. Also, on November 19, 1999, Viacom Inc. filed "Comments" in this proceeding seeking repeal of the same rule and, additionally, the dual network rule. The original deadline for filing comments in this proceeding was May 22, 1998, with June 22, 1998, being the reply comment deadline. These deadlines were later extended, pursuant to the request of the National Association of Broadcasters, to July 21, 1998, and August 21, 1998, for comments and reply comments, respectively. Order in MM Docket No. 98-35, DA 98-854 (released May 7, 1998). The Fox and Viacom filings, having been submitted nearly 18 months subsequent to these deadlines will not be considered in this proceeding. Simply, to do so would provide a precedent for subjecting our biennial review proceedings to unceasing comment cycles, and would deprive other parties of an ability to respond to these new matters absent establishment of new pleading cycles. Accordingly, they will not be considered herein but will be included in the record of our 2000 biennial review of broadcast ownership issues.

26. One factor in our decision is the recent relaxation of our local television ownership rules.[77] As noted above, those decisions provided increased flexibility for the creation of television duopolies and television/radio combinations in local markets while safeguarding an essential level of competition and diversity. We conclude that prudence dictates that we should monitor the impact of our recent decisions regarding local television ownership and any impact they may have on diversity and competition prior to relaxing the national reach cap. Commenters supporting relaxation or elimination of the cap make credible arguments in favor of their position. These arguments include the contention that elimination of, or increase in, the cap would allow additional economic efficiencies and more news and public affairs, increase minority ownership by removing the cap as an impediment to broadcasters obtaining attributable equity interests in minority-owned television stations, and promote the development of new broadcast television networks. We believe, however, that the competitive concerns of opponents of relaxation or elimination of the cap[78] are more convincing under current circumstances. Until we gain experience under the new local television ownership rules we are disinclined to correspondingly relax them on the national level. While we will reexamine this decision in our future biennial reviews of broadcast ownership rules, we intend to proceed cautiously in this area at the present time.

27. Also, elimination of the 12 station numerical cap has already permitted group owners to acquire a large number of stations.[79] The Appendix to this Report provides a snapshot view of the restructuring that has taken place in the broadcast television industry since enactment of the Telecom Act in February 1996. The table lists the number of commercial television stations owned by the top 25 group television owners for 1996 and 2000 ranked by the national audience reach of these television owners. The data show that many group owners have acquired additional stations and increased their audience reach since the Telecom Act's passage.

[77] See TV Ownership Order, supra.

[78] These arguments are that eliminating or expanding the reach cap would increase the bargaining power of networks over their affiliates, reduce the number of viewpoints expressed nationally, increase concentration in the national advertising market, and enlarge the potential for monopsony power in the program production market.

[79] The current rule permits a group owner to acquire a VHF station in every market below DMA 47 (i.e., DMA 48 through DMA 210, a total of 163 stations) and still remain below the 35 percent audience reach cap. By holding UHF stations only, a group owner could acquire a station in every market below DMA 10 (i.e., DMA 11 through DMA 210, a total of 200 stations) and still remain below the 35 percent audience reach cap.

28. Moreover, consolidation is a feature of other video media. In cable, the seven largest operators now serve almost 90 percent of all U.S. cable subscribers, which is up from 63 percent being served by the top 10 multiple system operators ("MSO") in 1990.[80] Thirty-seven percent of satellite-delivered national programming networks are now vertically integrated with a cable MSO. In 1999, for example, one or more of the top six cable MSOs held an ownership interest in each of 101 vertically integrated national programming services. In addition, a significant percentage of the top national programming services are controlled by approximately eleven companies, including cable MSOs, broadcasters and other media entities.[81] Of the top 50 programming services in terms of subscribership, 46 are owned by one or more of these 11 companies.[82]

29. The evidence suggests that the television broadcast industry is still adapting to the recent relaxation of the national and local ownership rules and we wish to avoid actions with the potential for disruptive restructuring. For example, applications for duopolies under our new local television ownership rule were only filed this past November and we believe that we should monitor developments under this new rule prior to making any changes to the national television ownership reach cap.

30. We also intend to proceed cautiously because the Commission has previously recognized that a change in the audience reach cap may well influence the bargaining positions between broadcast television networks and their affiliates.[83] We noted that in some situations, relaxation of the national ownership limits could increase the bargaining power of networks by expanding their option to own rather than affiliate with broadcast television stations. In other situations, however, relaxation of the national ownership limits could increase the bargaining position of group-owned affiliates by creating larger, more powerful groups. In its comments, NASA asserts that the national ownership rule is

[80] Sixth Cable Report, supra at 986; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 94-48, ("First Cable Report"), 9 FCC Rcd 7442, 7514 (1994).

[81] Sixth Cable Report, supra at 1058. The eleven are: ABC/Disney, General Electric, CBS/Viacom, News Corp., Time Warner, Discovery, Rainbow Media Liberty Media, USA Networks, E.W. Scripps and Comcast.

[82] Id. The four unaffiliated services among the top 50 are C-SPAN and C-SPAN2 (both of which are almost wholly funded by the cable industry), WGN and The Weather Channel.

[83] Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, 10 FCC Rcd 11951, 11960 (1995).

the essential mechanism for maintaining the balance between networks and their affiliates to ensure that affiliates can program their stations in the interests of the communities they are licensed to serve.[84] NASA argues that an increase in the audience reach cap will increase the bargaining power of networks.[85] We believe that in considering relaxation of the national ownership rule we should act cautiously in light of the potential impact of this rule on the bargaining positions of networks and affiliates, particularly given the restructuring that may be taking place concurrently on the local level. We do not believe that consolidation of ownership of all or most of the television stations in the country in the hands of a few national networks would serve the public interest. The national networks have a strong economic interest in clearing all network programming, and we believe that independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed. Independent ownership of stations also increases the diversity of programming by providing an outlet for non-network programming. We do not believe that the role played by independently owned affiliates is any less important today than it was four years ago when Congress determined that the public interest was served by maintaining a national ownership limit, albeit it at a slightly relaxed (35% rather than 25%) level.

4. Comments on the UHF Discount

31. A number of commenters advocate elimination or substantial modification of the UHF discount.[86] These groups argue that the original basis for the discount appears to have fallen away. Specifically, the deficiencies in UHF reception that existed in the early years of television have largely been ameliorated by improved television receiver design and the fact that more than two-thirds of all television homes now receive local signals via cable.[87] ABC maintains that the only television households that might have trouble receiving UHF signals are the 32 percent that do not subscribe to cable. ABC contends that if half of those households cannot receive UHF signals, a 50 percent discount is

[84] NASA Comments at 2.

[85] Id. at 5.

[86] ABC Comments at 18-23; NBC Comments at 16; Press Broadcasting and Greater Media Comments at 4-6; and CME, et al. Comments at 17-19.

[87] NBC Comments at 16; ABC Comments at 19; Press Broadcasting and Greater Media Comments at 5; CME, et al. Comments at 17-18.

being applied to rectify a 16 percent disparity.[88] ABC suggests replacing the 50 percent discount with an approach that estimates coverage disparities on a market-by-market basis. Press Broadcasting and Greater Media suggest that all stations that reach at least 51 percent of their market households be treated exactly the same for multiple ownership purposes. Only those stations that, as a matter of demonstrable fact, are unable to reach (either over-the-air or by cable carriage) at least 51 percent of the households in their markets should be accorded some special treatment.[89] CME, et al. argue that the UHF discount contributes to the lack of competition and diversity in the national television market. According to CME, et al., the UHF discount provides an unfair competitive advantage by allowing UHF owners to evade national ownership reach caps.[90] They warn that retaining the UHF discount will reduce the diversity of sources available to the public and potentially allow a handful of owners to control the national news agenda.[91]

32. A number of commenters, however, support retention of the UHF discount.[92] These commenters argue that the original basis for the discount remains. Specifically, these commenters maintain that cable carriage, must-carry rules, and improved receiver design have not created a level playing field between UHF and VHF stations. They argue that economic and technical disparities between UHF and VHF stations continue to disadvantage UHF stations. These disparities include UHF stations having weaker signals, inferior propagation characteristics, higher operating costs, lower ratings, and lower profits, relative to VHF stations. Many of these commenters also contend that the UHF discount is critical to the continued growth of the emerging broadcast networks.[93] Fox and USA Broadcasting maintain that VHF stations typically have a signal reach of 72 to 76 miles, while UHF stations' signal reach is 44 miles.[94] Fox and USA Broadcasting

[88] ABC Comments at 19.

[89] Press Broadcasting and Greater Media Comments at 6.

[90] CME, et al., Comments at 18.

[91] Id. at 19.

[92] Fox and USA Broadcasting Comments at 19-22, NAB Comments at 12-13, ALTV Comments at 2-30, Paxson Comments at 4-27, Telemundo Comments at 5-17, and Univision Comments at 2-16.

[93] Paxson Comments at 16-21, ALTV Comments at 27-29, and Telemundo Comments at 15.

[94] Fox and USA Broadcasting Comments at 21.

argue that the signal reach disparity results in similar inequalities in Grade B coverage, with UHF stations typically achieving approximately 55 to 75 percent of the Grade B area coverage of VHF stations.[95] Two studies submitted by NAB conclude that UHF stations continue to face a penalty in ratings and financial performance.[96] ALTV contends that despite must-carry provisions, many smaller UHF stations are not carried throughout their local area.[97] ALTV explains that stations must provide a Grade B quality signal to the cable system's headend in order to qualify for carriage but, in most instances, the Grade B of a UHF facility does not extend as far as the Grade B contour of a VHF facility. As a result UHF stations are carried on fewer cable systems. Univision asserts that if the UHF disparity no longer exists, then group owners would be taking advantage of the UHF discount by selling their VHFs and buying UHFs.[98] Univision notes that this has not occurred.

33. Commenters seeking elimination or modification of the UHF discount advocate differing grandfathering options. For example, ABC opposes grandfathering,[99] while CME, et al., favor phasing out grandfather rights over a three-year period.[100] In contrast, commenters favoring retention of the UHF discount argue that if the discount is eliminated, existing ownership interests should be grandfathered. For example, Paxson contends that forced divestiture could threaten its ability to compete with other networks and threaten the many stations that would lose access to Paxson's financial resources and programming.[101]

34. Commenters' responses were sharply divided on whether it makes sense to retain the UHF discount once we have transitioned to digital television transmission. Commenters advocating elimination of the UHF discount argue that retention of the UHF

[95] Id.

[96] NAB Comments at 12-13.

[97] ALTV Comments at 18.

[98] Univision Comments at 6.

[99] ABC Comments at 23.

[100] CME, et al., Comments at 19.

[101] Paxson Comments at 21-27.

discount serves no legitimate purpose when a large majority of DTV stations operate on UHF frequencies.[102] In contrast, commenters favoring retention of the UHF discount argue that the conversion to digital television broadcasting will not eliminate the UHF/VHF disparity. Paxson, and Fox and USA Broadcasting note that DTV allotments are based primarily on replication of existing analog service, and VHF NTSC stations that have been assigned a UHF channel for digital service have been allotted higher power levels precisely in recognition of the UHF handicap.[103] NAB and Paxson argue that digital carriage rights and the number of television stations choosing to remain on the UHF band following the digital transition are still undetermined, and these factors should be solidified before the Commission makes any changes to the UHF discount rule.[104]

5. Discussion of the UHF Discount

35. We believe that, for the present time, the UHF discount remains necessary in the public interest. As commenters note, there remains a UHF handicap that has not yet been overcome. Although roughly two-thirds of American viewers obtain their local television stations over a cable television system, still roughly one third do not. They rely on over-the-air reception. UHF stations have greater difficulty in reaching these viewers and cable headends -- thereby hindering their ability to obtain cable carriage -- because of their weaker signal. While the Commission has observed in other contexts that this UHF signal disparity has been ameliorated over the years[105] it has not yet been eliminated. Additionally, because of the higher operating costs of UHF stations, particularly due to their higher power requirements, even when they can reach these viewers they still incur greater expenses than VHF stations in doing so and, thus, remain under a competitive handicap warranting a 50 percent discount.

36. As Univision points out in its comments, if there were no competitive disparity between VHF and UHF television, we would expect group owners to take

[102] See, e.g., NBC Comments at 16, Press Broadcasting and Greater Media Comments at 5.

[103] Paxson Comments at 14, Fox and USA Broadcasting Comments at 22.

[104] NAB Comments at 13, Paxson Comments at 12-16.

[105] 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).

advantage of the UHF discount by selling their VHFs and buying UHFs. The fact that few, if any, group owners have used this strategy suggests that the market recognizes a continuing competitive disparity between the two services. Accordingly, we cannot say the discount is no longer in the public interest as a result of competition.

37. While the technical and engineering evidence submitted by commenters continues to support the UHF discount, we believe that it will likely not continue to do so in the future. The information received in the proceeding suggests that the reach disparity between VHF and UHF stations differs from market-to-market and station-to-station. In addition, we agree with commenters arguing that advances in technology now provide us with the tools to more accurately measure the household reach for each UHF station.[106]

38. In this regard, we note that the existing UHF discount will likely not work well for DTV. Our efforts to replicate existing signal coverage provide DTV stations the ability to reach approximately the same number of television households they currently reach with NTSC stations. Thus, it is not clear that a VHF NTSC station assigned a UHF DTV channel should be permitted a UHF discount if the station reaches the same number of households as did its NTSC counterpart. Nor is it clear that a UHF NTSC station assigned a VHF DTV channel should lose the discount if the DTV station does not reach more households. In this regard, however, we note that, pursuant to Section 5009(c) of Pub. Law 106-113, 113 Stat. 1501, Appendix I (1999), the Commission, on December 7, 1999, issued a Public Notice giving DTV licensees until December 31, 1999, in which to file notice that they intend to seek maximization of their DTV service area.[107] One thousand three hundred and sixteen letters of notification manifesting the intent to file to maximize DTV stations' service areas were filed by that deadline. Accordingly, DTV licensees, including those operating on UHF channels, have been given the opportunity to maximize their DTV coverage areas, and not merely replicate their analog coverage. This should ameliorate at least some of the disparities between UHF and VHF stations' access to viewership in the digital context. Additionally, unlike analog signal reception, where picture quality gets progressively worse as distance from the antenna increases, digital reception is characterized by the so-called "cliff effect." That effect is characterized by DTV television receivers obtaining the same quality of reception at a distance from the transmitting antenna as is obtained close to it until such a point as the data stream is no longer useable by the receiver. At that point reception "falls off a cliff" and no picture or

[106] The Commission has previously recognized that the best indicator of the reach handicap is one that measures the actual coverage limitation inherent in the UHF signal. 100 FCC 2d at 93.

[107] Public Notice, "'Community Broadcasters Protection Act of 1999' Sets Deadline of December 31, 1999 for Full Service TV Stations to File Letters of Intent to Maximize Their DTV Facilities," DA 99-2739 (released December 7, 1999).

sound is produced. In other words, the reception quality remains high when an adequate signal is available. Effectively, as the average DTV signal strength gets weaker at the edge of a station's service area, the picture and sound will be produced for smaller percentages of time, until reception is considered unacceptable. Generally, DTV UHF viewers should have better quality reception at greater distances from the station than is currently the case with respect to analog UHF reception. This, too, should allow DTV UHF stations to obtain better access to off-the-air viewers and should rectify the VHF/UHF disparity to an extent. We believe that under these circumstances, the eventual modification or elimination of the discount for DTV will be appropriate. Accordingly, at such time near the completion of the transition to digital television we will issue a Notice of Proposed Rulemaking proposing a phased-in elimination of the discount.[108]

B. Local Radio Ownership Rules

1. Regulatory History

39. In 1996, the Commission amended the local radio ownership rules to conform to provisions in Section 202(b) of the Telecommunications Act of 1996.[109] Section 73.3555(a)(1) of the Commission's rules sets forth the current local radio ownership rules. These rules currently allow: (1) combinations of up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM), in markets with 45 or more commercial radio stations; (2) combinations of up to 7 commercial radio stations, not more than 4 of which are in the same service, in markets with between 30 and 44 commercial radio stations; (3) combinations of up to 6 commercial radio stations, not more than 4 of which are in the same service, in markets with between 15 and 29 commercial radio stations; (4) combinations of up to 5 commercial radio stations, not more than 3 of which are in the same service, if no party controls more than 50 per cent of the stations in the radio market, in radio markets with 14 or fewer commercial radio stations.

40. In 1938, the Commission adopted a strong presumption against granting radio licenses that would create duopolies (i.e., common ownership of more than one station in

[108] We previously stated that until the UHF discount was addressed in the proceedings where it was under review, any entity that acquired stations during the interim period between the revision of the national reach cap pursuant to the Telecom Act, and a Commission decision on the UHF discount, and which complied with the 35 percent reach cap only by virtue of the UHF discount, would be subject to our eventual decision on the discount. Order, 11 FCC Rcd 12374, 12375 (1996). This has remained the case during the pendancy of the instant proceeding and we will continue to follow this policy until such time as the UHF discount is modified or eliminated.

[109] Order, 11 FCC Rcd 12368 (1996).

the same service in a particular community) based largely on the principle of "diversification of service."[110] In the early 1940s this presumption against duopoly ownership became an absolute prohibition when the Commission 1) adopted rules governing commercial FM service and 2) prohibited the licensing of two AM stations in the same area to a single network.[111] The AM rule barred overlap of AM stations where a "substantial portion of the applicant's existing station's primary service area" would receive service from the station in question, except upon a showing that the public interest would be served through such multiple ownership; and the FM rule prohibited the licensing of a new station which would serve "substantially the same area" as another station owned or operated by the same licensee.[112] The Commission explained that the radio duopoly rules sought to promote economic competition and diversity of programming viewpoints through station-ownership diversity.

41. In 1964, the Commission abandoned its case-by-case adjudication approach and barred common ownership of radio stations when the predicted 1 mV/m contours of the stations overlapped.[113] In adopting the rule, the Commission stated: "When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people."[114] The Commission explained that this objective flowed logically from two basic principles underlying the multiple ownership rules.

> First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public

[110] The Commission's duopoly policy was first articulated in Genesee Radio Corp., 5 FCC 183 (1938).

[111] See Federal Communications Commission, Sixth Annual Report Fiscal Year 1940 (1941) at 68; and 6 FR 2282 (Tuesday, May 6, 1941).

[112] See Report and Order in Docket 14711, 45 FCC 1476 n. 1 (1964).

[113] Id. at 1476. The Commission cited the end of the pioneering era of broadcasting, the large number of applicants for licenses, combined with the increasing importance of the editorial functions of radio stations, as justifications for the timing of the introduction of a numerical standard which was "more restrictive in content and more extensive in application" than the standard it replaced. Id. at 1478.

[114] Id. at 1477.

> opinion at the regional level.[115]

The Commission concluded that the rules were based upon the view of the First Amendment to the Constitution articulated by the Supreme Court in the Associated Press case - i.e., a notion that the 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."[116]

42. In 1988, the Commission replaced the 1 mV/m contour-overlap duopoly standard, which prohibited the common ownership of stations with overlapping 1 mV/m signal contours, with a more relaxed "principal city" contour-overlap standard that prohibited common ownership of AM stations when the predicted 5 mV/m contours overlapped and common ownership of FM stations when the predicted 3.16 mV/m contours overlapped.[117] As such, the rule prohibited combinations of 2 AM or 2 FM stations in the same "principal city" but permitted AM/FM combinations within the same community. The Commission explained that efficiencies of common ownership might be realized by allowing radio broadcasters to own two or more radio stations in the same geographic area, although not in the same principal city. The Commission also explained that the goals of the duopoly rule remained the same: to promote economic competition and diversity of programming and viewpoints through local ownership diversity. The Commission noted a changed marketplace, with an increased number of broadcast stations, the introduction of new services and technologies, and the abundance of competition in local markets, as the compelling reasons to relax the local ownership regulation.[118]

43. In 1992, the Commission again cited changed economic conditions in radio markets as a basis for further relaxing the local radio ownership rules.[119] Specifically, the Commission permitted combinations of up to (i) 3 AM and 3 FM in markets with 40 or more stations, (ii) 3 AM and 2 FM in markets with 30 to 39 stations, (iii) 2 AM and 2 FM in markets with 15 to 29 stations and (iv) 3 stations (with no more than 2 in the same

[115] Id.

[116] Associated Press v. United States, 326 U.S. 1, 10 (1945).

[117] First Report and Order in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989). The 1988 rule recognized that AM service has a larger audience reach than FM and therefore might have been discriminated against under the previous definition that used the same contour for both services.

[118] Id. at 1726-27.

[119] Revision of Radio Rules and Policies, supra.

service) in markets with 14 or fewer stations.[120] Under cases (i)-(iii), combinations were permitted if the combined audience share did not exceed 25 percent. In case (iv), the combination was permitted if it would not result in a single party controlling 50 percent or more of the stations in the market. The Commission noted growth in the number of radio stations and increased competition from non-radio outlets such as cable and MTV. The Commission noted that stations faced declining growth in radio revenues and concluded that economic circumstances threatened radio's ability to serve the public interest. The Commission explained that consolidation within the industry would allow radio broadcasters to realize economies of scale that would then generate greater programming investment and increase radio stations' competitiveness.

44. In response to petitions for reconsideration, the Commission moderated the relaxation of its rules permitting combinations of up to (i) 2 AM/2 FM in markets with 15 or more stations, if the combined audience share did not exceed 25 percent; and (ii) 3 stations in markets of 14 or fewer stations, with no more than 2 in the same service, if the combination would not control 50 percent or more of the stations in the market.[121] The Commission concluded "that adopting more moderate increases . . . in the permissible level of station ownership in certain local markets at this time will provide necessary relief while enabling us to monitor marketplace developments as they unfold."[122]

45. Pursuant to the Telecommunications Act of 1996, the Commission further relaxed its local radio ownership rules in March 1996, as set forth above.[123] The Commission did not change from its 1992 reconsideration decision, however, how it defined the relevant radio market or which stations it counted.[124]

[120] The Commission based the count of radio stations on the number of commercial radio stations meeting minimum audience survey reporting standards within an Arbitron designated radio metro market, or on overlapping principal community contours outside designated radio markets.

[121] Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket 91-140, 7 FCC Rcd 6387, at 6388, 6393-6395 (1992). The Commission decided to count radio stations with reference to a contour overlap standard in all situations, not just those outside of Arbitron designated radio markets. Thus, the Commission defined the radio market "as that area encompassed by the principal community contours . . . of the mutually overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations."

[122] Id. at 6388.

[123] Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368 (1996).

[124] Id. at 12370.

46. In our biennial review NOI, we asked for comment on how the relaxation of local radio ownership rules under the Telecom Act has impacted competition, diversity and economic efficiencies within local radio markets. We noted that since the passage of the Telecom Act, the radio industry has experienced an ongoing trend towards increasing ownership concentration, both in terms of local and national radio markets; although the number of radio stations has increased, the number of owners has decreased. The NOI asked for comment on whether this trend has had a significant impact on local market competition among radio stations, and with other local media outlets, in terms of the program delivery and local advertising markets.[125] The NOI also asked for comment on whether radio ownership concentration has had a significant influence over the expression of viewpoint diversity and the level of news coverage within local radio markets.[126] We noted in the NOI that the NTIA's 1997 annual report on minorities and broadcasting showed that there has been a drop in the number of minority-owned broadcast stations, and sought comment on the relationship between our ownership limits and the opportunities for minority and female broadcast station ownership.[127] In addition, the NOI sought comment on whether our current counting method for purposes of applying the local radio ownership rules should be modified to more realistically account for the number of stations in a radio market.[128]

2. Comments

47. Commenters were divided on whether the current local radio ownership rules, mandated by the Telecommunications Act, have produced positive or negative results. Commenters concerned about the effects of the rules on the marketplace ask the Commission to maintain or strengthen, the current rules.[129] CME, for example, argues that

[125] NOI, supra at 11282.

[126] Id. at 11283.

[127] Id. at 11283.

[128] Id. at 11283.

[129] See, e.g., American Federation of Television and Radio Artists Comments at 8, 10-12 (stating that it is essential that, at the very least, the current radio ownership restrictions remain in place); W. Russell DiBello Comments at 5 (urging FCC to return to the traditional "Seven AM, Seven FM, One TV, One Group Per Market"); CBI Comments at 3, 6, 9 (urging Commission to return to 2AM/2FM radio duopoly in markets below Top-100 radio markets, with existing superduopolies required to divest); CME Comments at 24-26 (stating that the local radio ownership rules should be strengthened); Gilliam Reply at 2-4 (urging the Commission to issue a statement supporting viewpoint diversity, and to issue a notice of proposed rulemaking to propose specific reductions in the local and national ownership limits, and states that until

radio market consolidations have increased the market power of group owners, and explains that by November 1997 all top-250 radio markets were above 1800 on the Herfindahl-Hirschmann Index, implying substantial market concentration.[130] Some commenters further contend that consolidation has increased radio owners' influence over local advertising rates. Americans for Radio Diversity (ARD) explains that the cost of radio advertising is accelerating at roughly triple the rate of inflation, and that it is common for two or three radio station owners to receive 80% to 90% of the advertising revenues in a local market. ARD further argues that consolidation has negatively impacted small business owners who cannot afford the inflated advertising costs which the current conditions help create.[131]

48. Commenters concerned about ownership consolidation also state that such consolidation has diminished local viewpoint diversity. While group owners may have greater resources to invest in local news and public affairs programming, ARD and CME argue that the scale economies from concentrated radio ownership arise in part from a homogenization of news reporting.[132] Similarly, Greater Media, Inc., and Press Communications LLC believe that radio consolidation has reduced viewpoint diversity in broadcasting.[133]

49. Other commenters, however, rejoin that consolidation was the intent behind deregulation of local radio ownership restrictions, and that any resulting problems that

greater ownership diversity is achieved, the Commission should refuse to recommend any further lessening of the ownership rules); UCC/Black Citizens Comments at 5-6 (stating that further relaxation of the radio ownership rules is not warranted at this time).

[130] CME Comments at 25.

[131] ARD Comments at 3-4. ARD also asserts that its members have experienced salary ceilings in markets where a few stations have market dominance. ARD Comments at 12. Commenters such as ARD and Gilliam also argue that radio consolidations have created barriers to entry for minorities. ARD cites the decline in minority ownership from 3.1% to 2.8%, since passage of the Telecom Act. ARD Comments at 3. Other commenters, however, disagree. Connoisseur comments at 7-8; Elyria-Lorain comments at 23-24; Freedom of Expression Foundation comments at 7-8; West Virginia comments at 25 (stating that "while it may be true that the number of radio stations owned by minorities declined between 1995 and 1997, there is nothing to suggest that opportunities for minorities to acquire stations that might otherwise have existed were eliminated as a result of consolidation acquisitions").

[132] CME Comments at 22-24; AFTRA also argues that such consolidation and economies of scale are inherently adverse to the public interest because they tend to homogenize news programming. AFTRA Comments at 11.

[133] Greater Media, Inc. and Press Communications LLC Joint Comments at 5.

may arise with market power should be left to antitrust authorities.[134] Commenters opposing strengthening the local radio ownership rules also state that anti-competitive effects are unlikely in local advertising markets. For example, CBS argues that competitive effects of changes in the local radio ownership limits must be evaluated in the context of the broad advertising markets where radio competes, and cites the fierce inter-media and intra-radio competition that occurs in advertising markets, the willingness of stations to change formats and the sharp fluctuations in listener preferences as evidence that radio incumbents can easily be challenged.[135] NAB asserts that higher ratings and higher quality service resulting from ownership consolidation account for the higher advertising rates.[136] Commenters supporting further relaxation of the local radio ownership rules also argue that consolidation has produced economic gains that reflect improved economies of scale, in terms of operating cost reductions and the improved quality and quantities of radio services offered. CBS cites transactional efficiencies that occur when a group owner can offer "one stop shopping" for advertisers, with benefits for both buyer and sellers of advertising time. Cumulus cites lower costs and improved radio service, and asserts that the improved economies of scale from group ownership allows radio stations in small and mid-sized markets to compete against local newspaper and television stations, which in many cases have enjoyed near-monopoly status with respect to their service to major local advertisers.[137] A.H. Belo and CBS also state that common ownership of multiple media sources results in greater format diversity.[138]

50. Commenters also differed on the Commission's methodology for counting stations in determining compliance with the ownership rules. Commenters such as Air Virginia, Americans for Radio Diversity (ARD), Greater Media, Inc., Press Communications, LLC, and Gross Communications Corporation argue that too many stations are counted under the Commission's current methodology. These commenters proposed to use an Arbitron or other rating service market definition,[139] taking into

[134] ABC Comments at 28; Connoisseur Comments at 7; Cumulus Comments at 25; Elyria-Lorain Comments at 23; Freedom of Expression Foundation Comments at 7; West Virginia Comments at 24.

[135] CBS Comments at 35, 37, 38 and 42. Cf. Fuller-Jeffrey Comments at 4-5 (arguing that radio is at most a minor player in advertising industry).

[136] NAB Reply Comments at 9.

[137] Cumulus Comments at 20-21.

[138] A.H. Belo Comments at 9 and 10. CBS Comments at 43.

[139] Air Virginia Comments at 9 and Greater Media, Inc. and Press Communications, LLC. Joint

account listener audience and station power,[140] and to include only those stations that place a 1mV/m (FM) or 2 mV/m (AM) primary service contour over the furthest city limit of the market's principal city,[141] or using Department of Commerce MSA definitions in place of Arbitron.[142]

51. In contrast, some commenting parties urged the Commission to retain, or even expand, its current radio market definition and station count method. CBS points to Congress' awareness of how the Commission defines a "market" in setting the current regulations, and opposes any changes.[143] ABC proposes using an all-inclusive measure that includes television, radio, cable, DBS, newspapers, video cassettes, yellow pages, direct mail and the Internet, and would substitute antitrust enforcement for the Commission's current local ownership regulation.[144] Cumulus would allow parties to supplement their applications with findings prepared in accordance with Technical Note 101 of the National Bureau of Standards (now National Institute of Standards and Technology), arguing that this alternative approach generally provides a more accurate method for predicting the location of signal contours. [145]

3. Discussion

52. Overview. We conclude that our current local radio ownership rules, as mandated by the Telecommunications Act of 1996, generally continue to serve the public interest. The longstanding goal of the Commission's local radio ownership restrictions has been to promote competition and viewpoint diversity within local radio markets. While some commenters argued that consolidation has had a positive impact on the economic viability of the radio industry, in terms of improved station profitability and

Comments at 4-5.

[140] Americans for Radio Diversity Comments at 5.

[141] Gross Communications Corporation Comment at 9-10.

[142] John W. Barger Comments at 1-2.

[143] CBS Reply Comments at 8.

[144] ABC Comments at 29.

[145] Cumulus Reply Comments at 5-6.

increased value of radio ownership, and has also yielded potential benefits for both the listening public and advertisers, others raised significant concerns about the impact of radio ownership consolidation on both our competition and diversity goals.

53. We recognize that the industry has undergone significant consolidation since 1996. Moreover, we expect further consolidation as a result of our recent ownership decisions relaxing the television duopoly and one-to-a-market rules. We intend to monitor the consolidation and gather information regarding the overall impact on competition and diversity. As discussed more fully below, although we will maintain our current local radio ownership rules for the time being, we are persuaded that further proceedings are warranted to address certain definitional and methodological issues affecting our local radio ownership rules. Specifically, we will commence a proceeding to seek comment on alternative means of defining radio markets and alternative methods of calculating the total number of stations "in a market" and the number owned by a particular party in a market to correct anomalies in our current methodology. We believe that proceeding will lead to rules and procedures that will be easier to apply, provide more certainty for entities contemplating acquisitions, and result in a more rational and consistent application of our multiple ownership limits.

54. Competition. Relaxation of the ownership limits under the Telecom Act has produced financial benefits for the broadcast radio industry. Financial data indicate that the industry has made significant gains since passage of the Telecom Act. For the industry as a whole, station profitability has increased and station values have reached new heights. However, it is not clear whether these gains are the result of greater efficiencies, enhanced market power, or both.

55. We are concerned that increasing consolidation may be having adverse effects on competition, especially in the local radio advertising market. Current data show that in 85 out of a total of 270 Arbitron radio markets, two entities already control more than 80% of advertising revenue; in 143 markets two entities control more than 70 percent of such.[146] We recognize that many advertisers consider alternative media to be good substitutes for radio advertising. However, the Department of Justice (DOJ) has concluded that there are a significant number of advertisers that do not. In distinguishing radio advertising as a distinct market from that of television and newspaper advertising, the DOJ explains that 1) radio advertising is unique in reaching a mobile broadcast audience; 2) radio has a greater ability to target particular audience segments; and 3) radio can be more cost effective and more flexible in responding to changes in local advertising

[146] There are approximately 270 Arbitron radio markets. Revenue estimates are derived from BIA Database (November 1999).

conditions.[147] Additionally, as we noted in our recent TV Ownership Order, "[a] recent econometric study finds that other advertising media are not good substitutes for radio advertising and that radio advertising probably constitutes a separate antitrust market."[148] Thus, for certain advertisers, newspapers, cable, and broadcast television stations do not constitute an effective substitute for radio stations. For these advertisers, the consolidation of local radio markets may raise significant competitive concerns.

56. Diversity. Consolidation of radio stations under group ownership might allow owners to increase investment in news coverage, through the acquisition of more sophisticated news coverage equipment and by maintaining larger, more efficient news staffs. Some commenters thus suggest that ownership concentration has fostered viewpoint diversity. For example, Fuller-Jeffrey Broadcasting Companies, Inc. believes that viewpoint diversity is "alive and well," and that pre-Telecom Act ownership limits had placed a severe economic strain on small to medium-sized companies. It also believes that the present level of consolidation should allow the radio industry to enjoy unprecedented success and stability, which will allow it to better contribute to the public interest. One impact of consolidation, it argues, has been to reduce unnecessary format duplication and to minimize audience overlap.[149] Commenters such as NAB assert that the Commission should look at all media, including television, radio, cable, DBS, Internet and newspapers, along with smaller services such as MMDS and SMATV, when judging program diversity. NAB also finds that group owners do not impose their views on audiences.[150]

57. The scale and scope efficiencies discussed above might in part arise from the consolidation of news coverage at commonly-owned stations, leading to a lessening of viewpoint diversity and to a smaller local market for news talent. If this were the case, this would conflict with the longstanding intent of the radio multiple ownership rules to promote viewpoint diversity through independently owned local stations. Viewpoint diversity has traditionally been viewed in terms of the number of independent viewpoints expressed in local markets, in which case ownership consolidation could have a negative

[147] United States of America v. Jacor Communications, Inc. and Citicasters, Inc. (C-1-96-757) (S.D. Ohio, Aug. 5, 1996), Competitive Impact Statement at 4-5.

[148] TV Ownership Order, supra at 12919, citing Robert K. Ekelund, George S. Ford, and John D. Jackson, "Is Radio Advertising a Distrinct Local Market? An Empirical Analysis," 14 Review of Industrial Organization, 239-256 (May 1999).

[149] Fuller-Jeffrey Broadcasting Companies, Inc., Comments at 2-3.

[150] NAB Reply Comments at 4-6 and 8.

impact on both viewpoint and source diversity. A related concern is that even without the loss of news staffs, viewpoint expression might become homogenized within a commonly owned group of radio stations as a result of the sharing of common news facilities and a common corporate culture.

58. Several commenters lend support to these notions. Air Virginia notes a trend by large group-owned stations towards less news and public affairs and more revenue-generating entertainment programming, particularly with local marketing agreements ("LMAs").[151] Americans for Radio Diversity (ARD) believes that independent broadcasters are more likely to provide diverse and unbiased programming, and that group owners tend to ignore public service to demographic groups deemed to be small or unprofitable, which often impacts minorities and those of lower economic status.[152] CME believes that consolidation has led to reduced public-affairs and local-news programming, since group owners increasingly use syndicated programming and out-sourcing to produce news and public affairs programs, often with the same production company as is used by competitors.[153] It reports that, for example, Metro Networks Inc., a Houston-based company, provides all of the news programming to 10 Washington, D.C., radio stations. Metro, it states, is one of the fastest growing companies in the United States and its growth, according to one of its executives, has been due to the “out-sourcing” his company has found at many radio stations.[154] Similarly, CME reports that Capstar Broadcasting uses ten announcers based in Austin, Texas, to record all between-song breaks and weather and traffic breaks for 37 of its stations in Texas, Arkansas and Louisiana.[155]

59. In view of the large-scale consolidation in the radio industry, we believe that the existing local radio ownership limitations remain necessary to prevent further diminution of competition and diversity in the radio industry. It appears that while there may have been a number of salutary effects flowing from the consolidation that has taken place since 1996, largely in financial strength and enhanced efficiencies, it cannot be said that consolidation has enhanced competition or diversity, and, indeed, may be having the

[151] Air Virginia Comments at 2-4.

[152] Americans for Radio Diversity Comments at 2-3.

[153] Center for Media Education Comments at 22-24.

[154] Id. at 23.

[155] Id. at 23-24.

opposite effect. There currently are hundreds of fewer licensees than there were four years ago and, in many communities, far fewer radio licensees compete against each other.

60. Our competition and diversity concerns outlined above lead us to conclude that the local radio ownership rules should not be further relaxed at this time. The industry is still adapting to the substantial relaxation of local ownership rules that followed enactment of the 1996 Act, and we expect consolidation to continue under our current ownership limits. While some commenters argue that we should tighten the ownership limits, we do not believe this appropriate given that Congress directed the Commission to adopt these limits in 1996.

61. Market Definition and Counting Methodology. Although we have decided to retain our ownership rule, our experience in administering the rule since its implementation in 1996 suggests several concerns that should be addressed, including our method of defining markets, counting the number of stations within them and counting the number of stations owned by a party in a radio market. These definitions and methodologies may be undermining Congress' intent in adopting the 1996 Act.

62. Our definition of a radio market and our method for counting the number of stations in a market were adopted in 1992.[156] These were not altered when we amended our rules to implement Section 202 of the 1996 Act.[157] To evaluate whether a proposed transaction complies with our ownership rules, we first determine the boundaries of each market created by the transaction.[158] Our rules define a radio market as the "area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m contour for FM stations) of the mutually overlapping stations proposed to have common ownership."[159] Thus, we look to all stations that will be commonly owned after the proposed transaction is consummated and group these stations

[156] Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992).

[157] Order, In the Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368, 12370 (1996).

[158] A transaction may create more than one radio market.

[159] Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, supra at 6395. Under our rules, a radio market is created by a proposed transaction. In addition, our rules define a market as a geographic area. The particular geographic area(s) created by proposed transactions often differs from the economic and business conception of the relevant geographic market.

into “markets” based on which stations have mutually overlapping signal contours. A market is defined as the area within the combined contours of the stations to be commonly owned that have a common overlap. For example, suppose an applicant proposes to own stations A, B, C and D. The contours of stations A, B and C each overlap the contours of the other two stations – that is, there is some area which the contours of all three stations have in common. Station D, on the other hand, overlaps the principal community contour of station A, but not those of stations B or C. Under our current definitions, the area encompassed by the combined contours of stations A, B and C form one “market” and the area within the combined contours of stations A and D form another market.[160]

63. To determine the total number of stations “in the market,” as defined above, we count all stations whose principal community contours overlap the principal community contour of any one or more of the stations whose contours define the market. Thus, in the market formed by the contours of stations A, B and C, any station whose contour overlapped the contour of A, B or C would be counted as “in the market.” We use a different methodology, however, to determine the number of stations that any single entity is deemed to own in a given market. For this purpose, we only count those stations whose principal community contours overlap the common overlap area of all of the stations whose contours define the market. Thus, a station owned by the applicant that is counted as being "in the market" because its contour overlaps the contour of at least one of the stations that create the market will not be counted as a station owned by the applicant in the market unless its contour overlaps the area which the contours of all of the stations that define the market have in common. Referring to our example of the market formed by the contours of stations A, B and C, station D would be counted as “in the market” because its contour overlaps the contour of station A. But, station D would not be counted as a station owned by the applicant in the ABC market because station D’s contour does not also overlap the contours of stations B and C. In short, the applicant’s ownership of station D would not be counted against it in determining compliance with the ownership cap in the ABC market.

64. These definitions and methodologies may be producing unintended results that are contrary to Congress’ intent. In the 1996 Act, Congress directed us to adopt radio ownership limits that increase as the size of the market increases. Implicit in Congress’ statutory directive is: (1) a rational definition of radio “market” that reflects the number of stations to which listeners in a particular community actually have access; and (2) a consistent definition of radio market when counting the number of stations in a market

[160] This example assumes that stations A and D are same-service stations, and that at least one other station, B or C, is also in the same service as station A. *See* 47 CFR § 73.3555(a)(2)(“[o]verlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service”).

and when counting the number of stations an entity owns within that market.

65. The Commission's current policies raise concerns on both counts. First, the Commission's use of overlapping signal contours to assess the number of stations in the market can produce unrealistic results.[161] In other contexts, such as our television duopoly and one-to-a-market rules, we recently opted for market definitions based on commercial reality – as measured by ratings services like Arbitron and Nielsen – rather than contour overlaps. In changing our duopoly rule from a contour-based restriction to a DMA-based restriction, we stated that the DMAs "are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products."[162] We believe that the same reasoning could apply to radio markets. Arbitron markets reflect the number of stations that actually target listeners in a particular community because they are the listeners that advertisers pay to reach. We will issue a Notice of Proposed Rulemaking seeking comment on whether Arbitron markets (or a proxy in non-Arbitron areas) would be a more accurate measure of marketplace reality than our current approach.

66. Second, our current methodology for counting the number of stations a party owns in a market may result, as in the example discussed above, in a station being counted in the market for purposes of establishing the number of stations in the market but not being counted against a licensee's cap on the number of stations it may own in that market. In one case, this would have led to a party being permitted, in effect, to own three stations in a four-station market because our method of counting the stations it owned in the market excluded one of its stations.[163]

[161] For example, in a recent case in Wichita, Kansas, a 24-station market according to the commercial Arbitron rating service, the contour overlap approach counted 52 radio stations in the market, including several Oklahoma stations whose signals did not even reach Kansas.

[162] *See* TV Ownership Order, supra at 12926.

[163] *See* In re Application of Pine Bluff Radio, Inc., 14 FCC Rcd 6594 (1999). In Pine Bluff, a station that was logically in a market in terms of listenership and advertiser support, and, in fact, was counted for purposes of determining the total number of stations in that market was not counted against a party's ownership cap in that market because its principal city contour did not overlap the principal community contours of all stations that defined the market. In the 1996 Act, Congress provided that in markets with 14 or fewer commercial radio stations a party may own up to five commercial radio stations, but "may not own, operate, or control more than 50 percent of the stations in such market." (*See* Section 202(b)(1)(D) of the Telecommunications Act of 1996.) Yet, in Pine Bluff, application of our established policies led to one party owning three stations in what could reasonably be considered a four-station market. In Pine Bluff we recognized that this may appear to be an anomalous result but pointed out that it was produced by a methodology that had been consistently utilized since 1992 and that subsequent events in the market had rendered harmless the impact of this anomaly in that case.

67. This shifting market definition appears illogical and contrary to Congress' intent. For instance, in the 1996 Act, Congress provided that:

> in *a radio market* with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in *such market*.[164]

Thus, the plain language of the statute seems to require us to look at the *same market* -- i.e., to use the same definition of "market" -- when determining the number of radio stations in the market and when counting the number of stations that an entity owns, operates, or controls within that market. As a logical matter, if a station has sufficient presence that it should be counted as contributing to the number of stations "in the market," it seems appropriate to count it as being "in the market" for purposes of calculating the ownership cap.

68. We tentatively conclude that our definitions and methodologies in this area may be having effects inconsistent with what Congress intended. In addition, they may be undermining the legitimate expectations of broadcasters, advertisers and the public as to the size of their market, the number of stations in their market, and the number of stations that can be owned by an individual party in that market. To consider appropriate changes to our rules, we will issue a *Notice of Proposed Rule Making* soliciting comment on proposed modifications of our rules in this area.

C. Dual Network Rule

1. Regulatory History

69. Section 73.658(g) sets forth the Commission's current dual network rule. It directly reflects the provisions of Section 202(e) of the Telecom Act, which permits 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;[165] or 2) any such network and an English-language program distribution service

[164] 1996 Act, Section 202(b)(1)(D) (emphasis added).

[165] A "network" is defined with reference to 47 C.F.R. § 73.3613(a)(1) for this purpose. As of the date the Telecom Act was enacted, those networks were NBC, CBS, ABC and Fox.

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. The Conference Report identified with precision the networks to which these definitions were to apply. It 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). The conferees do not intend these limitations to apply if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such networks.[166]

70. The Commission first adopted a dual network rule for broadcast radio networks in 1941 following an investigation to determine whether the public interest required "special regulations" for radio stations engaged in chain or other broadcasting.[167] The rule provided that no license would be issued to a broadcast station affiliated with a network organization that maintained more than one broadcast network.[168] The Commission extended the dual network rule to television networks in 1946.[169] The Commission believed that permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be tied up by the more powerful network entity. In addition,

[166] S. Rep. No. 230, 104th Cong., 2d Sess. at 163.

[167] 6 FR at 2282 (Tuesday, May 6, 1941).

[168] Id. The dual network rule did not apply if the networks were not operated simultaneously or if there was no substantial overlap in the territories served by each network. The rule was directed at NBC, the only company then with two radio networks. The Commission found that operation of the "Red" and "Blue" networks gave NBC excessive control over its affiliates because their contracts did not specify whether a station was part of the "Red" or "Blue" Network. Further, the Commission concluded that operation of two networks gave NBC an unfair competitive advantage over other networks and protected it against future competition. Commission Order No. 37, Report on Chain Broadcasting at 70-73. The Commission indefinitely suspended the rule in 1941 noting that voluntary separation of the Red and Blue networks would soon occur. FCC, Supplemental Report on Chain Broadcasting 14 (1941). After NBC sold its Blue network in 1943, the prohibition was readopted. 8 Fed. Reg. 16,005 (1943).

[169] Amendment of Part 3 of the Commission's Rules, 11 FR 33 (Jan. 1, 1946).

the Commission expressed concern that dual networking could give a network too much market power. The dual network prohibition, therefore, was intended to remove barriers that would inhibit the development of new networks, as well to serve the Commission's more general diversity and competition goals.[170] The dual network rule for broadcast television remained unchanged until 1996, when the Commission amended the rule, as noted above, to conform with the provisions in Section 202(e) of the Telecom Act.[171]

2. Comments

71. Four parties (ABC, CBS, Paxson and WB) submitted comments regarding the dual network rule; all favored repeal. These four broadcast networks argue that the rule constrains their ability to restructure and achieve efficiencies of common ownership.[172] They also argue that antitrust enforcement would be sufficient to address any anticompetitive concerns that might arise in the absence of the dual network rule.[173] ABC and CBS argue that broadcast networks are in poor economic health and struggling to compete with cable and satellite.[174] CBS, Paxson, and WB maintain that competition among broadcast networks and between networks and other video media has never been more intense and mergers between networks, especially those involving an emerging network and an established network, would seldom raise competitive concerns.[175] CBS argues that only the national advertising and program production markets are relevant to competition analysis of the rule and both markets are sufficiently competitive so as not to warrant a *per se* prohibition of any and all mergers between certain broadcast networks.[176]

72. With respect to diversity, ABC maintains that a network combination would

[170] Notice of Proposed Rule Making, 10 FCC Rcd 11951, 11967 (1995).

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

[172] ABC Comments at 25, CBS Comments at 18-19, Paxson Reply Comments at 26-27, WB Reply Comments at 13-14.

[173] ABC Comments at 25, CBS Comments at 19, Paxson Reply Comments at 25.

[174] ABC Comments at 25, CBS Comments at 19-20.

[175] CBS Comments at 23-28, Paxson Reply Comments at 27, WB Reply Comments at 13-14.

[176] CBS Comments at 26-28.

not harm local news and public affairs. ABC argues that a network combination operating two networks would provide national programming while local news and information programming would remain in the hands of the affiliates.[177] Paxson maintains that the diversity of local programming outlets has never been greater and WB asserts that repeal of the dual network rule would increase both diversity and competition because combinations involving an emerging network and an established network could produce efficient economies of scale and marketing advantages.[178]

73. These four networks maintain that the rule discriminates against broadcast networks, as opposed to cable, by allowing mergers between broadcast networks and cable networks, while limiting mergers between broadcast networks themselves.[179] CBS contends that the rule is a "striking example of regulatory inconsistency."[180] CBS argues that there is a diminishing difference between networking and syndication and every major syndicator, except All American and Hearst, produces at least four hours of programming per week with at least 75 percent audience reach and yet remains uncovered by the rule.[181]

3. Discussion

74. The current dual network rule differs markedly from the dual network rule that remained unchanged from 1946 to 1996. The latter prohibited a broadcast station from affiliating with a network organization that maintained more than one broadcast network. In contrast, the current rule effectively permits a broadcast station to affiliate with a network organization that maintains more than one broadcast network, unless such networks are created by a merger between ABC, CBS, Fox, or NBC, or a merger between one of these four established networks and UPN or WB. Thus, the current rule supports common ownership of multiple broadcast networks created through internal growth and new entry, and discourages common ownership of multiple broadcast networks created by mergers between specific network organizations.

[177] ABC Comments at 25-26.

[178] Paxson Reply Comments at 27, WB Reply Comments at 13.

[179] CBS Comments at 21-22, Paxson Reply Comments at 25, WB Reply Comments at 14.

[180] CBS Comments at 23.

[181] Id.

75. Under the current dual network rule, all existing network organizations, and all new network organizations, may create and maintain multiple broadcast networks. There are no limits on the number of broadcast networks that may be maintained by a network organization, or the number of television stations that may affiliate with a network organization. As such, it is theoretically possible for a network organization with sufficient programming to enter into affiliation agreements with every broadcast television station, in every market, and supply all of their programming. The opportunity to create and maintain multiple broadcast networks places broadcast networks on more equal footing with cable, satellite and other multichannel video programming distributors.

76. While the dual network rule gives all network organizations the opportunity to pursue any economic efficiencies that may arise from the maintenance of multiple broadcast networks, it restricts the manner in which specific network organizations become multiple broadcast networks. Specifically, the rule permits ABC, CBS, Fox and NBC to develop multiple broadcast networks by (1) creating new broadcast networks, (2) acquiring new broadcast networks created after passage of the Telecom Act, and (3) acquiring video networks from nonbroadcast media (e.g., cable or satellite) and moving them to broadcast, assuming they could find additional local stations with which to affiliate. However, the rule prohibits ABC, CBS, Fox, and NBC from developing multiple broadcast networks by merging with one another or UPN or WB.

77. We believe that the rule as it applies to UPN and WB may no longer be necessary in the public interest. Accordingly, we will adopt a *Notice of Proposed Rule Making* seeking comment on modifying the dual-network rule. We recognize that program production and broadcast networking are complementary inputs with economic characteristics (e.g., large sunk costs and large transaction costs) that make vertical integration desirable. Since UPN and WB are nascent subsidiaries of large, well-established program producers, a merger of ABC or CBS or Fox or NBC with UPN or WB may be characterized as a merger of an established broadcast network with an established program producer. We believe that allowing such mergers may permit realization of substantial economic efficiencies without undue harm to our diversity and competition goals.[182] However, because we are concerned about the effect of such a merger on our diversity goals, that *Notice* seeks comment on what, if any, safeguards should be imposed to assure a minimal reduction in diversity assuming we alter the rule in some fashion.

[182] Section 202(e) of the 1996 Act directed the Commission to adopt the current dual network. However, it did not preclude us from later changing it. Indeed, Section 202(h) of the 1996 Act directs the Commission to review the rules it adopted pursuant to Section 202 in its biennial reviews and to change them if they are determined no longer to be in the public interest.

78. We do not, however, believe that, at the present time, the dual network rule should be eliminated in its entirety. While there may be some economic efficiencies associated with mergers between established broadcast networks, we believe such mergers would raise significant competition and diversity concerns. As such, our forthcoming *Notice of Proposed Rule Making* concerning the dual network rule will not propose elimination of that portion of the rule that prevents mergers between ABC, CBS, Fox, and NBC.

D. Daily Newspaper/Broadcast Cross-Ownership Rule

1. Regulatory History

79. Section 73.3555(d) of the Commission's rules sets forth the newspaper/broadcast cross-ownership rule. That section states:

> 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.[183]

80. The Commission adopted the newspaper/broadcast cross-ownership rule in 1975.[184] Like all of the Commission's cross-ownership and multiple ownership rules in the broadcast context, the newspaper/broadcast cross-ownership rule rests on "the twin goals of promoting diversity of viewpoints and economic competition."[185] In adopting the rule, the Commission made clear that its diversity goal is paramount; sometimes

[183] 47 C.F.R. § 73.3555(d).

[184] Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, Second Report and Order in Docket 18110, 50 FCC 2d 1046 (1975), recon. 53 FCC 2d 589 (1975), aff'd sub nom. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

[185] 50 FCC 2d at 1074.

competition must "yield . . . to the even higher goals of diversity and the delivery of quality broadcasting service to the American people."[186] The Commission explained that diversification of ownership promoted diversification of viewpoint in that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergence of their viewpoints cannot be expected to be the same as if they were antagonistically run."[187] Thus, the Commission determined that, as a general rule, granting a broadcast license to an entity in the same community in which the entity also publishes a newspaper would harm local diversity, and should be prohibited.[188] The Commission did not foreclose, however, waiver requests under certain circumstances,[189] although it has only granted three waiver requests on a permanent basis.[190] In Fox and Field Communications, essentially, former owners of a newspaper were reacquiring ownership and, accordingly, new broadcast/newspaper combinations were not being created. Additionally, in Fox the Commission found that without a waiver there was substantial risk to the continued viability of the New York Post newspaper. In Columbia Montour, a waiver was granted because there were documented, unsuccessful efforts to sell the broadcast station separately, the broadcast station was a financially troubled small AM station, the common ownership would only involve a newspaper and a small AM station, there was already a high level of media diversity in the market where the facilities were located, the AM station was not a significant competitive force in the market, and the proposed combination was unlikely to have an adverse effect on media competition in the market

81. In 1978, the Supreme Court, in FCC v. National Citizens Committee for Broadcasting,[191] upheld the Commission's rules and waiver policies in their entirety. The

[186] Id. at 1074.

[187] Id. at 1079-1080.

[188] Id. at 1075.

[189] The circumstances are: (1) where there is an inability to dispose of an interest in order to conform to the rules; (2) where the only sale possible is at an artificially depressed price; (3) where separate ownership and operation of the newspaper and the station cannot be supported in the locality; and (4) where, for whatever reason, the purposes of the rule would be disserved by divestiture. 50 FCC 2d at 1085.

[190] 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); Field Communications Corp., 65 FCC 2d 959 (1977); Columbia Montour Broadcasting Co., Inc., 13 FCC Rcd 13007 (1998).

[191] FCC v. National Citizens Committee for Broadcasting, supra.

Supreme Court found the Commission's diversity goal an important public policy that furthered the First Amendment values of public access to diverse and antagonistic sources of information.[192] Although the Supreme Court noted the arguments of opponents of the rule to the contrary, it stated that “notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[193] The Supreme Court approvingly cited the lower court's observation that “[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.”[194] It also confirmed the Commission’s opinion in the Second Report and Order in Docket 18110 that "'it is unrealistic to expect true diversity from a commonly-owned station-newspaper combination. The divergency of their viewpoint cannot be expected to be the same as if they were antagonistically run.'"[195] The Supreme Court noted the availability of waivers to underscore the reasonableness of the rule.[196]

82. For several years in the 1980s and early 1990s, 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 rule.[197] In the Commission's 1994 appropriation, however, Congress provided that the Commission could amend policies with respect to waivers of the newspaper/broadcast cross-ownership rule as it applied to radio.[198] Subsequently, Congress dropped all restrictive language concerning the rule

[192] Id. at 795.

[193] Id. at 796.

[194] Id. at 796-97, citing 181 U.S.App.D.C. at 24, 555 F.2d at 961.

[195] Id. at 797, citing Second Report and Order in Docket 18110, 50 FCC 2d 1046, 1079-80 (1975).

[196] Id. at 802 n.20.

[197] See, e.g., Department of Justice and Related Agencies, Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992). These appropriations restrictions on eliminating the rule 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 Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

[198] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1153, 1167 (1993).

from the Commission's appropriations, and thus removed the statutory ban on the Commission's review of the rule itself.[199]

83. Although the Telecommunications Act of 1996 addresses various broadcast cross-ownership issues, it does not address newspaper/broadcast cross-ownership issues; indeed, the legislative history of that Act reveals that the House of Representatives explicitly considered and rejected changes to the newspaper/broadcast cross-ownership rule.[200] Thus, while the Commission now has the authority and obligation to reevaluate the newspaper/broadcast cross-ownership rule, and its policy regarding waivers thereof, there is no explicit Congressional guidance on how that authority should be exercised. However, we believe that there may be certain circumstances in which the rule may not be necessary to achieve the rule's public interest benefits. We, therefore, will initiate a rulemaking proceeding to consider tailoring the rule accordingly.

84. As a result of issues raised in the merger of The Walt Disney Company and Capital Cities/ABC, Inc.,[201] in September 1996 we issued a Notice of Inquiry soliciting comment on the possible revision of our waiver policy as to newspaper/radio combinations.[202] In that Notice we asked whether we should revise our waiver policy in ways that might make it less stringent and/or more objective, such as by adopting a voice count test.

85. Subsequently, in the instant proceeding, we solicited comment on whether the overall newspaper/broadcast cross-ownership rule should be retained, modified or eliminated.[203] In the biennial review NOI we expressed the view that permitting the

[199] Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996).

[200] 141 Cong. Rec. E-1571 (August 1, 1995).

[201] Capital Cities/ABC, Inc., 11 FCC Rcd 5841 (1996).

[202] Notice of Inquiry in MM Docket No. 96-197, 11 FCC Rcd 13003 (1996).

[203] NOI, supra at 11288. During the pendency of the newspaper/radio waiver policy proceeding, the Newspaper Association of America filed a petition for rulemaking to eliminate the newspaper/broadcast cross-ownership rule. 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 (filed April 27, 1997). In our NOI in the instant proceeding, we stated that we would incorporate NAA's petition in this proceeding, and invited comment on it. Id. at 11286. Additionally, on August 23, 1999, NAA filed an Emergency Petition for Relief. This petition, like NAA's prior Petition for Rulemaking, argues in favor of repeal of the newspaper/broadcast cross-ownership rule, although in this pleading NAA's arguments are based in part on the Commission's

owner of a broadcast TV or radio station to own a newspaper, or visa versa, could give a common owner the market power to unilaterally raise local radio, television, and/or newspaper advertising rates.[204] However, we also expressed the belief that the broadcast media and newspapers were not likely to compete in the markets for delivered programming or program production and, accordingly, elimination of the rule would likely not have adverse competitive impact in these markets.[205] We asked for comment on alternatives to elimination of the rule and other possible economic effects from such elimination (e.g., benefits to the public from efficiencies to be realized from joint operations).[206] Finally, we solicited comment on the effects elimination of the rule might have on our diversity concerns and specifically solicited comment on the arguments made in a Petition for Rulemaking filed by the Newspaper Association of America seeking repeal of the rule.[207]

2. Comments

86. Opponents of the rule claim that the Commission has never empirically demonstrated that the rule furthers its competition and diversity objectives.[208] In any event, they assert, media markets are dramatically more competitive and diverse now than when the Commission adopted the rule, such that the rule is no longer in the public interest,[209] and perhaps is even unconstitutional on First Amendment or other grounds.[210]

action in the TV Ownership Order. As with the pleadings filed by Fox and Viacom, see supra n. 76, this pleading will be treated as a late-filed comment and not considered in this proceeding. Rather, we will include these comments in the record of the 2000 biennial review.

[204] Id. at 11288.

[205] Id. at 11288-89.

[206] Id. at 11288-89.

[207] Id. at 11289-90.

[208] See, e.g., Lee Enterprises Comments at 3-4; NAA Comments at 17.

[209] See, e.g., ABC Comments at 26-27; ALTV Comments at 36; Lee Enterprises Comments at 4; NAA Comments at 17; Gregory Sidak Comments at 8-11.

[210] Elyria/Lorain Comments at 16-17; Freedom of Expression Comments at 22-23; Hearst Comments at 31; Gregory Sidak Comments at 45-61; Media Institute Comments at 11-13; NAA Comments at 83-84; Tribune Comments at 14-15; West Virginia Radio Comments at 14 (all First Amendment grounds). See also Cox/Media General Comments at 25-29 (equal protection grounds).

Opponents explain that the efficiencies of grandfathered combinations have enabled them to air more extensive and in-depth news and public affairs programming than their competitors, and to develop new media ventures, and therefore suggest that the efficiencies of combinations promote outlet diversity.[211] They claim that efficiencies are better realized through combinations than non-attributable joint ventures,[212] and are not driven by consolidation of content or editorial decisions and so do not compromise viewpoint diversity.[213] Opponents also contend that combinations would not affect competition in the advertising market, because the market share of newspapers is overstated in that it includes classified advertising, a market in which broadcast radio and television do not compete.[214] For these reasons, many commenters urged the Commission to repeal the newspaper/broadcast cross-ownership rule, or modify it to allow combinations if a certain number of independent voices remain after consummation of the transaction.[215]

87. Proponents of the rule counter that many of the new media outlets, such as the Internet, OVS and DBS, do not add to viewpoint diversity on the local level.[216] They also point out that new programs by the same broadcasters do not add to viewpoint diversity.[217] Rule proponents also state that the rule does not prohibit all combinations,

[211] A.H. Belo Comments at 11-13; Chronicle Comments at 16; Chronicle Reply Comments at 2. See also Hearst Reply Comments at 6-8; Hearst/Argyle Reply Comments at 2-5; NAB Reply Comments at 9-12. Stated another way, the rule discourages optimal performance and stifles new voices. ALTV Reply Comments at 25-26; NAB Comments at 9-10 (noting that combinations could save distressed newspapers and therefore facilitate diversity); Tribune Comments at 60-65.

[212] Chronicle Comments at 25-27; Hearst Reply Comments at 5-6.

[213] Hearst Comments at 16-20. Cf. Lee Enterprises Comments at 3-5 (explaining unlikelihood that combination would consolidate viewpoints because reporters and viewers would object); NAB Comments at 7-8 (observing that most grandfathered combinations have kept operations separate because unprofitable to combine); Schermer Reply Comments at 1-4 (stating that consumers will obtain news from other sources if combination denigrated journalistic integrity).

[214] Hearst Comments at 18-19; NAA Petition at 36.

[215] Elyria/Lorain Comments at 19-20 (Commission should allow newspaper/radio combinations if two independent voices would remain); Freedom of Expression Comments at 25-26 (two voices); Gannett Comments at 38 (thirty voices); West Virginia Radio Comments at 21-22 (two voices).

[216] CME Comments at 26-28.

[217] CME Comments at 26-28; OCC/UCC Comments at 6-7.

but rather only those in the same market; moreover, existing waiver policies allow combinations where a broadcaster or newspaper publisher is failing and cannot survive but for the combination.[218] Proponents also state that the broadcast and newspaper industries are already highly concentrated,[219] and that efficiencies could be realized from joint ventures rather than attributable combinations.[220] Proponents further claim that newspapers dominate the local advertising market, particularly in smaller markets, such that combinations would harm competition in that market.[221]

3. Discussion

88. We believe the newspaper/broadcast cross-ownership rule continues to serve the public interest because it furthers our important and substantial policy of viewpoint diversity. We therefore conclude that, as a general matter, the rule should be retained. However, we believe that there may be circumstances in which the rule may not be necessary to achieve its intended public interest benefits. We, therefore, will initiate a rulemaking proceeding to consider tailoring the rule accordingly.

89. Effects on Diversity. While the media marketplace has changed since we adopted the rule, we find that the changes are insufficient to justify repeal and we will need to gather a more complete record to determine what modifications may be appropriate. First, many of the new media outlets do not yet appear to be substitutes for broadcast stations and newspapers on the local level for diversity purposes.[222] As we have stated in the biennial review NOI and elsewhere, we are most concerned with viewpoint diversity at the local level. This is because "[m]onopolization on the means of mass communication in a locality assures the monopolist control of information received by the public and based upon which it makes elective, economic, and other choices."[223]

[218] Independent Free Papers Comments at 2-4.

[219] CME Comments at 26-28.

[220] Independent Free Papers Comments at 2-4.

[221] Id. at 3-4.

[222] See, e.g., CME Comments at 26-28; Independent Free Papers Comments at 1. See also Black Citizens for a Fair Media Comments in MM Docket No. 96-197 at 18-19.

[223] Further Notice of Proposed Rule Making in MM Docket Nos. 92-221 and 87-8, 10 FCC Rcd 3524, 3559 (1995)(hereinafter “TV Further Ownership Notice”).

New outlets such as DBS and MMDS, however, typically do not provide locally originated programming. In addition, even though cable systems may originate local programming, they are required to dedicate PEG channels only if their franchise authorities require them to do so, and to provide leased access channels only as a function of their activated channels.[224] There is no requirement that the material offered on cable access channels be locally originated or oriented. By contrast, as part of their public interest obligations, broadcasters are required to air programming that is responsive to issues facing their communities of license, and, although they are not required to do so, local daily newspapers typically cover local issues, endorse local candidates, and provide a platform for the presentation of local opinion.[225] Thus, the fact remains that broadcast services, in particular broadcast television, and newspapers have been and continue to be the dominant sources of local news and public affairs information in any given market.[226] Importantly, while the number of broadcast stations has increased in the past several years, the number of daily newspapers has decreased.[227] On one hand, some commenters argue that this warrants the Commission allowing newspapers to combine with local broadcast stations in order to realize the economies of joint operation, helping them to preserve their newspaper. On the other hand, to the extent that this suggests that the survival of some newspapers may depend on their joint operation with local broadcast stations, we have a waiver standard that can accommodate such instances.[228]

90. Second, we note that not all of the new media in a given market are available to all consumers in the market to the same extent as broadcast services and newspapers. Broadcast radio and TV are available free of charge to anyone who makes an investment in receiving equipment, and much of the public have such equipment; for example, 98.2%

[224] 47 U.S.C. §§ 531, 532.

[225] TV Further Ownership Notice, supra at 3557.

[226] Id. at 3555-57. The Commission has distinguished broadcast television from radio as having more visual impact and serving more people as a primary source of news. See, e.g., TV Further Ownership Notice, supra. at 3557-3558. Almost 70% of American adults surveyed indicated that they use television as their primary source of news. The Roper Organization, "America's Watching: Public Attitudes Toward Television, 1997," (New York, 1998).

[227] Independent Free Papers Comments at 5 (noting that in 1975, there were 1,756 daily newspapers in the United States, and in 1997, there were 1,520).

[228] See Fox Television Stations Inc., 8 FCC Rcd 5341(1993), aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995).

of Americans own a TV set.[229] Similarly, newspapers are available to anyone for a nominal charge. DBS, MMDS, and the Internet, however, are available only to those who both purchase or rent equipment and, except in the case of the Internet where some Internet Service Providers offer Internet connections free of direct charge, subscribe to a service, the monthly fees for which services are typically several times the cost of a newspaper subscription.[230] In addition, in the case of the Internet, the sunk cost of a computer and the software necessary to browse the Internet is typically several times that of a radio or TV.

91. Third, although some grandfathered combinations report that efficiencies they have derived therefrom have enabled them to air more news and public affairs programming than their competitors such additional programming does not necessarily enhance our policy goal of viewpoint diversity if the additional programs all come from the same source. The Commission has previously explained that its cross-ownership and multiple ownership rules encourage "outlet" and "source" diversity as an indirect means to achieve viewpoint diversity:[231]

> The Commission has felt that without a diversity of outlets, there would be no real viewpoint diversity -- if all programming passed through the same filter, the material and views presented to the public would not be diverse. Similarly, the Commission has felt that without diversity of sources, the variety of views would necessarily be circumscribed.[232]

92. Thus, as the Commission stated when it adopted the newspaper/broadcast cross-ownership rule: "it is unrealistic to expect true diversity from a commonly-owned newspaper combination. The divergence of their viewpoints cannot be expected to be the

[229] National Association of Broadcasters Internet website at: http:www.nab.org/irc/Virtual/faqs.asp (citing National Bureau of Advertising, "TVB Basics – Cyber Edition which cites Nielsen Media Research).

[230] For example, the Washington Post advertises a monthly subscription for $2.65 a week or, approximately, $10.60 per month, while Internet service can be obtained for free (supported by advertising) or by monthly subscription for approximately $15-20. DirecTV can cost from approximately $20 per month to over $80 per month, depending on the package of programming ordered.

[231] TV Further Ownership Notice, supra. at 3549-3550. "Outlet" diversity refers to "a variety of delivery services (e.g., broadcast stations) that select and present programming directly to the public"; "source" diversity refers to "a variety of program producers and owners." 10 FCC Rcd. at 3549-3550.

[232] Id. at 3550-3551.

same as if they were antagonistically run."[233]

93. We also emphasize that media markets are undergoing significant changes, occasioned by the Telecommunications Act of 1996 and our decision to relax other cross-ownership and multiple ownership rules and waiver policies. The Telecommunications Act directed the Commission to modify its radio ownership rules. Between the enactment of the Telecom Act and March 2000, the number of radio station owners declined by 22 percent from approximately 5,100 owners in March 1996, to about 4,000 in March 2000. In addition, we have recently amended our "TV duopoly" and "one-to-a-market" rules and waiver policies and we propose other changes to still other broadcast ownership rules or policies as a result of this biennial review. The response of the market to these rule changes will provide us concrete, empirical information about their impact on our public policy goals for use in our future biennial reviews. Therefore, the dominance of broadcast services and newspapers in providing local news and public affairs information, may suggest that a measured approach to modifying the newspaper/broadcast cross-ownership rule is appropriate at this time.

94. Effects on Competition. With respect to competition, we also emphasize that the record was not clear on several points. First, it was not clear that grandfathered combinations derived efficiencies only from co-located combinations. For example, Chronicle provided information that its combination aired more news and public affairs programming than its competitors in a given market, but the combination that produced these benefits included both co-located and non-co-located broadcast stations and newspapers. The newspaper/broadcast cross-ownership rule only prohibits combinations in the same market. Second, it was not clear that the efficiencies grandfathered combinations derived could not be realized from non-attributable joint ventures. Managers of existing newspaper/broadcast combinations, as well as other commenters, report that the broadcast station and the newspaper keep separate news staffs in combination situations because the combination does not derive efficiencies from consolidation of such staff. Accordingly, it does not appear that mergers of newspapers and broadcast stations would produce such efficiencies. Third, it was not clear that the efficiencies of newspaper/broadcast combinations produced any meaningful benefits for advertisers, and therefore for viewers as consumers of the advertisers' goods. As indicated above, some commenters explain that grandfathered combinations have provided more news and public affairs programming, and one could extrapolate that this translates into more advertising and viewing options. There was no evidence, however, that any of these additional options translated into benefits for advertisers in the form of reduced rates, or corresponding benefit for viewers in the form of reduced prices for

[233] 50 FCC 2d at 1079-1080.

advertised products and services. Accordingly, we conclude that the newspaper/broadcast cross-ownership rule continues to provide important public interest benefits and that its elimination would not necessarily provide any offsetting benefits to competition.

95. Notwithstanding our general conclusion that the rule should be retained, we recognize that there may be situations in which the rule may not be necessary to protect the public interest in diversity and competition. We wish to examine in greater detail such situations. There may be instances, for example, in which, given the size of the market and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed. While the record contains several proposals for tailoring the rule to address this issue, we believe that a more complete record can and should be developed regarding the circumstances in which the rule may not be necessary to achieve its intended public interest benefits. We will examine whether the rule needs to be tailored to address contemporary market conditions. We will issue a notice of proposed rulemaking seeking comment on these and other potential modifications of our rule. While we generally believe that the newspaper/broadcast cross-ownership rule should be retained, this rulemaking will ensure that the rule is tailored to cover only those circumstances in which it is necessary to protect the public interest.

96. Additional Matter. In 1996, the Tribune Company, which publishes a newspaper in Fort Lauderdale, Florida, agreed to merge with Renaissance Communications Corporation, which owned six television stations including one in Miami, Florida. Although Tribune sought a permanent waiver of the newspaper/broadcast cross-ownership rule to permit this combination, the Commission granted the license transfer subject to the condition that Tribune divest itself of either the Ft. Lauderdale newspaper or the Miami television station within one year, expiring March 22, 1998. On March 6, 1998, Commission staff granted an extension of Tribune's temporary waiver subject to the review of the newspaper/broadcast cross-ownership in the instant proceeding and required that it come into compliance within six months of the completion of the 1998 biennial review (unless, of course, Tribune's combination was in compliance with any new cross-ownership rule adopted as a consequence of that review).[234] We explained that an extension was appropriate because it would be unduly harsh for Tribune not to receive further interim relief given the confusion that may have resulted from the Commission's initial waiver decision with respect to its policy on interim waivers pending rulemaking. We also stated that an extension would not so compromise our diversity and competition interests as to outweigh the substantial equitable considerations favoring the grant.[235] Given our decision here to issue a Notice

[234] Stockholders of Renaissance Communications Corporation, 13 FCC Rcd 4717 (1998).

[235] Id. at 4718.

of Proposed Rulemaking seeking comment on possible modifications of the newspaper/broadcast cross-ownership rule, and the unusual circumstances that led to the prior extension of Tribune's waiver,[236] we will extend that temporary waiver, under the same terms and conditions now applicable, until the completion of the rulemaking.

E. Cable/Television Cross-Ownership Rule

1. Regulatory History

97. Section 76.501(a) of the Commission's rules sets forth the "cable/TV cross-ownership rule." That section states:

> No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).[237]

The Commission adopted the cable/TV cross-ownership rule in 1970.[238] In doing so, the Commission noted its concerns about concentration in the broadcast industry,[239] and stated that the rule would further the Commission's policy favoring diversity of control over local mass communications media, and thereby lead to diverse sources of programming.[240] The Commission noted that it wished to avoid over-

[236] We note particularly the withdrawal of the waiver opponent's opposition to the joint operation as long as Tribune continues to operate the newspaper and television station separately and the fact that we have found the joint operation does not so compromise our diversity and competition interests as to outweigh the substantial equitable considerations favoring the grant of an interim waiver.

[237] 47 CFR § 76.501(a).

[238] 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, Docket No. 18397, Second Report and Order, 23 FCC 2d 816 (1970), recon., 39 FCC 2d 377 (1973).

[239] Second Report and Order, supra. at 819-820.

[240] Id. at 820.

concentration of media control.[241] On reconsideration, the Commission reiterated that its "adoption of these provisions -- designed to foster diversification of control of the channels of mass communication -- was guided by two principal goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas."[242]

98. Congress codified and then repealed a statutory prohibition on cable/TV cross-ownership. On October 30, 1984, the Cable Communications Policy Act of 1984 became law.[243] Section 613(a)(1) of the Cable Act of 1984 codified the cable/TV cross-ownership rule.[244] Section 202(i) of the Telecommunications Act of 1996, however, eliminated section 613(a)(1) of the Cable Act of 1984,[245] thereby ending the statutory bar to cable/TV cross-ownership. In eliminating the bar, however, Congress stated: "The conferees do not intend that this repeal of the statutory prohibition should prejudge the outcome of any review by the Commission of its rules."[246] The instant proceeding is the first one in which the Commission has reviewed the rule since its adoption.

99. In the Biennial Review NOI we solicited comment on the cable/TV cross-ownership rule. Specifically we asked for comment on the possible effects that repeal or relaxation of the rule might have on various markets, including the market

[241] Id. at 821.

[242] 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, Memorandum Opinion and Order, 39 FCC 2d 377, 391 (1973).

[243] Pub. L. No. 98-549, 98 Stat 2779 (1984).

[244] Section 613(a)(1) stated: "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." The Commission found no need to modify Section 76.501(a) of its Rules as a result of this codification. Report and Order in MM Docket No. 84-1296, 58 RR 2d 1, 14 (1985).

[245] 47 USC § 533(a)(1).

[246] H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 165 (1996).

for delivered programming, on the appropriate scope of the product and geographic advertising markets in which cable and broadcast television compete, and on whether cable/broadcast television combinations could exercise monopsony power[247] in the program production markets. Additionally, we sought comment on the impact on diversity of both the increased number of video outlets and allowing cable/television cross-ownership.

2. Comments

100. Twelve parties commented on the cable/TV cross-ownership rule; seven supported retention of the rule,[248] and five supported repeal or modification.[249] Opponents of the rule note that relevant markets are more competitive and diverse than when the Commission adopted the rule, and state that the rule no longer serves the public interest,[250] and perhaps is even unconstitutional.[251] Opponents explain that the current delivered programming market now includes more broadcast television stations, DBS, MMDS, SMATV, OVS, VCRs, and even the Internet.[252] They contend that the advertising market is competitive and that the market share of broadcasters is significantly larger than that of cable.[253] Opponents also suggest that the program production market would not be affected by repeal of the rule, because most cable systems that provide local programming produce it themselves; very few cable systems buy syndicated programming for their own local channels. Opponents also claim that carriage and channel positioning rules, and the incentive of cable operators to provide their customers with the television stations that they desire on channel positions that work best for customers ensure that cable/TV combinations would not discriminate in favor of

[247] We defined this power in this context as the ability of the cable/television combination to artificially restrict the price paid for programming. NOI, supra at 11292-93.

[248] The seven commenters are ABC, ALTV, CME, NASA, NAB, OCC/UCC, and Univision.

[249] The five commenters are Ameritech, NBC, NCTA, Time Warner, and Warner Brothers.

[250] See, e.g., NCTA Comments at 5-12.

[251] See, e.g., Time Warner Comments at 6-7; Time Warner Reply Comments at 7.

[252] NCTA Comments at 5-6.

[253] Id. at 8.

their owned stations.[254] Opponents further suggest that repeal of the cable/TV cross-ownership rule would not impact diversity. They explain that consumers of news and public affairs information have numerous alternatives from which to choose, and they point out that cable operators provide local programming through leased-access and PEG channels, and in many instances do not have control over that programming.[255] For these reasons, opponents of the rule contend that its economic costs outweigh its benefits;[256] some claim that repeal would increase competition and diversity by facilitating the development of new broadcast networks, and suggest that if the Commission repeals the rule, it could accomplish its competition and diversity objectives through certain conditions and safeguards.[257]

101. Proponents of the rule claim that the rule continues to serve the public interest because cable is the dominant competitor in the multichannel video programming distribution market, and thus serves as a "gatekeeper" to the delivered programming market.[258] Proponents also contend that a cable/TV combination could harm competition in the advertising market by discriminating in favor of its television station and cable programming services, manipulating carriage and channel positioning and offering joint advertising rates, realizing economies of scale, driving competitors out of the market and frustrating new entrants.[259] Proponents also explain that our carriage and channel positioning rules are not sufficient to deter anticompetitive discriminatory conduct as a joint owner could still offer joint advertising opportunities and joint cross-promotions

[254] Id. at 10; Time Warner Comments at 18. See also NBC Comments at 17-18 (contending that rule was motivated by concern that cable operator might not carry programming of non-affiliated broadcast station, but must-carry rules address this and have been affirmed by Supreme Court).

[255] NCTA Comments at 12-13; Time Warner Comments at 16.

[256] NCTA Reply Comments at 8.

[257] Ameritech Comments at 23; Warner Brothers Reply Comments at 4, 8. Additionally, we note that on January 27, 2000, the WB Television Network filed “Supplemental Comments” and a “Request for Leave to File.” The Supplemental Comments argued for elimination of cable/TV cross-ownership rule. We will treat this filing in accord with our treatment of the late-filed Fox and Viacom comments, as set forth above.

[258] ABC Comments at 29-30; NAB Comments at 15; NAB Comments at 15; NASA Comments at 15.

[259] NASA Comments at 18.

unavailable to other competitors.[260] Additionally, absent the cable/TV cross-ownership rule, they contend that there would be no structural regulatory impediment to combined ownership of, for example, AT&T/TCI, GE and NBC by a single entity, creating a combination with unique competitive advantages.[261] Proponents suggest that cable/TV combinations would compromise diversity, and explain that a combination would reduce the number of independent sources of local news.[262]

3. Discussion

102. As explained more fully below, we agree with proponents of the rule that it continues to serve the public interest because it furthers our important public policies of fostering competition and viewpoint diversity. The cable/TV cross-ownership rule promotes competition and diversity and prevents unfair discrimination against competitors, including in forms not covered by existing law. We therefore retain the rule.

103. Effects on Competition. We conclude that the rule continues to serve the public interest because it furthers our goal of competition in the delivered video programming market.[263] This market includes an array of participants, such as operators or providers of broadcast television, cable systems, DBS, MMDS, OVS, SMATV, and possibly even the Internet and videocassettes for VCRs. Sixty-seven percent of American television households, however, subscribe to cable.[264] In the context of discussing the status of competition in the market for the delivery of multichannel video programming, the Commission stated in its most recent Cable Competition Report that "[t]he market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry."[265] Under these circumstances, we agree

[260] ALTV Comments at 38; NASA Comments at 18-20; OCC/UCC Comments at 8; Univision Comments at 6-14.

[261] NASA Comments at 19.

[262] CME Comments at 28-29; NASA Comments at 16; OCC/UCC Comments at 8. CME also contends that a cable/TV combination would have an incentive to discontinue the programming of local news altogether on the cable system in order to avoid competition with its broadcast affiliate. CME Comments at 28-29.

[263] As discussed below, the record was unclear on whether the rule continues to serve the public interest as a result of competition in the advertising and program production markets.

[264] 13 FCC Rcd. at 18.

[265] Sixth Cable Report, supra at 1044.

with proponents of the rule that cable, in many instances, functions as the "gatekeeper" to local markets for delivered video programming.[266] As commenters point out, this status gives cable system operators both the incentive and the means to discriminate against their competitors with respect to such core issues as carriage and channel positioning[267] as well as in areas not covered by statute or Commission rule such as joint advertising rates and promotions. As commenters also point out, a cable/TV combination would have even greater incentive and means to discriminate against others and in favor of its own broadcast affiliate in this fashion, and both the broadcast station and the cable system would stand to unfairly benefit.[268]

104. The record indicates that current carriage and channel position rules prevent some of the discrimination problems, but not all of them. For example, opponents of relaxing the rule note that current law would not prevent discrimination through joint advertising sales and rates practices and joint promotions unavailable to competitors. Additionally, although section 614(b)(6) of the Communications Act entitles a local commercial television station to be carried by a cable system on the same channel as it broadcasts over the air,[269] Univision describes protracted disputes with a cable system in securing its "on air" channel, with one cable system shuffling Univision's channel position four times in four years.[270] Univision also claims that a cable system abruptly changed the channel position of one of Univision's stations in order to provide that position to the cable system’s own local news channel.[271] Univision further claims

[266] ALTV Comments at 38; NAB Comments at 16; Univision Comments at 8-9.

[267] ALTV Comments at 38; NASA Comments at 18; UCC Comments at 8; Univision Comments at 10-11, 14.

[268] ALTV Comments at 38; NASA Comments at 18; Univision Comments at 12.

[269] 47 U.S.C. § 614(b)(6).

[270] Univision reports that the controversy remains protracted because although the Cable Services Bureau recently resolved the controversy in Univision's favor, the cable system has filed a petition for review by the full Commission. Univision Comments at 10-11. In its *Order on Reconsideration* (*see WXTV License Partnership, G.P.*, 15 FCC Rcd 3308 (2000)), the Commission granted reconsideration as to four of the twenty-one cable systems involved but agreed with the Cable Services Bureau that channel positioning violations had occurred with regard to the other seventeen cable systems and that a forfeiture proceeding should commence. A *Notice of Apparent Liability* for $127,500 was released concurrently with the *Order on Reconsideration (Notice of Apparent Liability*, *Cablevision Systems Corporation*, 15 FCC Rcd 3269 (2000)).

[271] Id. at 12-13.

that cable system operators sometimes otherwise delay carriage by denying that they receive an adequate signal from a station, which forces the broadcast station to divert resources away from obtaining quality programming and toward obtaining carriage and channel position.[272] Other commenters also emphasize that cable systems can delete broadcasters from carriage through waiver, and that cable/TV combinations will be unlikely to offer retransmission consent agreements.[273] Univision emphasizes that all of this anti-competitive behavior occurred in spite of the cable/TV cross-ownership rule, and claims that such behavior will only be exacerbated by cable/TV combinations that seek to favor their own broadcast affiliate over others.[274]

105. Although, as we noted in the NOI, DTV holds the potential to enable broadcasters to compete better with cable in the multichannel video programming distribution market, the reality is that DTV is now nascent. In addition, because of the advent of DTV, our DTV must-carry rules are the subject of a pending proceeding.[275] Modification of the cable/TV cross-ownership rule at this time could frustrate and undermine the potential that DTV holds for broadcasters if, as suggested by ALTV, a cable/TV combination, in order to give its own broadcast station a competitive advantage, denied carriage to a competitor and inhibited its DTV roll-out.[276] We believe that it is particularly important to ensure stability and a level playing field as the technology of DTV reaches the marketplace and competitive forces determine its fate in the marketplace. Cable/DTV competition may ultimately provide a basis for some modification of the cable/TV cross-ownership rule, but we believe that time has not yet arrived.

106. Effects on Diversity. We also conclude that the cable/TV cross-ownership rule is necessary to further our goal of diversity at the local level. As we noted above, current media markets include a variety of participants; as we also noted above in our discussion of the newspaper/broadcast cross-ownership rule, however, many new media

[272] Id. at 14-15.

[273] NASA Comments at 19.

[274] Univision Comments at 11. NCTA, however, contends that there is no evidence that a combined cable/television station operation would diminish competition in the local market or that it could skew the market in a manner that adversely affects advertising rates. NCTA Comments at 7.

[275] Notice of Proposed Rule Making in CS Docket No. 98-120, 13 FCC Rcd 15092 (1998).

[276] ALTV Comments at 39.

do not contribute to diversity at the local level. Broadcasters contribute to local diversity through the fulfillment of their public interest obligations to air programming responsive to the issues facing their communities of license; cable contributes through PEG and leased access channels and to some degree through origination of local cable news channels. In the TV Further Ownership Notice, the Commission thus tentatively concluded that broadcast television and cable are to a certain extent substitutes for diversity purposes,[277] but also stated:

> [w]e tentatively see no reason to include in our diversity analysis the other electronic video media [beyond cable], such as MMDS, VCRs, and VDT, as substitutable for a broadcast television station. None of these has nearly the ubiquity of cable and most do not have the capability for local origination that cable has. All provide similar entertainment programming; however, our core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events.[278]

107. More recently, we reaffirmed this view in the TV Ownership Order where we stated that many of these alternative video delivery systems “are still establishing themselves in the marketplace and generally do not provide an independent source of local news and informational programming.”[279] While newspapers and radio contribute to local diversity, broadcast television and cable television are the only participants in the market for delivered news and public affairs video programming at the local level. The Commission has distinguished the influence of television from that of newspapers as being more immediate, and from that of both newspapers and radio as having more visual impact and serving more people as a primary source of news.[280] The Commission has also noted that the public receives more news from television than from any other source;[281] while broadcast television is the more dominant source of local news and public affairs programming, cable functions as the "gatekeeper" to broadcast television, as

[277] TV Further Ownership Notice, supra. at 3556-3557.

[278] Id. at 3557.

[279] TV Ownership Order, supra at 12917-18.

[280] TV Further Ownership Notice, 10 FCC Rcd at 3557-3558.

[281] Id. at 3555 (citing The Roper Organization, "America's Watching: Public Attitudes Towards Television, 1997" (New York, 1997)).

we have noted above.[282] Cable/TV combinations thus would represent the consolidation of the only participants in the video market for local news and public affairs programming, and would therefore compromise diversity.

108. Opponents of rule retention argue that cable does not control the content of its PEG channels and, therefore, contend that cable/TV combinations do not threaten diversity at the local level.[283] However, PEG programming typically is not the cable programming that provides the closest substitute for broadcast local news and public affairs programming. The cable programming that is the closest substitute for such broadcast programming is originated by local cable systems. NCTA suggests that it is the efficiencies and synergies that could be derived from combining just this type of programming that makes the combinations desirable, and, in fact, contends that these efficiencies and synergies would enable combinations to produce more local news and public affairs programming, perhaps targeted at niche markets.[284] Such cable/TV combinations, however, would erode the number of independent local news and public affairs voices in the market. As CME explains, "[e]ven if the common owner created a local cable news station, it would not be providing a diverse source of local news programming because of the common ownership."[285]

109. The television industry has just begun adapting to the recent relaxation of our local television ownership rule. Further consolidation of local television broadcast stations will reduce the number of independent voices providing local news and public affairs programming. Prudence dictates that we monitor and ascertain the impact of these changes on diversity and competition before relaxing the cable/TV cross-ownership rule.

F. Experimental Broadcast Stations

1. Regulatory History

110. The multiple ownership rule for experimental broadcast stations was

[282] In the TV Ownership Order we concluded that cable would not count as an independent local voice for the duopoly rule because there was an absence of factual data in the record indicating that cable is a substitute for broadcast television. TV Ownership Order, supra at 12935.

[283] See, e.g., NCTA Comments at 12-14.

[284] NCTA Comments at 13-14.

[285] CME Comments at 29.

initially adopted in 1946 in Part 4 (4.134), and generally limited ownership to one station.[286] In 1963 this rule was redesignated as Part 74 (74.134) with no changes. In 1984 the Commission combined Parts 74 A (Experimental TV), 74 B (Experimental Facility) and 74 C (Developmental Broadcast Stations) into the present subpart, 74 A (Experimental Broadcast Stations) without changing the ownership limits. The rule currently reads:

> §74.134 **Multiple ownership**. No persons (including all persons under common control) shall control, directly or indirectly, two or more experimental broadcast stations unless a showing is made that the program of research requires a licensing of two or more separate stations.

2. Comments

111. Only one comment was filed. NAB recommends repeal of this rule stating that broadcast auxiliary facilities are facing regulatory change and dislocation and, accordingly, there is now ever greater need for responsible use of experimental stations to develop solutions to these problems. While supporting elimination of what it characterizes as "this arbitrary restriction,"[287] it urges the Commission to ensure that such stations not endanger the interference-free service provided by other broadcasters.[288]

3. Discussion

112. The rules authorizing experimental broadcast facilities seek to encourage experimentation and innovation in the provision of broadcast service to the public. A license for an experimental broadcast station will be issued for the purposes of carrying on research and experimentation for the development and advancement of new broadcast technology, equipment, systems or services which are more extensive or require other modes of transmission than can be accomplished by using a licensed broadcast station under an experimental authorization ((§74.102) Uses of experimental broadcast stations.). Most of the related rules are intended to prevent interference to existing services.

113. Experimental broadcast licenses are also subject to a broad variety of operating and reporting requirements, as well as a requirement that prohibits their commercial use. The licensee of an experimental broadcast station may make no charges

[286] An exception is allowed when a showing is made that the program of research requires the licensing of two or more separate stations.

[287] NAB Comments at 16.

[288] Id. at 16.

nor ask for any payment, directly or indirectly, for the production or transmission of any programming or information used for experimental broadcast purposes (§74.182(b). Nor may it transmit program material unless it is necessary to the experiments being conducted, and no regular program service may be broadcast unless specifically authorized (§74.182(a)). These commercial restrictions prevent entities from exploiting an experimental broadcast station for commercial purposes while functioning under the guise of an experimental authorization. The supplementary statement to be filed with an application for a construction permit (§74.112), supplementary reports filed with an application for renewal of license (§74.113), and the requirement to make a satisfactory showing of compliance with the general requirements of the Communications Act of 1934, as amended, to satisfy the licensing requirement (§74.131), allow for the oversight necessary to protect the goals of competition and diversity.

114. We find that elimination of the rule will have no adverse impact on our diversity and competition goals. Repeal of this multiple ownership rule would not affect the Commission's ability to ensure that experimental stations are used solely for their avowed purposes, which is separately covered under §74.102. Neither would it imply that any petitioner will necessarily be able to control multiple frequencies, since a license of an experimental broadcast station will not authorize the exclusive use of any frequency, under §74.131. The multiple ownership rule for experimental broadcast stations appears to have been originally adopted to limit the opportunities for the commercial use of experimental stations.[289] We believe that the current requirement that such stations operate for research purposes and the proscriptions on the broadcast of a regular program service and the imposition of charges for the transmission of programming or information on experimental broadcast stations are sufficient to assure that, even absent the multiple ownership rule, licensees do not, under the guise of experimentation, obtain sufficient experimental stations to create, *sub rosa*, commercial broadcast services. These stations operate for research purposes and, thus, do not compete in the marketplace for programming or advertising and existing rules will provides safeguards against abuse in the absence of the experimental station multiple ownership rule. There existing no competitive bar to the elimination of the multiple

[289] The early history of the Federal Radio Commission and, later, the Federal Communications Commission with regard to commercial use of experimental stations demonstrates an ambivalence with regard to such use of these stations. The FRC initially permitted commercial use but, in 1933, prohibited any further commercial use of such stations. The FCC also initially prohibited their commercial use, then, in 1935, permitted some commercial use, and, still later (1936) again prohibited their commercial use. Rules for experimental stations adopted in the late 1930s, were intended to prevent commercial operations from predominating and interfering with experimentation. Our current rules prohibit the licensee of an experimental broadcast station from making charges or asking for payment, directly or indirectly, for the production or transmission of any programming or information used for experimental broadcast purposes. (See 47 CFR § 74.182.)

ownership rule applicable to them, we believe that the multiple ownership rule governing experimental broadcast stations may no longer be in the public interest. We will issue an NPRM proposing elimination of the rule.

V. Constitutional Issues

115. Commenters raised Constitutional arguments with respect to two of our rules. The newspaper/broadcast cross-ownership rule is objected to by several commenters on the grounds that it violates the First Amendment.[290] Additionally, both that rule and the dual network rule are said to discriminate. In the case of the newspaper/broadcast cross-ownership rule, the discrimination is alleged to be between newspaper owners and other media owners.[291] The dual network rule is claimed to discriminate against broadcast networks as opposed to cable networks as it allows mergers between broadcast and cable networks but not between broadcast networks themselves.[292]

116. As an initial matter, our newspaper/broadcast cross-ownership rule has already been sustained by the Supreme Court.[293] Beyond that, it is well-established that a content-neutral regulation, such as the subject rule, will be sustained against claims that it violates the First Amendment if:1) it advances important governmental interests unrelated to the suppression of free speech; and 2) does not burden substantially more speech than necessary to further those interests (the "O'Brien test").[294]

117. As we noted previously, the Supreme Court has determined that the preservation of media diversity is a government interest that is not only important, but is of the highest order[295] and is unrelated to the suppression of free speech. Therefore, the rule meets the first prong of the O'Brien test. Even were one to conclude that it confines free speech of newspaper owners by limiting their ownership of co-located broadcast stations, that burden is the minimum necessary to accomplish the diversity goal. It does not prevent newspaper publishers from owning broadcast outlets. It does not prevent

[290] See n. 210, supra.

[291] Cox/Media General Comments at 25-29.

[292] CBS Comments at 21-22; Paxson Reply Comments at 25; WB Reply Comments at 14.

[293] FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

[294] Turner II, 520 U.S. at 189, citing U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

[295] Turner I, 512 U.S. at 663; Turner II, 520 U.S. at 190.

them from entering into joint venture agreements with broadcasters in their community. Rather, it simply precludes them from owning -- and therefore having ultimate editorial control over -- broadcast and newspaper outlets in the same community due to the impact of such common ownership on, especially, local viewpoint diversity. Accordingly, we believe that the newspaper/broadcast cross-ownership rule, to the extent it burdens free speech at all, does so to the minimum extent necessary. It therefore passes the constitutional test for such rules.

118. As to commenters' claims of discrimination, the Supreme Court has repeatedly held that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose."[296] As we noted above, protecting media diversity has been determined by the Supreme Court to be a governmental interest of the "highest order."[297] We believe that the classifications inherent in both the newspaper/broadcast and cable/television cross-ownership restrictions are, under current conditions, necessary to promote that governmental interest and, therefore, do not violate the rights of any party to equal protection of the law.

VI. Conclusion

119. In this, the first of our biennial reviews of our broadcast ownership rules, we conclude that some regulations are no longer in the public interest in their current forms as a result of competition.[298] We are, therefore, proposing to modify or eliminate these rules in Notices we will issue. We also conclude, however, that, for now, the other ownership rules considered in this proceeding warrant retention. We will, of course, revisit our ownership rules biennially, as directed by the 1996 Act. Our future biennial reviews will be informed by the impact of the substantial changes we made to our

[296] Central State University v. American Association of University Professors, Central State University, (*per curiam*), 526 U.S. 124. 119 S.Ct. 1162, 1163 (1999), citing Heller v. Doe, 509 U.S. 312, 319-321, (1993), FCC v. Beach Communications, Inc., 508 U.S. 307, 313-314 (1993), Nordlinger v. Hahn, 505 U.S. 1, 11 (1992). We do not concede that a fundamental right is involved in the instant matter. It is well established that there is no unabridgeable First Amendment right to a broadcast license. See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 798-802 (1978); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 101 (1973); United States v. Weiner, 701 F.Supp. 14 (U.S.D.C. Mass., 1988).

[297] Turner I, 512 U.S. at 663; Turner II, 520 U.S. at 190.

[298] These are: the dual network rule and the limitation on the multiple ownership of experimental broadcast stations. We will also adopt a *Notice* to explore the manner in which we define radio markets and determine both the number of stations in a radio market and the number of radio stations owned by a party in such a market.

television "duopoly" and "one-to-a-market" rules this past August.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

In the Matter of 1998 Biennial Regulatory Review¾Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996

In Section 202(h) of the Telecommunications Act of 1996, Congress directed the Commission to evaluate its ownership rules every two years. In this first review, we developed a comprehensive record and undertook a careful review of these vitally important rules, as required by Congress.

This Biennial Review Report balances the public interest in diversity of ownership with the demands of a changing marketplace and the broadcast industries' need to realize economic efficiencies and remain competitive. We reviewed our rules to determine whether competition, not simply an increase in programming options available to viewers, render our current rules unnecessary. I write separately to emphasize that the proposed modifications to the dual network and newspaper/broadcast cross-ownership rules, and the technical changes to our radio market definition policies are appropriately careful, deliberate, and forward looking.

I. Competition, Diversity, and Changes in the Media Marketplace

In the course of our review, we recognized three critical facts. *First*, the majority of Americans still get most of their news and public affairs information from broadcast stations. Our structural ownership restrictions, therefore, seek to promote critical First Amendment principles because in a participatory democracy, it is vitally important that we encourage the widest possible dissemination of this information from diverse and antagonistic sources.[1]

Second, the media marketplace has become increasingly dynamic, with an expanding number of information outlets and media platforms. However, although new technologies like the Internet and satellite delivery may be fundamentally changing the communications landscape, they do not yet command the time and attention of most consumers. The average American still spends *seven hours per day* watching television, but only *eight hours a month* on-line. In addition, even as programming choices expand,

[1] *See Associated Press v. United States* 326 U.S. 1, 10 (1945)(noting 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").

owners of media outlets continue to dwindle. For example, after Congress relaxed the radio ownership limits in 1996, the number of independent owners in commercial radio markets decreased from 5,133 in March 1996, to 4,004 in March 2000.[2] In 85 of the 270 Arbitron radio markets, two entities already control more than 80 percent of radio advertising revenue; in 143 markets, two entities control more than 70 percent of such revenue.[3]

Third, over the last 18 months, the FCC has provided significant regulatory relief to the broadcast industry and the industry is in the process of responding to this new regulatory environment. Although the marketplace is still in flux, we do know that the regulatory changes have allowed broadcasters in large markets to respond to competitive dynamics, without sacrificing our long-cherished diversity and competition principles. The changes we propose today provide similar advantages.

Commenters who oppose retention of our ownership rules emphasize the substantial growth in media outlets and programming choices relative to twenty years ago, but essentially ignore the countertrend toward ownership consolidation in the broadcast and cable industries. This asymmetry is problematic for two reasons. First, more choice does not necessarily yield more competition in viewpoint. Indeed, economic theory teaches that a monopolist may offer viewers more programming variety than a more competitively structured market.[4] However, such an industry structure yields only one point of view. Therefore, our assessment of the nature and extent of competition in broadcast markets necessarily must go beyond mere observations of the expanded programming and format choices available to consumers.

Second, this approach ignores the common sense, real-world predicate that undergirds our concern about viewpoint diversity: that who is in control matters. Simply multiplying the number of "pipes" into the home (i.e., moving from a 3-network world to a 500-channel world) does little to promote independent viewpoints if all the pipes are controlled by a very few. Instead, it may provide consumers with the proverbial "Hobson's choice" in

[2] BIA Master Access Database, adjusted to include completed (not pending) mergers and attributing ownership of LMAs to owners entering into the LMA rather than to the station licensee.

[3] *Id.*

[4] The modern economics literature on program choice carefully examines the special circumstances where *fewer* broadcasters *may* broaden the variety of programming. For example, a monopoly television station that is totally advertiser-supported will tend to avoid duplicated programs and may provide a wider range of program types compared to a market with multiple, competing stations. For a survey, see Bruce M. Owen and Steven S. Wildman, *Video Economics* (Cambridge, Mass.: Harvard University Press, 1992), Chapters 3 and 4.

terms of independent viewpoints.[5]

I am not convinced by the record in this proceeding that a single individual or corporation who serves as the only conduit for news and public affairs information in a community would have sufficient incentive to act against its self-interest in maximizing profits and maintaining a favorable corporate image and provide the same level of independent viewpoints as would competitively and independently-run outlets. Our ownership rules significantly increase the likelihood that consumers will receive independent viewpoints on issues of public importance.

II. Proposed Changes to Broadcast Ownership Rules

I support the careful, but forward looking rule changes we propose in this Report.[6] First, the dual network rule continues to promote viewpoint diversity and should not be eliminated as it applies to the four major networks. I am persuaded that there may be powerful arguments for modifying the rule to allow common ownership of an emerging and established network. For that reason, I support a Notice that examines the diversity costs and efficiency benefits of such a rule change.

Similarly, the newspaper/broadcast cross-ownership rule well serves our public interest goals. However, there may be certain circumstances in which, given the specifics of the market and of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain even if a newspaper and broadcast station were commonly owned. For example, a combination between a single radio station in a large market and a small, suburban newspaper might raise fewer concerns than other potential combinations.

[5] The notion that program diversity and viewpoint diversity are essentially the same would turn 50 years of policymaking on its head. For example, more than twenty years ago, the Supreme Court upheld the Commission's prohibition of cross-ownership on the basis that one could not expect viewpoint diversity from commonly-owned entities to mirror that from antagonistically run entities. *FCC v. National Citizens Committee for Broadcasting* 436 U.S. 775, 797 (1978).

[6] I also support our decision to retain the national television ownership rule and the cable/television cross-ownership rule. Contrary to the suggestion of the dissenting Commissioners, there is nothing procedurally inappropriate in making revisions, substantive or non-substantive, to the biennial review report after adoption in order to further elucidate the rationale for the decision to retain the national ownership rule. Such revisions are permissible when all non-dissenting Commissioners concur in the revisions. **Here, all the Commissioners who supported the relevant sections agreed to the post-adoption edits.** Post-adoption edits are not uncommon**.** Furthermore, the Commission made the determination required by Section 202(h) of the Telecom Act by the statutory deadline, and the post-adoption edits did not alter that determination.

I also fully support the decision to commence a proceeding to examine the way we define a radio "market" and the way we count the number of stations in a market for the purpose of our local ownership rules. In Section 202(b)(1) of the Telecommunications Act of 1996, Congress directed the Commission to expand the limit on how many stations a party could own in a market. Congress specified a sliding scale of numerical limits depending on the size of the market that, for example, would allow a party to own *up to* 8 commercial radio stations in a market with 45 stations, *up to* 7 stations in a market with 30-44 stations, and so on.[7] None of these standards contemplate (or approach) a duopoly or monopoly in local markets, and I am unwilling to ascribe such an intent to Congress.

Some parties have argued that the Commission has no remaining authority to consider these issues. However, when Congress raised the ceilings on local radio ownership, it did not eliminate the requirement that the Commission find that license transfers and assignments serve the public interest, convenience and necessity, pursuant to Section 310(d) of the Communications Act. Absent such action, our statutory responsibility is to continue to ascertain that such transactions comply with the public interest prior to granting license transfers or assignments.

In addition, Congress did not directly address the market definition aspects of the Commission's rules in the 1996 Act. Although the Commission has used one method of defining markets and counting the number of stations in a market since 1992, the potential of this methodology to produce unanticipated and anti-competitive results in particular cases did not become apparent until the methodology was used in conjunction with the increased ownership limits adopted pursuant to the 1996 Act.

We should not shy away from beginning a proceeding to resolve these important and controversial questions, on the record, after opportunity for public comment. The public interest would not be served by anything less.

[7] Pub. L. No. 104-104, 110 Stat. 56 (1996). *See* Order, In the Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996, 11 FCC Rcd 12368, 12370 (1996).

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: 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 write separately regarding the Commission's review of the newspaper/broadcast cross-ownership rule[1] to explain why I support commencing a rulemaking proceeding to modify but not eliminate that rule. I also write separately regarding the Commission's decision to commence a rulemaking to revise the methodology for calculating both the total number of radio stations in a market and the number of stations owned by a party, to underscore that any modifications must be applied prospectively only.

Newspaper/Broadcast Cross-ownership Rule

The question presented to the Commission in this biennial review is whether any rule is "necessary in the public interest as the result of competition" and, if not, whether the Commission "shall repeal or modify" that rule.[2] The rule was crafted in 1975 to achieve the noble goal of ensuring that local markets enjoy not just competition for advertising dollars but also diversity of viewpoints – a diversity that can come only from a healthy number of independently-owned outlets. In its decision adopting the rule, the Commission sought to promote "the widest possible dissemination of information from diverse and antagonistic sources,"[3] which the Supreme Court had found "is essential to the welfare of the public."[4] The Commission's rules, therefore, were designed to ensure that the public had access to a critical threshold of local viewpoint diversity. The Commission recognized that, at that time, broadcast services – especially television -- and newspapers were the dominant sources of local news and information.[5]

There have been sweeping changes in the media marketplace since the rule was adopted in 1975. Back then, there were only three commercial broadcast networks; today, there are six or seven. In 1975, many UHF stations were just initiating broadcast service and they were limited in number; today, the number of UHF television stations has nearly tripled. In the early 1970s, FM radio was a relatively new service; today, there

[1] 47 C.F.R. § 73.3555(d) (the "rule").

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

[3] *Multiple Ownership of Standard, FM and Television Broadcast Stations, Second Report and Order,* 50 F.C.C.2d 1046, 1048 (1975), *aff'd sub nom. FCC* v. *National Citizens Committee for Broadcasting,* 436 U.S. 775 (1978).

[4] *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945).

[5] *See, e.g., Second Report and Order,* 50 F.C.C.2d at 1065.

are approximately 6,000 FM radio stations in operation. When the rule was adopted, the big boom in cable television franchising had not yet begun; today, cable television passes more than 97% of households, of which approximately two-thirds subscribe. At the time the Commission adopted the rule, DBS had not yet been launched; today, DBS is ubiquitously available, with more than 10 million subscribers. The rule was adopted decades before the Internet would become available for public use; today, the Internet is rapidly capturing the American imagination and consumer's free time. Given such profound changes, it is not only timely, but essential for the Commission to revisit the newspaper/broadcast cross-ownership rule to ensure that it reflects contemporary marketplace realities, preserving local viewpoint diversity while still tailoring the rule to be restrictive only where necessary.

Ironically, the rule's underlying purpose of preserving diversity and competition in local markets may be undermined in some situations by the rule's current structure. For example, radio stations that do not have their own local news organizations are prohibited from being co-owned with daily newspapers, thus reducing the potential number of news outlets in a given community. Similarly, independent UHF television stations might provide more local news and information, if they could realize efficiencies from co-ownership with a local newspaper. Struggling daily newspapers might stand a better chance of contributing to public discourse and the dissemination of local news and information if they were allowed to combine with local broadcast licensees, thereby maintaining viewpoint diversity. At the very least, the Commission should consider changes to the rule that would address these potentially counter-productive effects.

At the same time, the rule has performed a necessary function in maintaining a critical threshold of local viewpoint diversity. The Commission has recognized that broadcast services, particularly television, and newspapers still are the dominant sources of local news and information in any given market.[6] Particularly in small markets with a single daily newspaper and less than a handful of broadcast stations, the combination of newspaper and broadcast assets might well severely and significantly reduce viewpoint diversity. And keep in mind that most cable and DBS services do not independently provide local news and information so vital to an informed public. Thus, they may not yet be adequate substitutes for broadcast stations or newspapers. Therefore, the rule has served and, in my opinion, continues to serve an important function in maintaining local viewpoint diversity and competition.

I do not believe that the rapidly changing media landscape, on the one hand, and the preservation of viewpoint diversity, on the other, present a binary choice between eliminating the rule or maintaining the status quo. Rather, I believe that the Commission

[6] *Further Notice of Proposed Rule Making in Television Ownership*, 10 FCC Rcd. 3524, 3555-57 (1995).

should carefully and methodically consider modifying the rule to make it more relevant to contemporary circumstances. For example, commenters ask whether the same rule apply to a top-ten market like New York City or Chicago, with dozens of independent media voices, and to a small city with only one daily newspaper and a few TV stations. Should radio licensees face the same newspaper cross-ownership restrictions as television licensees, or are these two media sufficiently distinguishable to apply the newspaper broadcast cross-ownership ban differently to each? Should the rule, in its current or modified form, be consistently applied to all merging combinations of newspapers and broadcast stations under a similar timeframe? Some commenters suggested that the rule could apply to varying degrees depending on market size by, for example, counting newspapers as a "voice" and allowing newspaper and broadcast cross-ownership where a certain number of independent voices remained in a market.[7]

While the record reflects a continued need to restrict newspaper/broadcast cross-ownership in some fashion, I believe that the questions concerning the possible modifications to the rule deserve a full airing and spirited debate. I have not made up my mind regarding the merits of any of these proposals; my only conclusion at this point is that an absolute ban is not necessary to achieve the purpose of the rule. It is time for the Commission to engage in a robust debate on the most appropriate ways to modify the rule to best serve the public in this information age.

Radio Market Definition

I have long supported revising our rules to correct our convoluted definition of radio markets and look forward to reviewing comments filed in the rulemaking proceeding we will initiate shortly. I believe, however, that any changes the Commission might make should be prospective only and should not undermine the legitimate investment expectations of parties who hold combinations lawfully assembled under our current rules. Whatever definition we adopt should also remain consistent with the intent of Congress under the Telecommunications Act of 1996 in relaxing the radio ownership restrictions.

[7] *See, e.g.*, Elyria/Lorain Comments at 19-20; Freedom of Expression Comments at 25-26; Gannett Comments at 38; West Virginia Radio Comments at 21-22; Newspaper Association of America, Emergency Petition, August 23, 1999.

DISSENTING STATEMENT OF
COMMISSIONER HAROLD 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 respectfully dissent from the Commission's decision to retain the national television ownership and cable/television cross-ownership rules and from its refusal to even consider repeal of the newspaper/broadcast cross-ownership rule.[1] For the reasons that follow, I believe that the Commission's rationale for refusing to repeal or modify these rules is fatally flawed. In my view, these rules simply should be repealed.[2]

I. The Commission's Rationale For Refusing To Repeal Or Modify The Regulations Is Fatally Flawed

The Commission claims that it should not take any action on the national television ownership and crossownership rules chiefly because it needs to assess the effects of last year's relaxation of local broadcast ownership rules. *See Biennial Review Report ("Report")* at para. 4, 25-26, 93, 109. This rationale for refusing to deregulate suffers from fatal flaws. As discussed below, this reasoning fails to respond to the actual question posed by the statute; is weak as a factual and logical matter; and constitutes, at least with respect to nationally applicable rules, an unexplained departure from past policy assessments of such rules.

A. The Commission Fails To Apply The Statutory Test For Repeal or Modification

The main problem with the Commission's argument – that it needs to study the effects of last August's limited local deregulation -- is that it is utterly nonresponsive to

[1] Specifically, I do not believe, for the reasons persuasively given by Commissioner Powell, that the Commission has carried its burden of showing that competition has not eroded the very foundation of the newspaper/broadcast rule. I thus cannot sign on to the Commission's "general conclusion that the rule should be retained." *Report* at para. 95.

[2] I agree, however, that the experimental license limit should be eliminated. I also concur in the decision to cut back on the reach of the dual network rule, but I would have gone further and asked whether the rule remains necessary at all. Finally, I concur in the rulemaking on the radio rules for the limited purpose of rationalizing our arguably arbitrary and capricious methodology of counting radio stations of section 202(h); my purpose is not, as the Report unfortunately suggests, to cut back by rulemaking on the concentration levels that Congress expressly set.

the statute. Under section 202(h), the Commission's job is to explain why changes in competition have not rendered broadcast ownership rules superfluous in promoting the public interest. *See* 47 U.S.C. section 202(h) (Commission "shall determine whether any of [its broadcast ownership] rules are necessary in the public interest as the result of competition"). This Report does not fulfill that obligation.

As I explained in the Notice of Inquiry, a helpful analytical approach for answering the statutory question posed by section 202(h) would be 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.

Separate Statement of Commissioner Harold W. Furchtgott-Roth, *Notice of Inquiry, 1998 Biennial Regulatory Review*, 13 FCC Rcd 11,276 (1998).

In its analysis of whether to repeal or modify the national cap or crossownership rules, however, the Commission *never* analyzes the continued utility of the rules "as the result of competition," as the statute requires. Instead of considering the effect of competition on the need for the rules, the Commission myopically discusses the effect of regulatory action on the rules – namely, the impact of its 1999 local broadcast rulemaking. *See Report* at paras. 25-29 (concluding that national television ownership rule should be retained because effects of local changes should be observed and last increase in cap resulted in acquisitions that need to be studied as well); paras. 95-102 (concluding that cable/television crossownership rule should be retained because it furthers policies of competition and diversity and prevents discrimination against competitors).

This discussion fails to broach -- much less answer in a persuasive way -- the question asked by the statute. Section 202(h) says nothing about basing decisions regarding deregulation on past regulatory action. Rather, it requires us to consider changes in the market landscape in deciding whether to keep the rules. That the Commission simply has not done. And the analysis that it does provide gets the statute exactly backwards; the question is not "what are the effects of the rule on competition?", *see, e.g., id.* at para. 94, but "what are the effects of competition on the continued need for the rule?." This latter question is never asked or answered in the discussion of the decision to retain any of these rules.

Finally, and for the record, I feel compelled to note that the Report that the Commission actually voted to adopt on May 26, 2000, did not include any findings of facts on the state of competition in the services relevant to the national cap. *Cf.* Report at para. 28 & nn. 80-82. Thus, not only did the Commission fail to ask and answer the statutory question, it did not discuss competition *at all*. The Report likewise did not include the (x-ray thin) "public interest" analysis of the lifting of the cap. *See id.* at para. 30. It gave only its "wait and see" reason in connection with local deregulation and Congress' 1996 increase in the cap. These are not just ministerial or non-substantive changes. Rather, this material provides an entirely new rationale and makes new findings of fact to support the decision to keep the cap.

This language was added more than two weeks after the Commission formally voted to adopt the Report and publicly announced its action.[3] Not coincidentally, these revisions immediately followed one prominent broadcasting company's public announcement of its intent to appeal the national cap decision.[4] Putting aside the related issue whether a majority of the Commission can agree to make these sorts of changes before an adopted document is officially released, I question here which Report it is that the Commission actually voted to adopt.

For we cast only one set of votes, and it was on the first Report, which we then publicly announced as adopted. There was no withdrawal of those votes or a revote on the materially revised version. If the first document represents the officially adopted

[3] *See* www.fcc.gov/Bureaus/Mass_Media/News_Releases/2000/nrmm0028.htm (describing Report as "[a]ction by the Commission, May 26, 2000"). Although the press release certainly does not represent a formal decision of the Commission, it does faithfully summarize the relevant content of the Report that was before the Commissioners at the time we cast our votes:

> The Commission determined to retain the 35% aggregate national television audience reach of a television group. It said the effects of recent FCC changes to the local television "duopoly" rule should be observed and assessed before making any alteration to the national limit. It also said the trend, since the cap was increased to 35% in 1996, of many group owners acquiring large numbers of stations nationwide needs further observation before making any changes in the cap.

Id. at para. 10. This reasoning is based solely on the "wait and see" argument. Our press office, of course, had no way of knowing that the voted and adopted document from which it was working would change so substantially as to render its release inaccurate.

[4] *See* 20 Comm. Daily 105 (May 31, 2000), 2000 WL 4695422 ("Fox TV immediately said it will challenge national ownership cap in federal court. . . . Fox said it will appeal as soon as FCC issues final decision.").

Report of the Commission, then the original analysis, absent the findings of facts on competition and explication of the public interest, controls. And if the second, materially retooled document is the official one, then the Report issued today violates the statutory deadline[5] and thus may well be invalid for that procedural reason alone.[6] In the end, however, the Commission cannot have it both ways: it must either claim the benefit (such as it is) of the new rationale and findings of fact, or it must confess error in transgressing the statutory deadline.

For the foregoing reasons, I do not think the Commission adequately justifies the decision to retain the rules in their present form. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (agency acts in arbitrary and capricious fashion if it "has relied in factors which Congress has not intended it to consider [or] entirely failed to consider an important aspect of the problem"). The to-ing and fro-ing on why to keep the cap and post-adoption backfilling of the Report well illustrate the capricious, results-oriented nature of the Commission's decisionmaking.

B. The Commission's Rationale For Retaining The Ownership Rules Is Weak

Apart from failing to address the inquiry required by the statute, the Commission's "wait and see" reasoning suffers from several factual and logical infirmities.

First, although the Commission and most commentators generally anticipated a flood of applications under the newly revised local broadcast rules, the fact is that the Mass Media Bureau has received very few such applications. Specifically, since the rules went into effect, broadcast interests have filed a total of 101 television station assignment or transfer applications. Of those 100 applications, however, only 42 were duopoly requests and 19 of those requests involved the purchase of television stations already programmed by the buyer pursuant to local marketing or time brokerage agreements. Thus, the Commission has received just 23 applications to create new television duopolies – even assuming that every application is granted, this is hardly the sort of seismic change in the broadcast landscape that requires extensive study. As for radio and television cross-ownership requests, broadcasters have filed about 30 of those; this is likewise not a surge towards consolidation.[7] Simply put, the reality is that there is

[5] Section 5003, Pub. L. 106-113 Stat. 1501 (1999).

[6] *See* 5 U.S.C. section 706 (under the Administrative Procedure Act, "a reviewing court shall. . . hold unlawful and set aside agency action, findings or conclusions found to be . . . without observance of procedure required by law").

[7] This filing phenomenon (or the lack of one) is probably explained by the fact that the changes in the ownership rules were actually quite marginal and, in any event, the market had already ordered itself

very little of an "effect" to be assessed here, which deprives the Commission's rationale of much persuasive force.

Second, even if the amount of filings under the newly loosened rules had been numerous, I fail to see why we could not have satisfactorily reviewed their impact in this Report. Far from being unavailable, the information necessary to evaluate consolidation ensuing from the new rules is uniquely in the Commission's possession. We need only have pulled the filings described above in order to find facts about that consolidation. Surely we have had enough time to perform such an assessment: this Report is being issued well into the second year since the release of the Notice of Inquiry.

Third, if one accepts the assertion that the Commission lacks sufficient information to assess the effect of the new local rules, that rationale applies with equal force to the other ownership rules included in the Report. Today the Commission decides to change some of those other rules, for example, the dual network rule or the experimental license rule. But the Commission never explains why it lacks sufficient information on the effect of the 1999 changes in order to modify the national cap and cross-ownership rules but why it has enough such information to go forward with these others. This flat inconsistency suggests, to me at least, that the argument from "lack of information" is pretextual.

Finally, even assuming that I am wrong about all of the foregoing, there remains the question of the relevance of changes in *local* rules to *national* rules such as the broadcast cap. As the Commission itself has often recognized, local information is not pertinent to a discussion of nationally applicable rules. *See, e.g., Amendment of Multiple Ownership Rules*, 100 FCC 2d 17, 37 (1984) (noting irrelevance of national rules to diversity in local markets). If this is so, as Commission precedent has it, then I fail to see how local deregulation rationally could bear on our decisions with respect to national deregulation.

The Commission's reason for maintaining the subject rules boils down to this: it feels that it has deregulated enough for the time being and simply does not want to go any further. This rationale is wholly unsatisfying to those regulated entities whose rulemaking happened to come second in time. They possess a statutory right to regulatory review and, if warranted by the effect of competition on regulation, deregulatory action. To say that other, tangentially-related deregulation occurred first, and therefore they can not have any regulatory relief, is a sorely inadequate response.

fairly efficiently under the Commission's previously liberal waiver process.

C. The Commission Departs Without Explanation From Prior Findings Regarding The Necessity of National Ownership Limits and The State of Competition In The Broadcast Industry

The Commission's refusal to modify the national broadcast ownership cap in even in the smallest way contradicts its prior conclusions about the utility of national ownership limits. Specifically, in an Order repealing the former "Seven Stations rule," the Commission found that "as a policy matter, the total elimination of presumptive national ownership rule[s] would benefit the public interest." *Amendment of the Commission's Rules Relating to Multiple Ownership,* 100 FCC 2d 74 at para. 50 (1984).

The Commission based this conclusion on the fact that, while competition and diversity are traditional broadcast policy goals, national ownership rules are "irrelevant" to viewpoint diversity and "unnecessary" to prevent competitive harm. *Amendment of the Commission's Rules Relating to Multiple Ownership,* 100 FCC 2d 17 at paras. 63, 73. The "more correct focus for addressing viewpoint diversity and economic competition concerns is the number and variety of information and advertising in local markets." *Id.* at para. 10. In addition, multiple ownership of broadcast stations can "foster news gathering, editorializing and public affairs programming, and the development of independent programming by regional or national *ad hoc* networks." *Id.* at para. 82.

Moreover, in the Order deregulating local broadcast markets, the Commission expressly recognized the dramatic shifts in the competitive position of the industry as a general matter. *See Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12,903 at para. 1 (1999) ("The new rules we adopt today reflect a recognition of the growth in the number of and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership."). But here the Commission refuses even to engage in that analysis. Having found enough evidence of increased competition and market changes in the industry to warrant deregulation of local broadcast markets, the Commission will be hard pressed to explain why those findings do not carry over to the national context. This differing approach is especially hard to justify when, as the Commission has found, diversity and competition concerns are foremost in the local, not the national, context.

These flat inconsistencies with respect to the Commission's assessment of nationally applicable broadcast ownership rules and the competitive nature of the broadcast industry leave us open to legitimate charges of arbitrary decisionmaking. *See generally Sangre de Cristo Communications, Inc., v. FCC,* 139 F.3d 953, 958 (D.C.Cir. 1998) (agency cannot inexplicably act inconsistently with prior decisions). Although the Commission has a duty to explain this disparate treatment, *cf. Radio and Television News*

Directors Association v. FCC, 184 F.3d 872, 886 (1999) (where there is "agency precedent for declining to use the FCC's power to redress a[n] [alleged] market failure in provision of [broadcast services]. . . the agency must offer clear, cogent explanations for treating the two cases differently"), it has not even attempted to do so.

II. The Rules Impose Heavy Burdens On Speech In Potential Contravention of the First Amendment

There is a final reason to be wary of these rules: they impose a direct and substantial burden on speech and thus run the risk of violating the First Amendment.

To be sure, the Supreme Court in the past has affirmed the constitutionality of some of these rules. *See, e.g, FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978)(rejecting First Amendment challenge to newspaper/broadcast crossownership rule). At the same time, however, the Court has observed that balancing First Amendment interests in the broadcast context is not a static enterprise: "[B]ecause the [] industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." *Columbia Broad. Sys., Inc. v. Democratic National Comm'n*, 412 U.S. 94, 102 (1972).

I believe that the ownership limits now have become constitutionally "outmoded," as the Court itself suggested might happen. If rules restricting ownership of broadcast stations were ever a justifiable infringement of speech, it was because of the relative dominance of that medium in the communications industry. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940) (ownership rules justified by "a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination"); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (justifying "less rigorous standard of First Amendment scrutiny" on basis of "spectrum scarcity").

The facts underlying this justification are simply no longer true, however, as the Commission has repeatedly recognized. *See* 1985 Fairness Report, 102 FCC 2d 145, 198-221 (1985); *Syracuse Peace Council*, 2 FCC Rcd 5043, 5053 (1985). Today, broadcasters face such a fierce array of competitors – from cable operators, cable overbuilders, cable networks, internet service providers, wireless video systems, and direct satellite systems – that their previously supposed ability to influence the content and control the flow of information is greatly diffused. *See* Joint Statement of Commissioners Powell and Furchtgott-Roth, *In re Personal Attack and Political Editorial Rules,* FCC Gen. Docket No. 83-484, at 5 and n. 15 (citing statistics on boom in communications outlets). Moreover, the number of broadcasters alone has grown exponentially since the time the rule was adopted.[8] In sum, over time, as alternative means of communication and even other broadcasters have proliferated in the marketplace, the burdens imposed on broadcasters by these restrictions have increased dramatically relative to the benefits that they produce.

For these reasons, I think that the lenient standard of review for regulation of broadcast speech formally announced in *Red Lion* rests today on a shaky empirical foundation. As I noted in the Notice of Inquiry, such an assertion is not only an appropriate one for this Commission to make, but in fact has been affirmatively invited by the Supreme Court:

> [T]he 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."). [And] [t]he 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).

Separate Statement of Commissioner Harold W. Furchtgott-Roth, *Notice of Inquiry, 1998 Biennial Regulatory Review*, 13 FCC Rcd 11,276 (1998) (footnote omitted); *see also RTNDA v. FCC*, 184 F.3d at 887 n. 19 (noting that Supreme Court in *Red Lion* "recognized that changed circumstances might be salient in future cases" and that "since *Red Lion*" the Court has "increasingly focused on the editorial discretion of broadcasters indicating that while the *Red Lion* framework may still be good law, its application . . . may require updating").

[8] The total number of broadcasters increased by more than 50% between 1975 and 1990, and independent broadcast stations increased by more than 400%. *See Broadcast Television in a Multichannel Marketplace*, FCC Office of Plans and Policy Working Paper No. 26, 6 FCC Rcd 3996, 4011(1991); *see also* Michael L. Katz, *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition*, at 34 (Sept. 1999) (attachment to comments of Fox) (in 1946 there were only six authorized television stations, and today there are over 1,200 such stations). During that period, the number of over-the-air broadcast stations available to the median household increased from six to ten stations. *See* FCC Working Paper, 6 FCC Rcd at 4011; *see also Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034, 1090 (1998); Katz Paper at 39 ("In 1979, only 33 markets had seven or more television stations. Today, 114 markets – more than half of all television markets – have seven or more television stations.").

While I personally have come to the conclusion that technology has advanced to the point where revision of broadcast regulation is now warranted, if not overdue, I note that the Commission itself has *already* come to this conclusion. Specifically, the Commission has found that "[t]he scarcity rationale developed in the *Red Lion* decision and successive cases no longer justifies a different standard of First Amendment review for the electronic press." *Syracuse Peace Council*, 2 FCC Rcd. 5043 at para. 65. In my view, the administrative basis for challenging this constitutional framework has been well laid, and the issue is ripe for review.

* * *

In this first biennial review of broadcast ownership regulations, many of which are over fifty years old, this Commission can ultimately find only one, obscure rule to be repealed. To my mind, however, it is simply untenable to assert, in the face of the record before us on competitive change since the adoption of ownership regulations, that retention of the vast majority is warranted. This Report, which regrettably turns section 202(h) on its head by asking how the rules promote diversity and competition instead of asking how the forces of competition itself produce those results and thus obviate the need for the rules, disserves the concept of regulatory reform embodied in section 202(h). This is not an effort at meaningful reform, but agency retrenchment in the face of a deregulatory provision. I therefore concur only in part and dissent in part.

SEPARATE STATEMENT OF
COMMISSIONER MICHAEL K. 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.

The majority of the rules we review today are old. The National Ownership Cap rule was first adopted in 1941. The Newspaper/Broadcast[1] and Cable/Television Cross-Ownership[2] rules were adopted in the 1970s. Though some of these rules have been modified slightly over the years, their predicates have remained the same, namely, that networks and stations enjoy tremendous market power that can lead to anticompetitive effects. Moreover, the goals of our structural rules also remain largely unchanged: (1) to guard against ill-effects in advertising and programming markets, (2) to promote diversity in programming, and (3) to promote locally-originated content.

Time does not stand still, however, and the highly concentrated video entertainment, news and information markets of the past, with their attendant limited programming offerings, have changed dramatically. Congress' recognition of this dramatically changed and changing landscape stands behind the Biennial Review process where we are charged to "determine whether any of such rules are necessary in the public interest as a result of competition."[3] My dissatisfaction with the present review is its stubborn refusal to fully consider the competitive landscape today and validate that these structural rules still serve their stated purposes—particularly in light of significant evidence that the rules are unnecessary to protect competition (and may even be causing competitive harm) and that diversity and localism are prospering as a consequence of new venues and greater capacity available to consumers. For these reasons, I concur in part and dissent

[1] Amendments of §§ 73.34, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, *Second Report and Order in Docket 18110*, 50 FCC 2d 1046 (1975), *recon.*, 53 FCC 2d 589 (1975), *aff'd sub nom. FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[2] 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, Docket No. 18397, *Second Report and Order*, 23 FCC 2d 816 (1970), *recon.*, 39 FCC 2d 377 (1973).

[3] Telecommunications Act of 1996, Pub. L. No. 104, 110 Stat. 56 (1996).

in part from this *Order*.

I. GENERAL CRITIQUE OF STRUCTURAL BROADCAST REGULATIONS

Before turning to my critique of particular rules, I first will sketch the breadth of change that should compel a more fulsome review of the rules than is represented by this Biennial Review. Second, I will generally outline the government's stated interest in these rules and challenge some of their underpinnings in light of the dramatically altered video landscape.

The Video Marketplace: Take the Mask off the Old Lone Ranger

"Return with us now to those thrilling days of yesteryear."[4] A time when there were three television networks that dominated the land (NBC, CBS and ABC). A time when there were only six television stations. A time before cable television, before direct broadcast satellite (DBS), before VCRs, before the Internet. It was a time of highly concentrated video markets in which only one medium—television—reigned. It was a time of nascent video advertising markets, and of very limited program sources. In this era, there were few around to curtail the power of these rustlers. There was only one Lone Ranger to discipline the dominance of the "Network Gang of Three." But "who was that masked man?" "A fiery horse with the speed of light, a cloud of dust and a hearty 'Hi-Yo Silver.'" The FCC!

Today, over fifty years after *The Lone Ranger* television show filled the bubbled screens of our black and white sets, the Lone Ranger rides again in an episode entitled *The 1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules.* So much has changed since the days that Tootsie Roll, "America's favorite candy," and General Mills brought to Americans the Ranger and his companion Tonto. Yet, the nostalgic FCC Ranger cannot bring itself to take full cognizance of this change and face whether it is time to retire the mask and let other forces do the job. Instead, we continue to sprint ahead kicking these rules forward, while being chased by a growing multitude (of new media, of economic change, of logic).

By any measure, the market, and thus the foundation of the FCC's structural ownership rules, has changed dramatically in ways that should lessen the dangers we

[4] This is the opening line of the television series *The Lone Ranger* which ran from 1949 to 1950, 1954-56. *See* <http://www.geocities.com/TelevisionCity/7286>.

purport to address that are associated with market dominance. The actor Clayton Moore starred in *The Lone Ranger* television series from 1949 to 1956. Mr. Moore passed away just last year, and in his name I couch my argument for a more thorough examination. Simply put, there is *MORE*, more of everything:

> *MORE Broadcast Networ*ks: In the 1940s and 1950s there were only three networks (NBC, CBS and ABC). Today, those three are joined by Fox, WB, UPN, and PAX to yield seven networks competing for programming and advertising dollars.
>
> *MORE Broadcast Stations*: Most households live in a television market served by eleven or more local stations. In 1946 there were only six stations nationwide.[5] Today there are over 1,600.[6]
>
> *MORE Video Outlets*: Today approximately 81 percent of all Americans subscribe to either cable, DBS, or another multi-channel service provider, rather than receive their signal free and over the air.[7] That is, the invention and ubiquitous deployment of cable and DBS services have given advertisers, programmers and Americans substantial alternatives to broadcast. These systems offer viewers a plethora of options unimagined when many of the rules reviewed in the *Order* were adopted. The average cable subscriber has 54 channels available to him.[8]

[5] *See* Warren Publishing, Inc., Television & Cable Factbook: Services Volume No. 68, 2000 Ed., at I-45.

[6] According to the FCC's most recent broadcast station tabulation, there were 1,616 television stations (VHF, UHF, and educational) licensed on September 30, 2000. *See* Station Totals prepared by Mass Media Bureau, Audio Services Division (rel. Nov. 22, 1999) at <http://www.fcc.gov/mmb/asd/totals/bt990930.html>.

[7] According to the FCC's sixth annual report on the competitive status of markets for the delivery of video programming, a total of 80.9 million households subscribed to multichannel video programming services (i.e., cable and noncable MVPDs) as of June 1999, up 5.5% over the 76.6 million households subscribing to MVPDs in June 1998. This subscriber growth translates into a 3.2 percentage point increase in multichannel video programming subscribership to 81.4% as of June 1999, *i.e*., 99.4 million U.S. homes with at least one television divided by 80.9 million households subscribed to multichannel video programming services. *See* Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, Sixth Annual Report [“*1999 Report*”], 15 FCC Rcd 978, ¶¶ 6, 19 (2000).

[8] The *1999 Report* noted 98.6% of all cable customers subscribed to systems with capacities of 30 channels or more, and 64.2% of all subscribers were served by systems with capacities of 54 or more channels in October 1999. *Id*, ¶ 23. In addition, 4.8% of all subscribers are reportedly served by systems with capacities of 91 or more channels. *Id.*

> The average DBS subscriber has hundreds of channels available to her.[9] Additionally, 50% of Americans have access to the Internet.[10] Moreover, the ubiquity of VCRs, DVD players and other video medium offer consumers additional entertainment, news and information sources. And, more recently the Internet is adding yet another. Most importantly, there is no end in sight to this trend.
>
> *MORE Programming*: There are more sources of programming than any time in history. There are 170 cable networks and seven broadcast networks.[11] The programs are also more diverse than in the "golden age of television," when Americans sat around watching the same basic shows. It was inconceivable in days of old that there would be channels dedicated to news 24 hours a day like CNN or Fox News. Or, that there would be channels dedicated not only to sports, like ESPN, but single sports like the Golf Channel. Or, that hundreds of movie channels would be available on their televisions, many on demand, with hundreds more titles in their local video store. Even on pure broadcast stations, there are more sports, movies, drama, and national and local news than at any time previously.

With so much more in the market, one can expect to find more competition and more diversity. Advertisers have many more choices to display their products. And, consumers have many more options to choose from as sources for entertainment, information, and news. If, as I believe, the good and plenty of outlets and programming is fertile ground for a healthy marketplace, there is clear reason to question why such forces (where consumers and producers interact) will not produce competitive prices, competitive opportunities for programming, and robust options for viewers. Yet, the

[9] The 1999 Report noted DBS operators DirecTV and EchoStar offer up to 350 channels of video programming and serve more than ten million subscribers. Id., ¶ 69.

[10] It is currently estimated that roughly 50 percent of American homes possess a personal computer and nearly 50 percent have Internet access. *See, e.g.,* Consumer Electronics Manufacturer Association, U.S. *Consumer Electronic Industry Today*, 1999 Ed., at 5 ("Computers now are in almost half of all American households, 45 percent, and some 60 percent of those homes have two machines in use."); Christine Doherty, *Online Market Is Hotting Up*, Sunday Business Post, May 14, 2000 (currently "49 percent of Americans enjoy internet access from their homes"); Business Wire, *Internet-Connected Households Soar to 60 Percent in 2000*, Mar. 28, 2000 (consultancy notes "majority of U.S. household, approximately 60 percent, will have personal Internet access in the year 2000").

[11] The 1999 Report noted a total of 171 basic, premium and pay-per-view cable networks. See 1999 Report, supra inote 6, ¶ 25.

Commission continues to place unsupportable faith in the concept that such things can only happen by government fiat and not by the natural forces of the market.

To Question the Rules is not to Question the Venerable Goals of Broadcast Regulation

The goals of our broadcasting rules are laudable. They seek: (1) to constrain undue economic power, (2) to promote diversity and (3) to promote locally originated programming. There may have been a time in which such objectives could not be achieved without regulatory intervention (though I question it). But, surely these values are not incompatible with market forces, or market failures in the classic sense. Thus, one does not abandon these objectives by calling on the Commission to consider if the rules are necessary at all or in their present form, particularly in the face of substantial evidence that they are unsupported by the facts, and that they may actually in some instances harm producers, suppliers and consumers. For an outstanding overview of the current market conditions and public harms being caused by some of our structural rules, I would direct the reader to *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition*,[12] by Michael L. Katz, which is included in the record of this proceeding.

Broadcast Economic Power in the Video Market

Video producers make money by inducing viewers to watch their products. If one follows the broadcast model, the product is free to viewers and revenue is generated through advertising. The game here is to get the most eyeballs you can, regardless of the type of program. Where one can charge for subscribers, as can cable, DBS and MMDS, you can make money both through advertising and by inducing viewers to pay for programming.

If the video market was highly concentrated, leaving few avenues to reach audiences, that unquestionably could result in harm. For instance, as is assumed by many of our broadcast structural rules, if a broadcaster enjoyed undue market power it could theoretically raise advertising rates to non-competitive, monopolistic levels, thereby harming advertisers. Similarly, if broadcasters (individually or collectively) could monopolize audiences they could harm suppliers of programming by demanding uneconomically low program prices.

[12] Michael L. Katz, *Old Rules and New Rivals: An Examination of Broadcast Television Regulation and Competition* ("*Old Rules and New Rivals*"), Sept. 1999.

Yet, again, if one notes the dramatic change in the market (which the majority only does superficially) one can see how questionable many of the suppositions are that undergird our ownership rules. For example, television networks have lost a substantial share of the national viewing audience. Between 1952 and 1991, the prime time ratings of the three major networks fell from 75 to 37.5, and by 1998 had fallen another 25 percent to 28.3 percent.[13] Are today's broadcast shares large enough to allow broadcasters to unilaterally raise advertising rates without constraint? This is just one question that deserves review if we wish to continue to justify ownership restraints on our fear of the impact on advertising markets.[14]

Additionally, there has been an explosion of media outlets to which both advertisers and programmers may turn, lessening the ability and incentives of broadcasters to unilaterally dictate rates. With regard to cable service, 67 percent of all Americans subscribe to this medium and nearly 97 percent have cable available.[15] Another 12.5 percent subscribe to DBS, which is virtually available to 100% of Americans within the continental U.S.[16] Consequently, advertisers now have other options from which to choose in reaching a national audience. In the vernacular of antitrust, there are substitutes. If a network or station owner attempted to extract monopoly rents, advertisers would have other options for reaching consumers. Moreover, other medium may prove more attractive to advertisers who can more carefully tailor their messages to particular demographics on media like cable or DBS. At a minimum, there is reason to question the blind assumption that advertisers would be harmed without the protections of our ownership rules, given the increased availability of other outlets.

The proliferation of other distribution outlets has also constrained broadcast program purchasers from depressing the prices program suppliers get. In fact, with more outlets, high quality programming can "shop" for the highest rents. This explains the trend we see toward cable and DBS capturing marquee programming such as sporting events, top movies and increasingly major news, history, public affairs, and arts programming. Indeed, contrary to what should be predicted if network concentration

[13] *Id.* at 11 (citing Paul Kagan Associates, *The Economics of TV programming and Syndication,* 1999 at 21-22).

[14] I would add that I have always questioned why the FCC should concern itself with advertising rates. We do not regulate advertising and the price impacts there do not have a secondary effect on viewers in a manner cognizable by the Communications Act. The antitrust statutes adequately address advertising concerns as they do generally for all markets.

[15] *1999 Report, supra.* Note 6, ¶¶ 19-20

[16] *Id.* ¶ 15.

were substantial, programmers are able to command a premium for shows like *E.R.*,[17] NFL Football,[18] and NHL Hockey.[19] In short, it is hard to defend the assumption that broadcasters have sufficient market power to command monopoly rents for advertisements or to deflate prices for programming. Surely, one sees no evidence to justify a standing structural rule, rather than rely on antitrust enforcement.

Diversity in the Market

Diversity is also an admirable goal, yet, it is an elusive concept. It has come to mean many things. Limiting ownership concentration does one obvious thing; it increases or maintains the number of different owners. Limiting ownership and allowing more owners has three primary diversity effects: For one, there are more broadcast properties and more ownership opportunities available for more people. Protecting opportunity is one way of promoting minority and female ownership. This is sometimes called "source diversity."[20] I will not discuss this point in this statement. Second, more owners might mean more from which to choose. Viewers will be able to see the different programming choices of different owners, and it is hoped that these programs will vary in content and style. This is what we often call "program diversity." The third point is a subtle variation on the second. Proponents often urge rules to promote not just different program genres or styles to capture viewer interest, but different "viewpoints." That is, by the fact that owners are different people or institutions, one might expect to see

[17] See id. ¶ *26.* See also *Kyle Pope,* Network Makes $850 Million Deal with Warner Bros., *Wall St. J., Jan. 15, 1998, at B1 (NBC strikes "a record $850 million deal to keep the nation's top-rated show, ER); Peter Kaplan,* NBC Pays Top Dollar to Keep No. 1-Rated "ER" on Board, *Wash. Times, Jan. 15, 1998, at B6 (same); Brian Lowry,* NBC's Prescription for Success: Keep "ER" TV, *L.A. Times, Jan. 15, 1998, at A1 (same).*

[18] See, e.g., NFL Buyers, Sellers Could Butt Heads on Rates, *Multichannel News, Jan. 26, 1998, at 28 ("Fox Broadcasting, ABC, CBS and ESPN will shell out a combined $17.6 billion across eight [NFL] seasons."); John M. Higgins,* Cable Operators Blast ESPN for NFL Megabid, *Broadcasting & Cable, Jan. 19, 1998, at 10 (Of $17.6 billion total, ESPN "agreed to pay $600 million per season for 18 Sunday night games");* MSOs Await Bill as ESPN Grabs NFL, *Multichannel News, Jan. 19, 1998, at 1 (same).*

[19] See Disney Offer Would Triple NHL's Current TV Deal, *Palm Beach Post, Aug. 6, 1998, at 8C (Walt Disney Co. offered "to pay the [NHL] almost $600 million for exclusive U.S. broadcast rights for five years". . .the deal "would triple the amount Fox Sport and ESPN [paid] the league" under the prior deal).*

[20] Source diversity refers to "promoting a variety of program or information producers and owners." *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,* Notice of Inquiry, MM Docket 98-35, rel. Mar. 13, 1998, ¶ 6.

different perspectives that are "antagonistic" to those of other programmers. Let me first make some general observations about the number of distinct program choices available to consumers.

It is said, "beauty is in the eye of the beholder."[21] The same could be said for television. It is difficult and perhaps constitutionally impermissible for government to impose its conception of worthiness or beauty on viewers.[22] Yet, it is understandable to craft rules that promote the widest swath of programming choice to match the infinite variety of interests of the American consumer. Whether your taste runs to WWF wrestling (perhaps the most popular programming on television today), the symphony, sports, comedy, news, drama, feature film, cartoons, music videos, history, public affairs, or shopping, the video marketplace has more of it, in more colors and flavors, than ever before.

To make my point I highlight a powerful and persistent trend in programming—movement from broadcasting to narrowcasting. In the early period of television, broadcasting was the primary means of receiving video content (excluding the movie theatre). Broadcast is a medium that provides one signal to many people. That is its central virtue, but also its central limitation. Because it can only serve up one program at any given moment in time, it has to find a program that appeals to the broadest possible audience. This is particularly the case since broadcasting is solely advertiser supported. Thus, almost by its nature, broadcast has trouble being diverse—that is, serving a more narrow, particularized community of interest is difficult, both in technical terms (the signal goes everywhere) and in economic terms (to remain viable a station must maximize eyeballs, *i.e*, aggregate interests). When broadcasting dominated video programming the challenges of program diversity were quite acute.

Cable, and later DBS, brought to the marketplace a new medium that had

[21] Apparently, "beauty is in the eye of the beholder" is a misinterpretation of the following aphorism by Plato:

> *"Remember how in that communion only, beholding beauty with the eye of the mind, he will be enabled to bring forth, not images of beauty, but realities (for he has hold not of an image but of a reality), and bringing forth and nourishing true virtue to become the friend of God and be immortal, if mortal man may."*

See *Quoteland.com* <http://www.quoteland.com>.

[22] *See United States v. Playboy Entertainment Group, Inc*., 529 U.S. ___, 2000 WL 646196, at *13 (2000) (Asserting that the Constitution exists to grant the people, rather than the Government, the ability to evaluate moral, artistic, and intellectual content.)

characteristics that clearly enhanced program diversity and choice. A cable system offers subscribers multiple channels. A subscriber that hungers for sports might watch a channel dedicated to that genre (*e.g.*, ESPN, Fox Sports). A history buff the same (*e.g*, History Channel). A movie fanatic the same (*e.g.*, HBO, Showtime, Cinemax). A news and public affairs junkie the same (*e.g.*, CNN, MSNBC, Fox News, C-Span), and WWF fans can watch all day and night to their hearts content. A system operator can offer this diverse programming economically because he draws both from advertising and subscription revenue. Subscription fees also allow a program producer to gauge a viewer's preference. Programs that are strongly desired are more valuable and thus more can be charged. (This is why there are tiers and programming packages offered.) Additionally, the technical nature of the system allows for this variety. Because cable is not hindered by interference problems, like broadcasters, the system can be upgraded continually to increase capacity and thus provide more channels.[23] The importance of cable, DBS and other systems is not just to increase video competition. These mediums also have ushered in greater diversity, for they can program to distinct parochial interest on a daily basis in a manner that is challenging for broadcasting. The ability to program to a wider variety of interests is what, in part, accounts for the fact that the majority of Americans (nearly 80 percent) subscribe to some multichannel service.

Of late, the trend toward tailored programming is getting finer with the advent of digitalization and the Internet. Perhaps the penultimate expression of diversity is the ability to program for a single individual's unique interest. The video landscape is moving in this direction. On the Internet one clearly sees the trend: "My Yahoo" and "My AOL" for example. Products like WebTV, AOL TV, Geocast, and Excite@Home, all promise to enhance traditional television product with personalized, tailored content. These trends show clearly that the breadth of unique and different programming has exploded and is growing exponentially. Under the weight of such trends, I cannot begin to see how one can claim the loss or fear of loss of diverse programs and choices for consumers.

[23] Bear, Stearns & Co., Inc., Byte Fight!: Cable TV & Broadband Report (rel. Apr. 2000), at 59 (With hybrid fiber optic-coaxial upgrade, "[a] cable operator with 750 MHz system can ultimately offer the equivalent of 240 channels (both analog and digital) while having 50 MHz, or the equivalent of 80-100 digital channels held in reserve." With eventual digitalization of cable plant, operator "will be able to offer the *equivalent of 1,100-1,600 digital channels*") (emphasis added).

Viewpoint Diversity

The strongest proponents of diversity in programming will insist that it is not multiple, different choices that matter, but "viewpoint diversity." Given the facts of the marketplace, I believe this to really be the crux of the government's purported diversity interest. The goal is not simply to provide choices that appeal to diverse interests. The proponents want shows that are "antagonistic to each other."[24] The first problem with this conception is that it is unclear that a market that produces programming that serves the interests of a broad and varied audience does not also represent a sufficient number of "viewpoints" from which consumers can choose.

Secondly, I question what the concept means for the vast majority of programs consumers watch. Is NBC's *Friends* antagonistic to WB's *Dawson's Creek?* Is ABC's *Who Wants to be a Millionaire* antagonistic to CBS' *Touched by an Angel*? Or, is ABC's *Monday Night Football* antagonistic to Fox's *Football Sunday*? It's hard to see the relevance of this concept. Perhaps, the viewpoint interest is reserved for public affairs and news programs, where issues might be presented and debated. But, here, too, one questions its meaning. Local news programs rarely editorialize, or pick political candidates, or take stands on major issues such as abortion or gun control. The reason is simple enough: because consumers do not pay to watch, broadcasters make money by reaching the largest possible audience. They rarely take the kind of risks that might endear them to some in the viewing area and raise the ire of others. They are not in the "antagonizing" business. Moreover, I am not sure why we are certain "antagonistic" programs do not sell. I see plenty of evidence of opinionated programming: *Crossfire*, *Face the Nation*, *Hardball*, *Larry King Live*, and why not *Jerry Springer*, for examples. Are we to believe all of this would vanish absent our structural ownership rules?

I also fail to see how ownership restrictions in themselves do much to promote the goal of antagonism. Different owners may have different perspectives, but they probably have more in common as commercial interests than not, for each must compete for maximum audience share to remain profitable. Moreover, the ownership class may include different people, but it is hard to see how that ensures that they are different in their viewpoints. We do not and could not possibly insist there be Republican owners and Democratic owners, pro-gun and anti-gun owners, etc. I would suggest some amount of "antagonism" sells. Controversy and conflict are the stuff of good story. If different viewpoints are to be found, I think they will be the products of the commercial market

[24] "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 . . .'" *Order* (quoting *Associated Press v. U.S.,* 326 U.S. 1, 20 (1945)).

much more than by our rules and our adherence to the high-brow ideal we used to defend them.

Localism

Finally, I would like to say a brief word about localism, which is often subtly distinguished from diversity in general. The principle is that the government favors locally originated programming because that is the programming most likely to serve the interests of those viewers and listeners in the community of the licensed station. The majority of stations are affiliated with a national network. Because the broadcasting business seeks to maximize viewers, there has always been concern that a powerful network would force local stations to carry their national program, theoretically to the detriment of local viewers and local interests. For decades, the Commission has pursued rules intended to ensure networks do not dominate local stations and their programming preferences.[25]

One central failing of regulations intended to promote localism is that they assume that such programming would not flower if networks and stations were too large. One is hard pressed, however, to see why, in a healthy marketplace, if the public values local programming, producers would not supply it. If a local audience desires a program, and is willing to watch the program, that program will attract advertising dollars and thus a station or network will have an incentive to produce and provide that show. Indeed, since most consumers purchase advertised product in their local towns and communities, advertisers—even national ones with local franchises—would favor programs that appeal to local audiences.

I remain struck how often we simply assume that such programming will vanish if we do not require it. Of course, if consumers do not want certain kinds of local programming and it is not provided as a consequence, there is no justification for the government to compel it. Where government attempts to promote the messages and images that it prefers, even where consumers themselves do not, we are no longer in America and the First Amendment has been abandoned.[26]

II. CRITIQUE OF THE BIENNIAL REVIEW

[25] One example is the “right to reject rule.” *See generally*, 47 C.F.R. § 73.658.

[26] *See Playboy*, 2000 WL 646196, at *13 (Stating that "these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of the majority.")

I will now turn and address the specifics of today's *Order*. The Commission has taken steps today to modify some of its broadcast ownership rules in an attempt to make our regulations more consistent with current marketplace conditions. While I support these steps, I believe they are too limited in scope and reflect a continuing reluctance to examine in a meaningful way the legacy of our broadcast regulations. As a result, I concur in part and dissent in part to the *Order* released today. I will address the rules to which I dissent or concur below.

Before doing so, I wish to state my approach to the Biennial Review of structural ownership rules. Since our charge is to examine whether a rule continues to serve the public interest in light of competition, I feel it imperative to always fully examine the state of the video market—market share, number of competitors, competitive effects, ease of entry and inefficiencies—and challenge the continued validity of prophylactic ownership rules in light of this examination.[27] I believe the clear bent of the biennial review process set out by Congress is deregulatory, in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interests in competition and diversity. Thus, contrary to the approach of the majority, I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity. Against that backdrop, I turn to today's decision.

National Television Ownership Rule and UHF Discount

I respectfully dissent from the majority's conclusion that, based on the record before us, the national ownership cap still serves the public interest. The *Order* contains no meaningful examination of the market or the state of competition, a glaring omission given Section 202(h)'s directive to consider whether competition obviates the need for such rules. This is particularly disturbing, since serious questions have been raised (but not adequately addressed) as to whether this rule is substantially related to the stated government interests of protecting local competition and promoting local diversity, and evidence has been presented that the rule may actually cause harm to the public interest.[28]

In the Notice of Proposed Rulemaking, we asked for comment on the effect of the rule on competition in the national advertising and program production markets. We also asked about the effect of the rule on existing television networks and the formation of

[27] I believe the guiding principles articulated in Commissioner Furchtgott-Roth's separate statement have merit.

[28] *See Old Rules and New Rivals*, *supra* note 11.

new networks. These points of inquiry go to issues of competition in the national markets. One would expect to see an examination of market concentration, advertising and programming price effects, etc. The *Order,* however, lacks any meaningful discussion of either of the national markets or the formation of new networks. If it had, it would have noted the substantial change that has occurred offering greater competitive discipline and substantially increased diversity. *See* Section I, *supra*.

Instead, the *Order* validates the rule on two other grounds: It states that (1) additional time is needed to assess the impact of the local ownership rule changes made last August;[29] and (2) expresses concern about the growing number of large group owners and the potential for disruptive restructuring. None of these articulated reasons address the national programming or advertising markets, or the rules' impact on new or existing networks.

Indeed, the justifications appear to focus almost exclusively on competition and diversity at the *local* level.[30] It is not intuitive why national ownership restrictions have any meaningful impact on local competition or local diversity. We have very detailed rules limiting the number of stations one may own in a given local market. Thus, no matter how many stations one owns nationally, he cannot increase concentration in the local market, by operation of our local ownership rules. Indeed, these rules were modified less than a year ago to reflect our present views on local competition and diversity. Consequently, I fail to see the relationship between the national cap and the stated government interest in local competition and diversity. Further, the *Order* does not offer a meaningful explanation. I would note that on many previous occasions the Commission has itself squarely expressed doubt about the linkage between the national cap and its stated goals.[31]

Not only are the stated rationales for retaining the rule in its current form not persuasive, but the *Order* lacks any meaningful discussion of the potential harms posed by the rule. For example, the study completed by Professor Michael Katz raises the

[29] *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policies and Rules,* 14 FCC Rcd 12903 (1999).

[30] The *Order* finds that applications for duopolies under our new local television ownership rule were only filed this past November and, as a result, they should monitor developments under this new rule prior to making any changes to the national television ownership reach cap.

[31] *See, e.g., Amendment of Multiple Ownership Rules*, 100 FCC 2d 17, 37 (1984) (noting irrelevance of national rules to diversity in local markets). *See also Old Rules and New Rivals supra* note x, at 61 *(*discussing Department of Justice opinion in 1983 that eliminating the national multiple ownership rules would raise little risk of adverse competitive effects in any market).

possibility of some non-trivial harms associated with this rule. The study finds that the rule: (1) limits economies of scale associated with common ownership, thus raising costs and reducing incentives to invest in over the air television; (2) blocks the expansion of particularly well-run station groups; and (3) limits the ability of broadcast networks to own stations, an arrangement that would improve coordination and lower the risks associated with investing in high-quality, innovative programming.[32] These harms are not small concerns to an industry in the midst of remaking itself in digital form and for whom every day the number of competitors increases while total viewership declines.

These concerns are also strikingly similar to those raised by the Commission in its decision to modify the Dual Network Rule. In the Notice of Proposed Rulemaking in that proceeding, also issued today, the Commission reviews with some specificity the current economies of the network broadcasting market. As noted in the *NPRM*, networks are in the business of producing mass audiences, and the size of that audience is facing continuing erosion from cable and DBS. The *NPRM* finds that in order for networks to be economically viable they must be "larger rather than smaller as measured in terms of affiliated stations and the viewers produced and sold to advertisers."[33] In the dual network context, the Commission finds that contract negotiations between program producers and networks are extremely complex and, as a result, the costs of these contracts are high. Integration allows for lower costs and better allocation of risks.[34] The NPRM also points to the amount of integration that has occurred in this market after the repeal of our financial interest and syndicated exclusivity rules (fin/syn) as reflective of the difficulty in negotiating contracts.[35]

I would argue that these same economic costs and efficiencies accrue to a network's affiliate relationships as well. Contract negotiations between networks and affiliates are also complex and the costs high. And as in the case of the fin/syn rules, I would point to the number of networks that are either closing in or at the cap as evidence of the difficulty and costs associated with contracting with affiliates.[36] For those companies that are at the cap, these costs are a direct result of our rules. But the *Order* not only fails to analyze these costs, but also whether the costs associated with the rule

[32] *See Old Rules and New Rivals, supra.,* note 12, at ii-iv.

[33] Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule, Notice of Proposed Rulemaking, FCC #00-213, Adopted Jun. 8, 2000, Rel. Jun. 20, 2000, at ¶ 12.

[34] *Id.*, at ¶ 18.

[35] *Id.*, at ¶ 15.

[36] CBS is currently at 40 percent audience reach, FOX at 35 percent, PAX at 34 percent and Tribune at 29 percent. *See Special Report Top 25 Television Groups, Broadcasting and Cable,* Apr. 10, 2000, at 72-98.

are justified on the basis of our interest in preserving competition in the national programming or advertising markets, or even competition or diversity at the local level.

The *Order* also states that a change in the cap may well influence the bargaining positions between broadcast television networks and their affiliates, and that we should proceed cautiously, particularly given the restructuring that may be taking place concurrently on the local level. However, we do not have evidence of a massive restructuring taking place at the local level. Only 42 applications for duopolies in local markets have been filed since we modified our local ownership rules, and 19 of those reflect purchases of television stations that the buyer already programs through local marketing or time brokerage agreements. And, while I am sensitive to the shifts currently taking place in the network/affiliate relationship, I am unconvinced that these concerns necessarily implicate issues of diversity and competition at the local level. Protecting one group of station owners over another for its own sake is not a valid function of government. Nonetheless, I would have liked to hear much more about the impact on local stations and how that impact undermines the public interest in an NPRM that would more comprehensively examine the 35 percent audience reach cap.

In short, the Commission's decision is deficient in several ways. It fails to fully examine the video market and consider the changes in that market. It merely assumes a valid link between a national limit and local competition and diversity, despite fairly substantial evidence to the contrary. And, it fails to consider the public interest harms that may flow from the rule. I believe there is more than enough on the record of this proceeding to call into question whether the public is being served by the 35 percent audience reach cap, and I would have supported a Notice to examine more thoroughly the possibility of its modification or repeal. Further, I support the Commission's decision not to amend the UHF discount. Any action on the discount should be considered in conjunction with a thorough analysis of the cap.

Newspaper/Broadcast Cross-Ownership Rule

I also must respectfully dissent from the majority's conclusion that the newspaper/broadcast cross-ownership rule continues to serve the public interest. While I welcome the decision to issue an *NPRM* to look at the impact of the rule in particular circumstances, I am disappointed that the Commission appears unwilling to engage in a broader debate about the continuing validity of this 25-year-old rule, which has never been modified. This rule raises significant First Amendment concerns, and, as a result, requires rigorous analysis in support of its continuing validity. To my mind, the *Order* falls short of that bar, and I cannot conclude that the rule continues to serve the public interest as a result of competition.

As I predicted in my separate statement to the *NOI*, the pivotal issues in this entire proceeding evolve around the issue of diversity. Nowhere is this more the case than in the analysis surrounding the newspaper/broadcast cross-ownership rule. With respect to this rule, the Commission relies heavily on its goal of promoting "viewpoint diversity," which looks specifically at the amount of "local" programming in a market. While the *Order* considers the effect of the rule on competition, it limits its discussion to whether meaningful efficiencies derive from existing combinations. A more thorough competitive analysis would also discuss, for example, the relationship between the advertising markets for broadcasting and newspapers and the substitutability of the television and newspaper products. If they are the same products, then the Commission should justify its decision to permit television duopolies but not newspaper/television combinations in local markets. If they are different products, then the Commission should justify why it will continue to apply a complete ban on cross-ownership between the mediums, based simply on their character.

The heart of the newspaper/broadcast cross-ownership rule is the Commission's belief that these two mediums are the only two suited to providing content oriented toward the local community.[37] This *Order* retains that thesis by rejecting the proposition that the explosion in alternate sources of programming obviates the need for the rule. It finds that: (1) "new outlets" (DBS/MMDS) are not substitutes for newspapers or broadcasters on the local level; and (2) that cable is a poor substitute because it is not required by law to provide locally originated content, even though some systems do. By contrast, the *Order* places faith in broadcasting, because broadcasters are required, pursuant to their public interest obligations, to provide programming responsive to the needs of the local community, and newspapers, even though they are not required to, typically cover local issues. From these observations, the *Order* concludes that broadcast television and newspapers continue to be the dominant source of local news and public affairs information in any given market. Let me address each of these two propositions.

As configured today, it is true that most satellite and wireless based video providers offer primarily national programming. The central reason for this is technical. Satellite technology has had difficulty beaming unique programming into local communities from hundreds of miles in space. The technology is changing, however, and with spot beam technology DBS providers are pursuing localized carriage. Indeed, they fought aggressively to modify the Satellite Home Viewer Act to allow them to carry local broadcast signals, feeling that it was a competitive disadvantage not to have local

[37] *See* Amendment of §§ 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, Second Report and Order in Docket 18110, 50 FCC 2d 1046, 1057-58 (1975).

content.[38] Some companies appear to be pursuing a satellite service that would include multiple channels of tailored 24 hour local programming, including weather, sports, traffic, arts and community affairs. Thus, as competition increases in providing national programming content (broadcast, cable, DBS, MMDS, Internet) carriers will naturally push into local content to differentiate their offerings. It is clear, in my view, that content as an important competitive offering. So, while I would concede that these services provide limited local programming today, it is clear that video competition is driving them to provide localized content and they should not be dismissed as viable alternatives out of hand.

The majority's rejection of cable as a viable medium for local content is more baffling. The fact is that many cable systems are offering local programming, perhaps for more concentrated periods than broadcast television. News Channel 8 in our own area offers just one example. Cablevision's New York Metro service offering local news, weather, traffic, sports and community affairs is another. Most cable systems offer community PEG channels. Many systems offer local high school sports, such as the Home Team Sports channel. HTS is apparently valuable enough to consumers that it costs extra to have access to it. Moreover, cable systems are operated locally, just as stations are, and I see no real impediment to them offering local services if their community wishes to have them. In fact, local cable systems are regulated by local franchises that often extract local community services as a condition of receiving a local franchise. Broadcast stations have no local regulatory oversight. Despite all of this, the Commission turns a blind eye, refusing to survey the breadth of local cable programming and dismissing the argument by holding that because federal law does not mandate local content, we cannot count on such systems providing it.

The Commission, however, repeats the same error I note in Section I. It seems unwilling to recognize that localism sells. There are a bevy of commercial motivations for offering such fare: advertisers want to target groups with similar demographics and interests. National programmers want to differentiate their products. Multichannel systems want to increase the value of subscription fees. I find it a bit remarkable we will not look to or credit competitive content, where there is not a regulation compelling it, when reviewing the market to see if competition has obviated the need for a regulation! Moreover, the *Order* refuses to consider local content in cable systems, because it is not required, but in direct contradiction is unobstructed in crediting regulation-free local newspaper coverage because that medium "typically" covers local issues. This is

[38] *See, e.g.*, *Audio Notes*, Audio Week, Nov. 15, 1999, *available in* 1999 WL 7563749 ("CEA Pres. Gary Shapiro . . . said CE companies 'have long believed that the ability of DBS subscribers to receive local network signals is critical to the success of the home satellite market.' "); *Capitol Hill*, Warren's Cable Regulation Monitor, Nov. 29, 1999, *available in* 1999 WL 6826333 (DirecTV and EchoStar planned to provide local broadcast network channels to their customers as soon as President Clinton signed SHVA into law).

unquestionably arbitrary analysis.

In defending this rule, the Commission again trumpets the value of "antagonistic voices," or "viewpoint diversity." I question generally some aspects of this governmental interest, which I discussed more fully in Section I. I would only add a few points. For one, I do not see how one can demonstrate that newspapers, by their very nature, are antagonistic to broadcasters and, thus, their combination would frustrate our stated goal. I have not observed or been shown any particular give and take between these two mediums. I don't believe we have even genuinely examined this proposition. Surely, one can hypothesize that if a local paper and local station combined, there may be some homogenization of news and information. But, one can equally imagine that the combined resources may allow for greater and more efficient coverage of local events that could not be covered by the two individually. (There is some evidence of this where certain combinations have been grandfathered). Second, I would note that a broadcast station is the most likely candidate to take views antagonistic to another station, since they directly compete for audience share. Yet, we allow a single entity to own two broadcast stations in many markets, if enough "voices" remain in the market. I do not see why newspaper/broadcast combinations could not be regulated the same way.

Based on the above considerations, I cannot support the conclusion that the newspaper/broadcast cross-ownership restrictions continue to serve the public. I would support a proceeding that would look critically at how the significant and far reaching changes in the video marketplace since 1975 have eviscerated the need for what is an extremely prohibitive regulation.

The Cable/Broadcast Cross-Ownership Rule

> I also dissent from the *Order's* decision to retain the Cable/Broadcast Cross-Ownership rule. The rule is 30 years old, and, as in the case of the rules discussed above, I believe there have been sweeping and pervasive changes in the local video programming market that warrant a more critical analysis of the benefits associated with this rule than has been undertaken in the context of the instant *NOI*. I believe that many of the harms, such as channel positioning, asserted in the context of this rule may be adequately addressed by other rules the Commission regularly enforces. For example, I would observe that even if one were concerned that cable might have an incentive in favoring its own local station on its cable system, the "must carry" rules would largely deny it the ability to do so.
>
> Finally, I find it ironic that the majority is concerned that it will lose an "antagonistic voice" if a local cable system is co-owned with a broadcast station,

but is unwilling to count that same voice as viable in the broadcast/newspaper cross-ownership context. For all of the above reasons, I would have supported a rulemaking to more adequately and thoroughly examine whether this rule is still necessary to promote the public's interest.

The Dual Network Rule

I concur in the *Order's* conclusion that the Dual Network Rule as it applies to UPN and the WB may no longer serve the public interest and the decision to issue an *NPRM* to evaluate possible modifications to the rule. While I would support an *NPRM* that would also consider repeal of the current rule as it applies to the top four networks, I believe that the record supports this more limited *NPRM* as an adequate first step. I look forward, however, to continuing to review this rule in our upcoming biennial reviews.

Local Radio Ownership

I also concur in the decision today to retain the current local radio ownership rules. However, I am unconvinced that the further proceeding contemplated by the *Order* is warranted, nor do I believe, as a general matter, that consolidation in the industry has threatened local competition and diversity in a manner inconsistent with the intent of Congress.

The *Order* contemplates a Notice of Proposed Rulemaking (NPRM) to address several radio market issues. One issue is how to harmonize the counting methods we use to determine both the size of the market and the number of stations in the market that count toward the cap. To the extent that this NPRM addresses what may be an arbitrary distinction between counting methods, I support its issuance.

The NPRM will also ask whether the Commission should adopt a different (and more restrictive) method for determining the relevant "market" because our current definition may be "producing unintended results that are contrary to Congress' intent." My single greatest problem with the proposed action here is one of statutory interpretation. The effect of its proposal would be to shrink markets and thereby substantially limit the number of stations that one could own. When Congress adopted its radio ownership provision, Commission regulations defined these markets in a particular way. That way was the law of the land. The Arbitron market definitions were in existence, but they were not used for regulatory purposes, and Congress did not specifically incorporate them. I believe that it is disingenuous to suggest at this late date that only by changing the market definition to Arbitron can we effectuate what Congress "really meant." I believe proper statutory interpretation would lead one to conclude that

Congress set its numerical limits against the market definition that prevailed in regulation at the time, and not a definition that had not been used for this purpose previously.[39] Moreover, if Congress did not mean to set the appropriate level of concentration, or the acceptable level of diversity, what on earth are the numerical market levels meant to do?

III. CONCLUSION

In conclusion, I do not believe that the Commission has justified its decision that the 35 percent audience reach cap, the newspaper/broadcast cross-ownership rule or the cable/broadcast cross-ownership rule continue to serve the public interest as a result of competition as Section 202(h) requires. With respect to each of these rules, I would have supported further proceedings to more thoroughly evaluate the pervasive changes that have occurred in the video marketplace, and whether these rules continue to achieve the goals for which they were intended. I think such an analysis is critical in light of the challenges facing the broadcasting industry, especially the reality that the technical advances in digital capabilities will allow more and more platforms to deliver video programming. This Commission must look forward if it is to foster, and not stand in the way of, the digital revolution that is occurring across all of the communications industries. The approach taken by the Commission today, however, continues to look to “the days of yesteryear,” to justify its rules. It is time to take the mask off this old Lone Ranger and look more deeply into the face of change.

ADDENDUM

The purpose of this Addendum is to address material that was added by the majority to the item after its adoption and after the preceding statement was completed. Specifically, the facts in paragraph 28 and the analysis contained in the last four sentences in paragraph 30 were circulated two weeks after the item was adopted. As a procedural matter, I am concerned that the changes, which I believe are substantive, have been inappropriately added after the item’s adoption on May 26, 2000 and may change the adoption date of the item to no sooner than June 13, 2000, well past the statutory deadline.[40] In any case, I will respond to the newly added material below.

[39] “It is a commonplace of statutory construction that the specific governs the general,” *Morales v. Trans World Airlines*, 504 U.S. 374, 384-385 (1992) (citing, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987).

[40] Section 5003, Pub. L. 106-113 Stat. 1501 (1999). *See also* Dissenting Statement of Commissioner Harold W. Furchtgott-Roth.

The majority now maintains that elimination or relaxation of the national cap rule would lead to "the consolidation of ownership of all or most of the television stations in the country in the hands of a few national networks."[41] This apocalyptic pronouncement is without foundation. As the *Order* itself points out, large numbers of stations are currently owned by group owners and there is not even a hypothesis proffered as to why such major commercial interests would suddenly sell their full complement of stations to the networks.[42]

While it may be a valid hypothesis that network-owned stations have an incentive to clear the majority of their network programming, it is far from clear that they would not also have economic incentives to program local content that would attract both viewers and advertisers. Clearly, competitive video service providers believe local content is key to the success of their product.[43] Moreover, every station, regardless of ownership, is required to serve its local community, a point relied on by the majority in distinguishing broadcasters from other providers of programming,[44] Thus, network-owned stations could not, arguably, run national programming exclusively.

The majority also now for the first time says that we should be concerned that there is a loss of an outlet for non-network programming sources, but I am not sure that this concern comports with the facts. Do the current network owned and operated stations have higher clearance rates for network programming? Do they serve their local communities with less local content than affiliated stations? Do national programmers find themselves blocked from distributing their product through stations owned and operated by the networks? Who knows? We certainly have not bothered to look.

The majority is correct in noting that Congress chose not to eliminate the cap, but only to liberalize it in the 1996 Telecom Act. But Congress also clearly instructed the Commission to continually evaluate market and competitive conditions to determine whether rules remain in the public interest. Failing to have done so fully, it cannot glibly escape its responsibility by deferring, without more, to a judgment Congress made four years ago and one that Congress specifically directed us to continually revisit.

[41] *See Order,*¶ 30.

[42] The Commission's *Order* at the Appendix indicates that the top 25 group owners own 527 of the over 1600 television stations operating today. The average number of stations owned by the top 25 group owners is 21. NBC owns 13 stations, ABC owns 10, Fox owns 23 and the newly merged Viacom/CBS owns 35, but is subject to divestiture conditions to come into compliance with the 35% cap.

[43] *See* p. 15, *infra.*

[44] *See* p. 14, *infra*.

STATEMENT OF COMMISSIONER GLORIA TRISTANI, DISSENTING IN PART

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

I dissent from the majority's conclusion that the dual network rule should be modified to permit ABC, CBS, Fox, or NBC to combine with UPN or WB. Such a modification is unsupported by the record and, if ultimately adopted, would further erode the already tenuous level of diversity available on the public airwaves.

Congress itself modified the dual network rule only four years ago, as part of the Telecommunications Act of 1996. In describing the networks covered by its amended rule, Congress expressly referred to "emerging networks (WBTN, UPN)," a fact recently relied on by the Commission in applying the rule to UPN in connection with the CBS-Viacom merger.[1] Thus, in 1996, Congress found that the state of competition warranted continued application of the dual network rule to UPN and WB. Admittedly, the Commission may change the rule adopted by Congress pursuant to the biennial review provisions of the 1996 Act. But nothing has occurred in the past four years that should lead us to question Congress' judgment.

To the contrary, all of the arguments advanced by the majority as justifying modification of the rule were as true, if not more true, in 1996 than they are today. First, the majority asserts that program production and networking are complementary inputs that make vertical integration desirable, and that a merger of one of the top four networks with UPN or WB could be characterized as a merger of an established broadcast network with an established program producer. Leaving aside the factual inaccuracies of this argument (e.g., ABC and Fox are affiliated with major production studios just like UPN and WB), this characterization was equally true in 1996. Second, the majority argues that the rule should be retained for the top four networks but repealed for UPN and WB because the former are "established" broadcast networks, while the latter are still "nascent." Again, however, even assuming that UPN and WB are still "nascent" networks, they were far more nascent in 1996, when Congress specifically decided that they should fall within the dual network rule's application.

[1] *See* Mem. Op. and Order, FCC 00-155 (rel. May 3, 2000) at para. 10, *citing* 142 Cong. Rec. H1078-03, *H1121.

It is not hard to anticipate the effect that modification of the rule will have. It will reduce diversity on the public airwaves by reducing the number of outlets available to independent program producers. Independent programmers are already having a difficult time gaining network carriage. For the new television season, a record 24 of 37 new series are either owned or co-owned by the television networks which will air them.[2] Disney will own or co-own an interest in 3 out of 4 of ABC's new programs; CBS owns an interest in 6 of 7 new shows; NBC owns an interest in 4 of 7 new shows; 20th Century Fox will own or co-own 5 of Fox's 9 new shows; Paramount will produce 2 of UPN's 4 new series; Warner Brothers will own or co-own 4 of 6 new shows for WB.[3] Far from demonstrating that the rule has outlived its usefulness, the marketplace shows that the rule may be needed more today than ever.

The Order emphasizes the economic efficiencies that would accrue to incumbent networks by modifying the rule. This I do not doubt. But we have a higher duty than helping broadcasters maximize their private gain. Our first duty is to manage the airwaves in a manner that promotes the public's interest in competition and diversity. In the absence of evidence that more than four independent networks are not economically feasible, we should be cautious about changing our priorities.

[2] Joe Schlosser and Steve McClellan, "*Moneyphilia*," Broadcasting and Cable, May 22, 2000 at 17.

[3] *Id.*