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

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	
Ways to Further Section 257 Mandate and To Build on Earlier Studies	)	MB Docket No. 04-228
	)	
Public Interest Obligations of TV Broadcast Licensees	)	MM Docket No. 99-360

REPORT AND ORDER AND
ORDER ON RECONSIDERATION

Adopted: December 18, 2007 **Released: February 4, 2008**

By the Commission: Chairman Martin issuing a statement; Commissioners Copps and Adelstein dissenting and issuing separate statements; Commissioners Tate and McDowell issuing separate statements.

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I. INTRODUCTION

1. In this Report and Order and Order on Reconsideration ("Order"), we conclude our 2006 Quadrennial Review of the broadcast ownership rules. Our review encompasses the newspaper/broadcast cross-ownership rule, the radio/television cross-ownership rule, the local television ownership rule, the local radio ownership rule, and the dual network rule.[1] We review these rules under Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"),[2] which requires the Commission to review its ownership rules (except the national television ownership limit) every four years and "determine whether any of such rules are necessary in the public interest as the result of competition."[3] Under Section 202(h), the Commission "shall repeal or modify any regulation it determines to be no longer in the public interest."[4] We modify the newspaper/broadcast cross-ownership rule, and we generally retain the other broadcast ownership rules currently in effect.[5] We also address petitions for reconsideration of the Commission's

[1] The Commission's broadcast ownership rules are contained in 47 C.F.R. § 73.3555. For the local television ownership rule, the radio/television cross-ownership rule, and the newspaper/broadcast cross-ownership rule that are currently in effect, see 47 C.F.R. § 73.3555(b)-(d) (2002); for the local radio ownership rule, see 47 C.F.R. § 73.3555(a) (2006). The dual network rule is contained in 47 C.F.R. § 73.658(g) (2006).

[2] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-112, and Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (codified at 47 U.S.C. § 303 note (2006)) ("2004 Consolidated Appropriations Act").

[3] In 2004, Congress revised the then biennial review requirement to require such reviews quadrennially. Congress also eliminated the national television multiple ownership rule from the quadrennial review requirement. *See* 2004 Consolidated Appropriations Act, 118 Stat. at 3. Consumer Federation of America and Consumers Union ("CFA/CU Petition") ask for reconsideration of the 2002 biennial review of the Commission's broadcast ownership rules concerning issues relating to the national television ownership limit. CFA/CU Petition at 5-10. Because Congress subsequently set national television ownership limits by statute and excluded this rule from the quadrennial review requirement, those arguments are moot. *See Prometheus Radio Project, et al. v. FCC*, 373 F.3d 372, 395-397 (3d Cir. 2004) ("*Prometheus*"). In this Order, "Petition" refers to a petition for reconsideration filed in response to the *2002 Biennial Review Order*, *see* note 6, *infra*.

[4] 1996 Act, 110 Stat. at 111-12.

[5] Although we are basically retaining the local television ownership rule as currently in effect, we are reinstating the failed station solicitation rule. *See* Part V ("Local Television Ownership Rule").

Report and Order in its 2002 biennial review of its broadcast ownership rules (the "*2002 Biennial Review Order*") and the remand of that Order by the U.S. Court of Appeals for the Third Circuit in *Prometheus Radio Project, et al. v. FCC* ("*Prometheus*").[6]

II. BACKGROUND

2. *History of the Proceeding.* We initiated this 2006 Quadrennial Review proceeding with the *Further Notice of Proposed Rule Making* ("*Further Notice*").[7] In addition to inviting comment on whether the ownership rules remain "necessary in the public interest as the result of competition," under the Section 202(h) standard, the *Further Notice* invited comment on how to address the issues raised by the U.S. Court of Appeals for the Third Circuit in its *Prometheus* decision[8] and those raised by the U.S. Court of Appeals for the District of Columbia Circuit in *Sinclair Broadcast Group, Inc. v. FCC*.[9] This Order addresses all of those issues.

3. The *Prometheus* decision reviewed the *2002 Biennial Review Order*,[10] which addressed all of the Commission's broadcast ownership rules. The Commission concluded that neither the newspaper/broadcast cross-ownership rule nor the radio/television cross-ownership rule remained necessary in the public interest. Accordingly, it replaced those rules with new cross-ownership regulations called the cross-media limits. The Commission also revised its market definition and the way it counts stations for purposes of the local radio ownership rule, revised the local television ownership rule, modified the national television ownership cap, and retained the dual network rule. Several parties sought appellate review of various aspects of the *2002 Biennial Review Order*; others filed petitions for reconsideration.

4. The Third Circuit stayed the effectiveness of the new rules pending review.[11] In its subsequent decision on the merits, the court affirmed some of the Commission's decisions in the *2002*

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[6] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Report and Order and Notice of Proposed Rulemaking, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, 03-130, 18 FCC Rcd 13620 (2003), *aff'd in part and remanded in part*, *Prometheus*, 373 F.3d at 435*, stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied*, 545 U.S. 1123 (2005).

[7] *2006 Quadrennial Regulatory Review – Review of The Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Further Notice of Proposed Rule Making, MB Docket Nos. 06-121, 02-277, MM Docket Nos. 01-235, 01-317, 00-244, 21 FCC Rcd 8834 (2006). In this Order, "Comments" refers to comments in response to the *Further Notice* that were due to be filed by October 23, 2006, and "Reply" refers to reply comments that were due to be filed by January 16, 2007. We issued a Second Further Notice of Proposed Rule Making to set forth in greater detail proposals offered by the Diversity and Competition Supporters ("DCS" or "MMTC") to promote broadcast ownership by women and minorities. *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Second Further Notice of Proposed Rule Making, MB Docket Nos. 06-121, 02-277, MM Docket Nos. 01-235, 01-317, 00-244, 22 FCC Rcd 14215 (2007) ("*Second Further Notice*"). We address those proposals concurrently in a separate order. *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Further Notice of Proposed Rulemaking, MB Docket No. 07-294, adopted Dec. 18, 2007, Press Release (FCC 07-217) ("*Diversity Order*").

[8] *See Further Notice,* 21 FCC Rcd at 8835-48, ¶¶ 1-35.

[9] *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 163-65 (D.C. Cir. 2002) ("*Sinclair*"). The *Further Notice* invited comment on how to address the *Sinclair* decision. *See* 21 FCC Rcd at 8842, ¶ 18.

[10] 373 F.3d at 381.

[11] *See Prometheus Radio Project, et al. v. FCC,* No. 03-3388 (3d Cir. Sept. 3, 2003), *Stay Order*, 2003 WL 22052896.

Biennial Review Order and remanded others for further justification or modification.[12] On September 3, 2004, in response to the Commission's petition for rehearing, the court allowed certain revisions to its local radio ownership rules – "specifically, using Arbitron Metro markets to define local markets, including noncommercial stations in determining the size of a market, attributing stations whose advertising is brokered under a Joint Sales Agreement to a brokering station's permissible ownership totals, and imposing a transfer restriction (collectively, the 'Approved Changes')" - to go into effect, but continued its stay of the other revisions.[13] Accordingly, except for the Approved Changes, the ownership rules that were in effect prior to the *2002 Biennial Review Order*, including the previously existing newspaper/broadcast cross-ownership prohibition, radio/television cross-ownership rule, and local television ownership rule, remain in effect.

5. In response to our *Further Notice* and *Second Further Notice* in this proceeding, we received many comments from a broad range of commenters, including broadcasters, newspapers, public interest groups, unions, and individual citizens. While many commenters believe that relaxation of the media ownership rules is necessary to promote our goals and that the current rules must be revised or eliminated under the statutory standard, many other commenters expressed significant concerns about the general level and potential consequences of media consolidation, including concerns that such consolidation results in a loss of viewpoint diversity and negatively affects competition. In addition, the Commission conducted or commissioned ten studies and received numerous other studies in the record of the proceeding.[14] The Commission also conducted six media ownership hearings around the country and heard widely divergent testimony from a number of commenters and speakers at open microphones as to whether the media ownership rules should be relaxed, retained, or even tightened.[15] We have carefully reviewed these comments, as well as the studies and the testimony.[16] Our approach herein is a cautious approach. By modestly loosening the 32-year prohibition on newspaper/broadcast cross-ownership, our approach balances the concerns of many commenters that we not permit excessive consolidation with concerns of other commenters that we afford some relief to assure continued diversity and investment in local news programming. We believe that the decisions we adopt today serve our public interest goals, appropriately take account of the current media marketplace, and comply with our statutory

[12] *See generally Prometheus*, 373 F.3d at 389-435.

[13] *See Prometheus Radio Project, et al. v.* FCC, No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*").

[14] See *FCC Seeks Comment on Research Studies on Media Ownership,* Public Notice, DA 07-3470, MB Docket No. 06-121 (rel. July 31, 2007) for a description of the studies. The studies are available on the Commission's website: http://www.fcc.gov/ownership/studies.html. In this Order, "Comments to Media Ownership Studies" and "Reply to the Media Ownership Studies" refers to comments in response to the Public Notice that were due to be filed by October 22, 2007 and reply comments that were due to be filed by November 1, 2007.

[15] Media Ownership hearings were held in Los Angeles and El Segundo, California (Oct. 3, 2006); Nashville, Tennessee (Dec. 11, 2006); Harrisburg, Pennsylvania (Feb. 23, 2007); Tampa, Florida (April 30, 2007); Chicago, Illinois (Sept. 20, 2007); and Seattle, Washington (Nov. 9, 2007). Transcripts of the hearings are filed in MB Docket No. 06-121 (there is no transcript for the Nashville hearing). In addition, transcripts and audio webcasts of the hearings are available on the FCC website at http://www.fcc.gov/ownership/hearings.html.

[16] Capitol Broadcasting Company, Inc. ("Capitol") believes that the Commission's method of analyzing each rule individually in the *2002 Biennial Review Order* was insufficient, and it asks the Commission to conduct a comprehensive analysis of the collective impact of the new rules. Capitol Petition at 12-13. The Commission retains the discretion to best determine how to conduct its proceedings, *see* 47 U.S.C. §§ 154(i),(j), and we have conducted a comprehensive and thorough review of our ownership rules, considering them all together in one proceeding in light of our policy goals.

responsibilities.[17]

6. *Media Marketplace*. As discussed in succeeding sections in more detail, today's media marketplace remains a dynamic arena, albeit one in which the traditional "mainstream media" still maintain leading roles in many respects and are learning to adapt to the new digital and online environment. In 2002, the Commission noted the substantial evolution of traditional media (*i.e.*, daily newspapers and full-power television and radio stations) and the emergence of new modes of media (*e.g.*, portable devices, the Internet).[18] Whereas the years immediately preceding 2002 were largely characterized by dramatic technological advancements, the current record reflects that many noteworthy developments appear more in the nature of technological and marketplace refinements than the advent of wholly new media. The online medium in particular is well-recognized as another platform for the delivery of audio, video and written content.[19] Today, media companies both old and new are working to identify the best use of technology in order to maintain their competitive positions.[20]

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[17] The Office of Communication of the United Church of Christ, Inc., Black Citizens for a Fair Media, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press ("UCC") ask the Commission to reconsider its refusal to require a certain percentage of programming time for independent producers. UCC Petition at 42. In addition, the American Federation of Television and Radio Artists ("AFTRA") and the Screen Actors Guild ("SAG") ask the Commission to require the networks to devote 25 percent of prime-time programming slots to independent programmers. AFTRA Comments at 24-25; SAG Comments at 9-12. Finally, the Center for the Creative Community and the Association of Independent Video and Filmmakers ("CCC") seek a rule that promotes source diversity in the production of television programming, arguing that 77.5 percent of the new television programs for 2002 were owned in whole or part by the four major networks. CCC Petition at 7-8, 13-16. Although we received some testimony, invited and received comment on the issue of independent producers in response to the *Further Notice*, and commissioned a study that addressed some aspects of the issue (see "Vertical Integration and the Market for Broadcast and Cable Television Programming," by Austan Goolsbee, University of Chicago, Graduate School of Business; American Bar Foundation; and National Bureau of Economic Research (April 2007) ("Media Ownership Study 9"), *available at* http://www.fcc.gov/ownership/studies.html), upon further review of the scope of this issue, we decline to address those matters within this Order. We note that the rules that we are required to review under Section 202(h) are limited to the media ownership regulations addressed in this Order. Indeed, in the *2002 Biennial Review Order*, the Commission explicitly held that this issue was outside the scope of the proceeding. 18 FCC Rcd at 13864-69, ¶¶ 640-56. While the independent producer issues raised by these commenters may be pertinent to the broader issue of source diversity in the media, we find that they are more appropriately addressed elsewhere.

[18] *2002 Biennial Review Order*, 18 FCC Rcd at 13647-49, ¶¶ 86-89.

[19] Thus, for example, Communications Workers of America ("CWA") contends that the Commission should focus primarily on the ownership of newspapers and television stations because they continue to be the dominant sources of local news and information, despite the growth of cable, satellite, and the Internet. CWA Comments at 17-18, 54. CWA opposes including the Internet, particularly websites owned by the newspaper and media outlets, as an independent source of local news and information in the Commission's measurements of local media diversity. *Id.* at 21-24, 27. It argues that the Internet continues to serve primarily as an alternative distribution platform for traditional media outlets, citing several surveys and reports showing that most websites merely republish, repackage, and redesign information originated for their newspapers and television stations. *Id.* at 22-27. The Office of Communication of the United Church of Christ, Inc., National Organization for Women ("NOW"), Media Alliance, Common Cause, and Benton Foundation ("UCC") contend that the Internet and other forms of non-traditional media do not displace Americans' reliance on broadcast and newspapers for news and should be "treated as a supplement rather than a competitor of traditional media." UCC Comments at 43.

[20] *See, e.g.*, Newspaper Association of America ("NAA") Comments at 25-27; Media General Reply at 8-12; *see also The State of the News Media 2007, Online: Audience*, Project for Excellence in Journalism (2007) at http://www.stateofthenewsmedia.org/2007/narrative_online_audience.asp?cat=2&media=4 (Growth trends in the online audience of newspapers suggests that "the newspaper audience may not be shrinking, ... But it reinforces the imperative that the Internet model needs to figure out a way to 'monetize' those readers. Otherwise the resources available to cover the news may shrink."). *See also, e.g.*, *FCC Annual DTV Ancillary/ Supplementary Services*

(continued...)

7. Five years ago, the Commission recognized that digital technologies were beginning to translate into more options for consumers.[21] Since that time, it has become clear that additional consumer choices also bring audience fragmentation.[22] That development, in turn, has consequences for the business models that support the operation of traditional media companies – including, but not limited to, those entities' gathering and disseminating of news and information to their local communities. The record shows that the number of traditional media outlets has remained largely static since the Commission last considered its media ownership rules,[23] even as online-only outlets have grown.[24] As a result, traditional media entities have been trying to find ways to maintain revenue growth while implementing new models of distribution.[25] With attention turned to the online and digital environment, consolidation among owners of broadcast stations appears to have slowed,[26] while the stability of once-

(Continued from previous page)
Report, 18 FCC Rcd 23972 (2003); 47 U.S.C. § 336 (a), (e). DTV allows broadcasters to use part of their digital bandwidth for subscription video, datacasting, and other pay services. To date, the provision of ancillary and supplementary services has been modest.

[21] *2002 Biennial Review Order*, 18 FCC Rcd at 13647-49, ¶¶ 86-89.

[22] *See, e.g.*, NAA Comments at 40-41; Gannett Comments at 15-16; Cox Comments at 18-23; and Belo Comments at 18. As cable subscribership continues to grow, and as the total number of non-broadcast networks continues to increase, broadcast television stations' audience share continues to fall. *See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 05-255, Twelfth Annual Report, 21 FCC Rcd 2503, 2550-51, ¶ 93 (2006) ("*2005 Video Competition Report*"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 04-227, Eleventh Annual Report, 20 FCC Rcd 2755, 2804-05, ¶ 77 (2005) ("*2004 Video Competition Report*"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 03-172, Tenth Annual Report, 19 FCC Rcd 1606, 1669, ¶ 94 (2004). The introduction and increasing adoption of competing MVPD technologies has resulted in the decline in market share of cable operators in recent years. *See, e.g., 2005 Video Competition Report*, 21 FCC Rcd at 2617, Table B-1; *2004 Video Competition Report*, 20 FCC Rcd at 2869, Table B-1.

[23] *See* "Ownership Structure and Robustness of Media," by Kiran Duwadi, Scott Roberts, and Andrew Wise, FCC (2007) ("Media Ownership Study 2") at 2, *available at* http://www.fcc.gov/ownership/studies.html ("In the TV industry, the data reveal a slight increase in the number of stations and a slight decrease in the number of owners.... For the radio industry, the number of stations increased moderately."). *See also* Broadcast Station Totals 1990 to Present, FCC, *available at* http://www.fcc.gov/mb/audio/totals/index.html.

[24] Media General Comments at 44-45; NAA Comments at 60-64; Tribune Comments at 22; Cox Comments at 20-23; NAB Reply at 26.

[25] Cox Comments at 17-18; Media General Comments at 59-60; NAA Comments at 25-30.

[26] *See* Media Ownership Study 2 at 2 ("Media ownership was fairly stable over the period studied. This contrasts with the previous [September 2002 FCC] study, which revealed substantial consolidation across most forms of media, especially following the 1996 Telecommunications Act."). At least one major broadcasting company seems to suggest that it is uninterested in this rulemaking because its focus is elsewhere:

> The Walt Disney Company is not advocating and does not seek any relaxation of the Commission's Broadcast Ownership Rules…. [T]he Walt Disney Company owns 10 television stations that collectively have a theoretical aggregate reach of less than 24% of U.S. Television Households, well below the statutory cap of 39%. Disney has not bought a television station in more than 10 years. Disney sold any interest in newspapers years ago. Disney also [has divested] a large number of its owned radio stations.
>
> Given the increase in, and attractiveness of, new media outlets, in Disney's view, the Commission may soon find itself considering ways to incent, rather than restrict, ownership of over-the-air broadcast stations.

Walt Disney Comments at 2.

storied newspaper publishing companies has become open to question.[27]

8. Yet while the marketplace is fragmenting and the revenue needed to maintain traditional media operations appears to be declining,[28] the data also show that mainstream media continue to hold a major position in the marketplace, particularly in the markets for the provision of news and information. Commission-sponsored studies and those of third parties indicate that consumers still rely most heavily on broadcast television stations and daily newspapers for local news and other non-entertainment fare.[29] Consumers rely on broadcast radio stations to a lesser extent.[30] Moreover, studies focused on the specifics of Internet usage to obtain news show that sites operated by newspapers and broadcast television stations capture a significant percentage of consumer attention.[31] This appears to be due in part to the power of "branding" in a competitive marketplace; existing newspapers and broadcasters enjoy the benefits of years of consumer familiarity and trust.[32] This also may be due to the fact that traditional media still largely provide the original newsgathering and reporting on which consumers – and many of the new media outlets such as aggregator sites and bloggers – rely.[33] Although the future landscape of the online media world is difficult to predict, for the foreseeable period ahead it appears that traditional media outlets will remain important sources of news and information, especially at the local level.

9. *Policy Goals.* The media ownership rules are designed to foster the Commission's longstanding policies of competition, diversity, and localism. We set these policies out in detail in the

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[27] *See, e.g.*, NAA Comments at 43; Media General Comments at 65.

[28] *See, e.g.*, NAA Comments at 42; Tribune Comments at 34. *See also*, *e.g.*, Jonathan Levy, Marcelino Ford-Livene, and Anne Levine, *Broadcast Television: Survivor in a Sea of Competition*, OPP Working Paper No. 37 (Sept. 2002) at 26 ("OPP Working Paper No. 37"), *available at* http://www.fcc.gov/osp/workingp.html ("the fact that the gap in broadcast and cable network prime time audience size is narrowing suggests once again that cable will continue to expand its advertising revenue share at the expense of broadcasting"); Peter Appert, *Newspaper Stocks: Values or Value-Traps?*, Goldman Sachs: Publishing News8Views, Apr. 20, 2006, at 3 (In view of "the ever increasing fragmentation in the local media marketplace, we believe we are experiencing a permanent downward shift in valuation levels").

[29] *See e.g.*, How People Get News and Information, survey by Nielsen Media Research, Inc. (2007) ("Media Ownership Study 1"), *available at* http://www.fcc.gov/ownership/studies.html; Consumers Union, Consumer Federation of America, and Free Press ("CU Comments"), Attach., Study 7 "Media Usage: Traditional Outlets Still Dominate Local News information" by Mark Cooper**,** and CU Comments, Attach., Study 8 "The Internet and Local News and Information" by Mark Cooper**.**

[30] *See* NAB Comments at 53-54. *See also* CU Comments, Attach., Study 7 and Study 8.

[31] *See* Pew Internet, Latest Trends, Internet Activities http://www.pewinternet.org/trends.asp (72 percent of Internet users report ever using the Internet to get news, and 37 percent report using the Internet to get news "yesterday" (the day prior to the date of the survey)); Pew Research Center for The People & The Press, "Online Papers Modestly Boost Newspaper Readership: Overview" (July 30, 2006), *available at* http://people-press.org/reports/display .php3?ReportID=282 (finding 31 percent of people surveyed use the Internet three or more times per week to access news, compared to 25 percent in 2005 and 2 percent in 1996); The State of the News Media 2007: Online: Audience, Project for Excellence in Journalism (2007), *available at* http://www.stateofthenewsmedia.org/2007 /narrative_online_audience.asp?cat=2&media=4. *See also* Newspaper Websites: Total Web Audience, Newspaper Association of America, *available at* http://www.naa.org/TrendsandNumbers/Newspaper-Websites.aspx (number of unique visitors to newspaper websites has increased from 41 million in January 2004 to 59 million in August 2007).

[32] CU Comments, Attach., Study 8.

[33] *See, e.g.*, NAA Comments at 55-57; CU Comments at 10-13 (citing to their own Studies 7 and 8). State of the News Media 2006: Online: Content Analysis, Project for Excellence in Journalism (2006), *available at* http://www.stateofthenewsmedia.org/2006/narrative_newspapers_economics.asp?cat=4&media=3 ("Virtually all original newsgathering, though, was still being done by the old media, and some of the major new Internet-only challengers appeared to have made less progress in content over the previous year than the sites of the old media.").

2002 Biennial Review Order,[34] and we reaffirm those goals. We address localism more fully in a separate report intended to enhance broadcasters' commitment to serving their local markets.[35] In addition, in the *Diversity Order*, we adopt a number of measures to enhance diversity by promoting entry of small businesses, including those owned by women and minorities,[36] and invite comment on other proposals to promote those goals.

10. *Section 202(h) Analysis.* Section 202(h) of the Telecommunications Act of 1996 requires the Commission to review quadrennially[37] its broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as a result of competition."[38] The statute further requires the Commission to "repeal or modify any regulation it determines to be no longer in the public interest."[39] In *Prometheus*, the Third Circuit concluded that "necessary in the public interest" is a "'plain public interest' standard under which 'necessary' means 'convenient,' 'useful,' or 'helpful,' not 'essential' or 'indispensable.'"[40] It further concluded that the second sentence of Section 202(h) requires the Commission to repeal or modify any regulations that it has determined do not satisfy the standard set forth in the first sentence.[41]

11. Moreover, the court explicitly rejected the argument that Section 202(h) is a "one-way ratchet" that the Commission may use only to eliminate existing regulations, reasoning that this construction ignores the word "modify" and the requirement that the Commission act "in the public interest."[42] Thus, the court rejected contentions that Section 202(h) imposes "rigid limits on the Commission's ability to regulate in the public interest"[43] and instead held that the statute requires only

[34] 18 FCC Rcd at 13627-45, ¶¶ 17-79.

[35] UCC claims that the Commission also failed to ensure that any cost savings resulting from consolidation would be used to provide more and better local news and public affairs programming. UCC Petition at 2-10. As noted above, issues related to localism are being addressed in a separate localism report.

[36] In the *2002 Biennial Review Order*, the Commission stated that it would commence a separate proceeding to examine proposals to advance broadcast ownership opportunities for minorities and women. 18 FCC Rcd at 13634, 13636, ¶¶ 46, 50. The *Prometheus* court, noting that the Commission had deferred consideration of certain proposals for advancing broadcast ownership by minority and disadvantaged businesses and for promoting diversity in broadcasting for a future Notice of Proposed Rulemaking, stated that "the Commission's rulemaking process in response to our remand order should address these proposals at the same time." 373 F.3d at 421 n.59. Accordingly, we concurrently adopt the *Diversity Order*, which adopts a number of proposals to enhance diversity of ownership. A number of parties, including the MMTC, NOW, and National Association of Black Owned Broadcasters, Inc. and the Rainbow/PUSH Coalition, Inc. ("NABOB"), had petitioned for reconsideration of the *2002 Biennial Review Order*, arguing that the new rules did not address minorities and suggesting proposals that the Commission could adopt to enhance diversity in media ownership. *See, e.g.,* MMTC Petition at 10-28. In addition, UCC sought reconsideration of a number of issues relating to the Commission's promotion of its diversity goals. UCC Petition at 2-10. *See also* Future of Music Coalition and American Federation of Musicians Reply ("FMC Reply ") at 13-14, Attach., "False Premises, False Promises," by Peter DiCola, Research Director, Future of Music Coalition (Dec. 2006) ("DiCola Study") at 85-90 (proposing a new diversity measure). The Commission addresses these diversity proposals in the *Diversity Order*, *supra* note 7.

[37] Congress amended the statute in 2004 to make the review requirement quadrennial rather than biennial. *See 2004* Consolidated Appropriations Act, 118 Stat. at 3.

[38] 1996 Act, 110 Stat. at 111-12.

[39] *Id.*

[40] 373 F.3d at 394.

[41] *Id.*

[42] *Id.*

[43] *Id.* at 382.

that the Commission "'monitor the effect of ... competition ... and make appropriate adjustments' to its regulations."[44] In sum, Section 202(h) requires us to periodically examine these rules, and repeal or modify them if they do not remain useful in the public interest.[45] In this Order, we examine each of these rules in turn.

12. *Severability.* Although all of the ownership rules that we review in this Order are designed to further diversity, competition and/or localism, each serves a particular function in the media marketplace independently of the others. Therefore, it is our intent that each of those rules shall be severable. If any of the rules is declared invalid or unenforceable for any reason, it is our intent that the remaining rules shall remain in full force and effect.[46]

III. NEWSPAPER/BROADCAST CROSS-OWNERSHIP

13. In this section we address the newspaper/broadcast cross-ownership rule to determine whether it is necessary in the public interest. The 1975 cross-ownership ban is the only Commission media ownership rule that has remained in effect without modification for over three decades. Today, we make a modest change in the rule that has the primary effect of presuming that certain limited combinations of newspaper and broadcast facilities in the largest markets are in the public interest.[47] In this order, we take a modest step in loosening the complete ban on cross-ownership. We adopt a

[44] *Id.* at 391 (quoting *2002 Biennial Review Order*, 18 FCC Rcd at 4726-27, ¶ 5).

[45] *Id.* at 395. The vast majority of commenters agree that *Prometheus* sets forth the legal standard guiding this proceeding. FMC recommends that the Commission use a standard of "in the public interest" and not "necessary in the public interest." Future of Music Coalition Petition at 5-6 ("FMC Petition"). Similarly, UCC protests the view that Section 202(h) carries a deregulatory bent. UCC Petition at 10-17. Clear Channel, however, continues to argue that we should construe "necessary" in the context of Section 202(h) to mean "absolutely required," "indispensable," or "essential." *See* Clear Channel Comments at 5-6. Both the Third Circuit and the D.C. Circuit explicitly rejected this proposed construction, and we decline to adopt it here. *See Prometheus*, 373 F.3d at 393-94; *Cellco Partnership v. FCC*, 357 F.3d 88, 97-98 (D.C. Cir. 2004) (affirming Commission's interpretation of "necessary in the public interest" in the context of the biennial review requirements of Section 11 of the Act, 47 U.S.C. § 161, and concluding that the definition of "necessary" was not constrained by prior court decisions).

[46] *2002 Biennial Review Order*, 18 FCC Rcd at 13874, ¶ 679.

[47] On November 13, 2007, the Chairman issued a news release, which shared with the public a proposed change to the newspaper/broadcast cross-ownership rule and his proposal to retain the other media ownership rules currently under review. He invited public comment on his proposals and indicated that any such comment should be filed by December 11, 2007, which was the day when, absent a waiver, the Sunshine Period would begin for the Commission's December 18 meeting. *See* "Chairman Kevin J. Martin Proposes Revision to the Newspaper/Broadcast Cross-Ownership Rule" (rel. Nov. 13, 2007). In this Order, "12/11/07 Comments" refer to public comments submitted in response to the news release. Several commenters criticize the Chairman for seeking public comment outside the scope of agency procedures and question whether the news release complies with Administrative Procedure Act ("APA") requirements. Communications Workers of America and American Federation of Television & Radio Artists ("CWA/AFTRA 12/11/07 Comments") and Consumers Union, Consumer Federation of America, and Free Press ("CU 12/11/07 Comments") request that the Commission publish the final rule in the Federal Register prior to its adoption. CWA/AFTRA 12/11/07 Comments at 2; CU 12/11/07 Comments at 36-41. *See also* Media Access Project ("MAP") 12/11/07 Comments at 1-2; The Office of Communications of the United Church of Christ, Inc., National Organization for Women, Media Alliance, Common Cause, Benton Foundation, Consumers Action, Massachusetts Consumers' Coalition, NYC Wireless, Democracy Now!, Wayne Caswell, and James S. Elekes ("UCC 12/11/07 Comments") at 2-4. We disagree and find that the Commission has satisfied the APA notice of proposed rulemaking requirements. The *Further Notice* was adequate under Section 553 of the APA, which only requires notice of the "terms or substance of the proposed rule *or a description of the subjects and issues involved*." (emphasis added). 5 U.S.C. § 553(b)(3). Because the original NPRM was adequate for APA compliance purposes, it is immaterial whether the recent news release complied with APA requirements. Indeed, any Commissioner was free to issue a press release sharing with the public his or her suggested changes to the media ownership rule prior to the December 18 meeting.

presumption, in the top 20 Designated Market Areas ("DMAs"), that it is not inconsistent with the public interest for one entity to own a daily newspaper and a radio station or, under the following limited circumstances, a daily newspaper and a television station, if (1) the television station is not ranked among the top four stations in the DMA and (2) at least eight independent "major media voices" remain in the DMA. In all other instances, we adopt a presumption that a newspaper/broadcast station combination would not be in the public interest, with two limited exceptions, and therefore emphasize that the Commission is unlikely to approve such transactions. Taking into account these respective presumptions, in determining whether the grant of a transaction that would result in newspaper/broadcast cross-ownership is in the public interest, the Commission will consider the following factors: (1) whether the cross-ownership will increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast outlet, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations. Our cautious approach addresses the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity.

A. Background

14. Adopted in 1975, the newspaper/broadcast cross-ownership rule prohibits common ownership of a full-power broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.[48] In the *1998 Biennial Review Order*, the Commission concluded that the newspaper/broadcast cross-ownership rule continued to serve the public interest because it furthered diversity, and therefore should be retained.[49] The Commission noted, however, that the rule might not be necessary to achieve its intended public interest benefits under all circumstances.[50]

15. In the *2002 Biennial Review Order*, the Commission eliminated the newspaper/broadcast cross-ownership ban, which did not account for either market size or the number of available outlets in a market, finding that it failed to promote competition, localism, or diversity.[51] The Commission held that, because newspapers and broadcast stations do not compete in the same economic market, elimination of the ban could not harm competition.[52] The Commission also found that efficiencies resulting from cross-ownership can actually promote localism because newspaper-owned television stations tend to produce local news and public affairs programming in greater quantity and of a higher quality than non-

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[48] For AM radio stations, the service contour is the 2mV/m contour, 47 C.F.R. § 73.3555(d)(1) (2002); for FM radio stations, the service contour is the 1mV/m contour, *id.* § 73.3555(d)(2) (2002); for TV stations, the service contour is the Grade A contour, *id.* § 73.3555(d)(3) (2002). A daily newspaper is one that is published in the English language four or more times per week. *Id.* § 73.3555 n.6. As discussed below, the rule was revised in the *2002 Biennial Review Order*, and appears in the current print of the Code of Federal Regulations. The revised rule was remanded and stayed by the Third Circuit in *Prometheus*.

[49] *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, Biennial Review Report, 15 FCC Rcd 11058, 11105, ¶ 88 (2000).

[50] *Id*. at 11109, ¶ 95. The Commission recognized that there may be instances, because of the size of a market or the size and type of the newspaper and broadcast outlet involved, that sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed. Therefore, it initiated a rulemaking to develop a more complete record to determine the circumstances in which the cross-ownership rule may not be necessary to achieve its intended public interest benefits. In addition, it planned to examine whether the rule should be tailored to address contemporary market conditions.

[51] 18 FCC Rcd at 13748, ¶ 330.

[52] *Id.* at 13748-49, ¶¶ 331-32.

newspaper-owned stations.[53] Furthermore, the Commission determined that the blanket ban was not needed to promote diversity given the vast array of media outlets available in many markets.[54] The Commission replaced the ban with new cross-media limits, which were targeted more precisely at specific types of markets in which particular combinations could harm diversity.[55] The cross-media limits were derived from the Diversity Index (the "DI"), which analyzed and measured the availability of outlets that contributed to viewpoint diversity in local media markets.[56]

16. The Third Circuit affirmed the Commission's decision to eliminate the complete ban, finding the Commission's conclusions that the ban undermined localism and that it was unnecessary to protect competition or diversity to be reasonable.[57] It agreed that the Commission reasonably concluded, given the conflicting evidence in the record on whether ownership influences viewpoint, that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias so as to warrant maintaining the prohibition.[58] The court concluded, however, that the specific cross-media limits adopted were not supported by reasoned analysis, and remanded those limits for further justification or modification. The court found that the Commission placed too much weight on the Internet as a source of local news in its DI, did not support the equal-sized competitor assumption on which the DI was based, and inconsistently derived the cross-media limits from its DI results.[59] Numerous parties also objected to the DI, claiming that its methodology and the measures based upon it were flawed.[60] In addition, parties

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[53] *Id.* at 13753-60, ¶¶ 342-54.

[54] *Id.* at 13760-62, ¶¶ 355-59.

[55] *Id.* at 13775, ¶ 390. The cross-media limits also replaced the existing radio/television cross-ownership rule. *Id*. The new cross-media limits prohibited newspaper/broadcast and radio/television cross-ownership in markets with three or fewer television stations. *Id.* at 13797-801, ¶¶ 452-61. The revised rules did not, however, bar a broadcast station from starting a new newspaper in its market. *Id.* at 13799, ¶ 456. For purposes of counting the number of stations in a market under the cross-media limits, the Commission counted both commercial and noncommercial full power television stations assigned to the DMA. *Id.* at 13798, ¶ 454. In markets with between four and eight stations, the Commission held that an entity could own a combination that includes a newspaper and either (a) one television station and up to 50 percent of the radio stations that could be commonly owned under the applicable radio cap, or (b) up to 100 percent of the radio stations allowed under the applicable radio cap. *Id.* at 13803, ¶ 466. In markets with nine or more television stations, cross-media combinations were permitted without limit under the cross-media limits, so long as they complied with the applicable local television and local radio ownership limits. *Id.* at 13804, ¶ 472-73.

[56] *Id.* at 13775-76, ¶ 391. The DI, modeled after the Herfindahl-Hirschman Index ("HHI") used for determining market concentration, assigned a weight to each type of outlet based on its relative use by consumers. *Id.* at 13776-79, ¶¶ 393-400.

[57] 373 F.3d at 398-99, 399-400.

[58] *Id.* at 399-400. The court also found the Commission did not violate Section 202(h) by concluding that (1) repealing the cross-ownership ban was necessary to promote competition and localism, and (2) retaining some limits was necessary to ensure diversity. Furthermore, the court held that the Commission's continued regulation of cross-ownership was constitutionally sound. *Id.* at 400-02 (citing *FCC v. Nat'l Citizens Comm. for Broad*., 436 U.S. 775, 801-02 (1978)) ("*NCCB*").

[59] *Id.* at 402-03.

[60] American Federation of Labor and Congress of Industrial Organizations and the Department for Professional Employees, AFL-CIO ("AFL-CIO") Comments at 56; NAA Comments at 85-89. UCC and CFA/CU assert that the DI is rife with flawed assumptions. Among the problems they assert are (a) inclusion of the Internet in the index, despite the fact that the major providers of Internet news and information own other media outlets, and (b) inclusion of outlets regardless of whether they offer local news, whether they reach the entire DMA, and whether they have reportable audience shares within the DMA. CFA/CU contends that the DI is not procedurally or substantively sound. For example, they take issue with the fact that certain television stations within the New York DMA, including a community college station and a station with a home shopping format, are weighted more heavily than (continued...)

contended that because the DI was the basis for the cross-media limits, the deficiencies in the DI were fatal to the adopted limits.[61]

17. In light of the extensive and detailed criticism of the DI, we tentatively concluded in the *Further Notice* that the DI is an inaccurate tool for measuring diversity and that some aspects of diversity may be difficult to quantify.[62] We affirm that conclusion here, and accordingly reject any use of the DI. In addition, the court held that because the cross-media limits are based upon the DI, its deficiencies are fatal to the cross-media limits. Thus, on remand and reconsideration, we will not reinstate the cross-media limits or rely on the DI.[63] Instead, we will modify the newspaper/broadcast cross-ownership rule as described below.

B. Discussion

18. As an initial matter, we reaffirm the Commission's decision to eliminate the blanket ban on newspaper/broadcast cross-ownership and replace it with a presumption that waivers of the ban are in the public interest in certain limited circumstances set forth below. The *Prometheus* court agreed that the ban is not necessary to promote competition, diversity, or localism. First, the court agreed that the ban is not necessary to promote competition in local markets because most advertisers do not view newspapers and television stations as close substitutes.[64] Second, the court agreed that the ban could undermine localism by preventing efficient combinations that would allow for the production of high-quality local news.[65] Third, the court found that the ban is not necessary on grounds of diversity because of insufficient evidence that ownership influences viewpoint.[66] Finally, the court affirmed that a complete ban is unwarranted due to the presence of other media sources in local markets, such as the Internet and cable.[67]

19. Evidence in the record continues to support the Commission's earlier decision that retention of a complete ban is not necessary in the public interest as a result of competition, diversity, or localism. Many commenters agree that an absolute ban is not necessary in order to achieve our competition, localism, or diversity goals.[68] We agree and remain unconvinced that a blanket ban would

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The New York Times in the DI. Procedurally, CFA/CU fault the Commission for failing to seek public comment on the index. *See*, *e.g.,* CFA/CU Petition at 3-4, 14-15.

[61] UCC Petition at 34-38; CFA/CU Petition at 3-4.

[62] 21 FCC Rcd at 8848, ¶ 32.

[63] Because our new cross-ownership rule does not rely on the DI and we are abandoning the cross-media limits, we dismiss as moot the petitions challenging the DI and the cross-media limits.

[64] *See* 373 F.3d at 398.

[65] *Id*. at 398-99.

[66] *Id.* at 399-400.

[67] *Id.* at 400.

[68] Belo Comments at 17-18; Cox Comments at 5-7; Fox Comments at 25-26; Freedom of Expression Foundation, Inc. ("FOEF") Comments at 9-10; Media General Comments at 43-44, 63; Gannett Comments at 6-14; Hearst Comments at 47-48; NAA Comments at 2, 17-18; NAB Comments at 110-11; Tribune Comments at 7-9; *see also* Remarks by Vincent Malcolm, Vice President and General Manager of KTLA Channel 5 (Tribune Broadcasting Company), Media Ownership Hearing in El Segundo, California (Oct. 3, 2006), Transcript at 23-28; Remarks by Pat Roberts, President of Florida Association of Broadcasters, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 83; Remarks by Congressman Jim Davis, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 95-97; Remarks by Bob Gremillion, President, CEO and Publisher of the South Florida Sentinel, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 221-25.

(continued...)

continue to serve the public interest, particularly in the largest markets. As the Commission stated in adopting the newspaper/broadcast cross-ownership ban in 1975, "an agency's view of the extent to which its public interest mandate requires it to take newspaper ownership into account can change over the years," and that prior statements "on what policy best serves the public interest does not mean that the agency is excused from its continuing responsibility to seek to further the public interest which may cause it to reach a different conclusion twenty-two years later."[69] We have ample evidence in the record that marketplace conditions have indeed changed and thus justify a recalibration at this time. As discussed below, the record indicates that the largest markets contain a robust number of diverse media sources and that the diversity of viewpoints would not be jeopardized by certain newspaper/broadcast combinations. The record also shows that newspaper/broadcast combinations can create synergies that result in more news coverage for consumers. In addition, because the presumption we adopt today that waivers of the ban are in the public interest is generally limited to combinations of a single broadcast outlet and a daily newspaper in the largest markets, it will ensure that such synergies can be captured without impairing diversity. In short, our new rule lifts the complete ban but does so in a modest manner in order to ensure both that our goals of competition, localism, and diversity are not compromised and that we may achieve the economic benefits of allowing certain combinations.

20. We now adopt a presumption that generally will permit certain newspaper/broadcast station combinations in the largest 20 markets, and generally will preclude them in all other markets.[70] Specifically, we establish a presumption that a waiver of the cross-ownership ban is in the public interest in the following circumstances: when a daily newspaper seeks to combine with a radio station in a top 20 DMA, or when a daily newspaper seeks to combine with a television station in a top 20 DMA and (1) the television station is not among the top four ranked stations in the market and (2) at least eight "major media voices" would remain in the DMA. We will continue to presume that all other proposed newspaper/broadcast station combinations are not in the public interest, subject only to two limited exceptions. In evaluating transactions to determine whether a waiver is warranted, we will look at every transaction on a case-by-case basis, mindful of these presumptions. We provide specific factors that the Commission will consider in conducting that analysis to determine whether a proposed combination will

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But see AFL-CIO Comments at 52-56 and Reply at 26; AFTRA Comments at 20; CWA Comments at 4, 54; CU Comments at 6, UCC Comments at 60, 63 and Reply at 26; Joint Resolution of State, Regional and National Association of Free Community Papers Comments at 1; Free Community Papers of New England Comments at 1; Free Community Papers of Michigan Comments at 1; Free Community Papers of New York Comments at 1; Remarks by Congresswoman Maxine Waters, Media Ownership Hearing in Los Angeles, California (Oct. 3, 2006) Transcript at 19-23; Remarks by The Honorable Diane Watson, Media Ownership Hearing in Los Angeles, California (Oct. 3, 2006) Transcript at 23-27; Remarks by Dr. Mark Cooper, Director of Research for the Consumer Federation of America, Media Ownership Hearing in El Segundo, California (Oct. 3, 2006) Transcript at 56-60; Remarks by Emily Rush, Citizen Participant, Media Ownership Hearing in El Segundo, California (Oct. 3, 2006) Transcript at 74-76; Remarks by Steve Erlanger, Publisher of Hometown News, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 51-57; Remarks by Professor Eric Klinenberg, New York University, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 67-72; Remarks by Patrick Manteiga, Editor and Publisher of La Graceta, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 73-78; Remarks by Lowel Stewart Harris, Teacher and Student, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 290-92; Remarks by Lucille Griggs, Citizen Participant, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 295-97.

[69] *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, 50 FCC 2d 1046, 1051 ¶ 20 (1975) ("*1975 Second Report & Order*").

[70] Our rules will not, however, bar a broadcast station in a market from starting a newspaper, as that would expand, not decrease, diversity. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13798-99, ¶ 456; *see also* Letter from Mark D. Schneider, Counsel for Allbritton Communications Co. to Marlene H. Dortch, Secretary, FCC (Nov. 19, 2007).

be in the public interest. Our cautious approach balances the need to support the availability and sustainability of local news and informational programming with the needs to preserve diversity and to avoid significantly increasing local ownership concentration.

21. *Relevant Marketplace Developments*. The Commission has tailored its approach to common ownership of newspapers and broadcast stations several times in its history as the media marketplace evolved. As discussed below, the current ban prohibiting the cross-ownership of newspapers and broadcast stations arose 32 years ago in an era when two mature industries – daily newspapers and broadcasting – constituted the only "mass media" providing local news and information to most American communities. In 1975, moved by a newly heightened concern about media diversity at the local level, the Commission reversed what had been its decades-old policy of encouraging newspaper/broadcast combinations.[71] The data before us now show that the media environment has changed considerably over the past three decades. The emergence of new forms of electronic media in recent years has come at the expense of traditional media, and of newspapers in particular. Changes include a diminished number of newspaper outlets, ebbing popularity with consumers, and a notable shift in the role that traditional media outlets play in gathering and disseminating news and information. Faced with these facts, we, like our predecessors, remain cognizant of our obligation to adjust our regulations to "adequately reflect the situation as it is, not was."[72] And we are now, of course, under a statutory obligation to do so under Section 202(h) of the 1996 Act. We find that the state of the marketplace today warrants a measured readjustment of the newspaper/broadcast rule. We believe that our revised regulation will continue to serve our goal of preserving media diversity in local markets while also providing some flexibility for new, efficient combinations in appropriate circumstances.

22. In the early days of broadcasting, when the success of the then-new medium was not assured, the Commission had actively encouraged newspaper owners to apply for newly available licenses in their local communities.[73] Regulators hoped that such established local media entities would bring both expertise and financial support to the development of broadcasting as a viable mass medium.[74] By the 1970s, however, the Commission determined that television and radio broadcasting operations had come into their own and no longer needed the help of local newspaper publishers to survive:

> Now, unlike [the early days of broadcasting], the broadcasting medium has matured. While not all have made profits, for the most part, it is the particular market situation, or the newness of the operation that is the cause. Thus, the special reason for encouraging newspaper ownership, even at the cost of a lessened diversity, is no longer generally operative in the way it once was. Nor are newspapers the sole reservoir of experience on which reliance has to be placed. To the extent that television (or radio) facilities are worth applying for, qualified and experienced applicants can be expected to step forward. Newspapers are not the only interested parties. The Commission is obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was.[75]

Given these developments, and mindful of its obligations to take action in the public interest, the Commission's concern shifted to media diversity – specifically, its "long standing policy of promoting diversification of ownership of the electronic mass communications media" on the basis that "ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of

[71] *See generally 1975 Second Report & Order*, 50 FCC 2d 1046.

[72] *Id*. at 1074-75, ¶ 100.

[73] *See Id.* at 1066, 1074-75, ¶¶ 70, 100.

[74] *Id*.

[75] *Id*. at 1074-75 ¶ 100.

presentation, all of which are a critical aspect of the Commission's concern with the public interest."[76]

23. To that end, the Commission in its 1975 *Second Report and Order* concluded that it no longer served the public interest to permit one entity to own both a local daily newspaper and a broadcast station in the same community.[77] The Commission based part of its rationale for adopting a cross-ownership ban on the relatively limited resources available at that time for the dissemination of ideas on a community-wide scale. In 1975, a person wishing to provide local news to reach a mass audience on a frequent basis in his or her local community had only two reliably effective options: (1) produce a written publication, or (2) acquire a full-power broadcast license.[78] Neither option was without significant transaction costs that raised high hurdles against entry into the mass media arena.[79] Given the then-extant harms of highly consolidated cross-ownership and the high barriers to entry, the Commission adopted the ban, which continues to this day.

24. The media marketplace today is profoundly different. In absolute terms, dramatic changes have occurred over several decades with respect to the number and types of media "voices" competing for the public's attention. With the increase in media voices has come a marked fragmentation of audience share as viewers, listeners and readers gravitate toward new sources of information and entertainment. The modern era of fragmentation began in the late 1970s, with the emergence of what has grown to be hundreds of video programming channels available over cable and, later, by satellite distribution. Many of the media outlets now vigorously competing for audiences simply did not exist at the time the Commission's rule prohibiting newspaper/broadcast combinations was adopted. For example, there are currently approximately 11.6 million subscribers to satellite radio, a service which did not exist in 1975.[80] In addition, approximately 86 percent of U.S. households subscribe to video service provided by an MVPD, which includes cable, SMATV systems, direct broadcast satellite (DBS), fiber-optic network service, wireless cable, and other such delivery systems that either did not exist or existed only in limited form in 1975.[81] Moreover, increased efficiencies in the use of terrestrial broadcast

[76] *Id.* at 1048, 1050, ¶¶ 9, 14.

[77] *Id.* at 1075, ¶ 101.

[78] The relatively limited options available to a person attempting to reach a wide audience within his or her community stands in stark contrast to the means by which new entrants today can participate in the marketplace of ideas in an effective way. The widespread availability of home publishing devices that Americans now enjoy in the form of personal computers, printers, and copy duplication equipment existed only in limited, cost-prohibitive, and primitive form – if they existed anywhere at all. William Blinn Communications, *A Short Jaundiced History of Desktop Publishing*, Random Thoughts: Communications With a Purpose, July 2004, *available at* http://www.blinn.com/news/2004-07.pdf (visited Dec 10, 2007). The Internet, which today stands as the premiere means by which ordinary citizens and startup media companies communicate with a worldwide audience, was in 1975 little more than a handful of linked university and Defense Department research computers transmitting relatively miniscule amounts of information, none of it for public consumption. Katie Hafner & Matthew Lyon, *Where Wizards Stay Up Late: The Origins of the Internet* 211 (1996) (MIT's Artificial Intelligence Lab passed only 9,925 messages over ARPANET, the Internet's predecessor, during the first quarter of 1976).

[79] The number of traditional newspapers operating in the United States during the period between 1945 and 1980 remained relatively stable, which suggests that the newspaper market was operating at or near capacity and generally was unlikely to support additional entrants. In 1947, there were 1,854 daily newspapers; in 1958, there were 1,778 daily newspapers; in 1970, there were 1,748; in 1980, there were 1,745. *Statistical Abstracts 1951-1994*, US Department of Commerce, Bureau of the Census, *available at* http://www.census.gov/prod/www/abs/statab1951-1994.html (visited Nov. 15, 2007). On the broadcasting side, by 1975 the Commission noted that it was very possible that a newspaper owner applying for a broadcast license in its local community might well be applying for the last available broadcast channel in the area, due to the fact that "the number of channels open for filing ha[d] vastly diminished" as compared to earlier years. *See 1975 Second Report & Order*, 50 FCC 2d at 1075, ¶ 101.

[80] *See* NAA Comments at 24-37.

[81] *Id*. at 30.

spectrum allowed for increased numbers of television and radio stations on the air since 1975; the number of radio stations increased by approximately 76 percent, while there has been an 83.5 percent growth in the number of television stations over the same period.[82] The later dawning of the Internet as a major distribution channel for content has accelerated this audience fragmentation.[83] As new digital technologies are being introduced, audiences continue to splinter, and advertising dollars continue to shift with the changing structure of the marketplace.[84] All of these post-1975 marketplace developments obviate the need for an across-the-board ban on newspaper/broadcast combinations.

25. On its surface, the fragmented state of media audiences today seems a rather benign consequence of technological progress. Media audiences in overall terms continue to grow,[85] as do advertising revenues that are generated by the various media that reach those audiences.[86] In many respects, the evolution of the modern media marketplace has been a positive social advancement in terms of its potential for increased distribution of news and information.

26. How well the traditional media are adapting to the current phase of media evolution – and what the consequences may be for the gathering and reporting of news and information – is a matter of considerable debate. Some evidence suggests that while television originally diverted audiences from radio and newspapers, the Internet and handheld devices may be helping to bring audiences back to these traditional forms of media.[87] In fact, unique visitors to newspaper websites have increased over the past

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[82] *Id*. at 24 n.84.

[83] Internet resources may be used as a primary source for news and information, or they may be used in conjunction with broadcast stations and newspapers. *See* John B. Horrigan, Pew Internet & American Life Project, *Online News: For many home broadband users, the Internet is a primary news source*. (Mar. 22, 2006), *available at* http://www.pewinternet.org.pdfs/PIP_News.and.Broadband.pdf. Many local broadcast stations and newspapers now have a dedicated website for their media outlets. Not only are these new online sources providing information to the public, they are also competing with traditional media for audiences and advertising revenue. Online advertising was up more than a third in 2006, exceeding $16 billion. However, according to PEJ, projections for continued growth in online advertising will begin to slow in 2008, and could drop to single digit growth before the end of the decade. Project for Excellence in Journalism, The State of the News Media 2007: An Annual Report on American Journalism: Economics, *available at* http://stateofthemedia.org/2007/narrative_online_economics.asp? cat=4& media=1.

[84] *See* OPP Working Paper No. 37 at 102-113. *See also* Hitwise, US News & Media Report at 2 (Apr. 2007), *available at* http://www.hitwise.com/registration-page/us-news-media.php ("The market share of visits to the top 10 News and Media websites declined by 3.8% from March 2006 to March 2007, indicating that news consumption is beginning to fragment as users expand their range of news sources to non-traditional news websites").

[85] *See* Research Central, Market Track, Trends in Television, Television Households, TVB.org, *available at* http://www.tvb.org/rcentral/mediatrendstrack/tv/tv.asp?c=tvhouseholds (showing the number of TV households increasing). *See also 2005 Video Competition Report*, 21 FCC Rcd at 2617, Table B-1; *2004 Video Competition Report*, 20 FCC Rcd at 2869, Table B-1 (showing MVPD subscribers increasing); US Dept. of Commerce, Bureau of the Census, Statistical Abstract of the United States: 2001-2006, Section 24: Informal and Communications, *available at* http://www.census.gov/prod/www/statistical-abstract-2001_2005.html (visited Dec. 21, 2007).

[86] *See* Research Central, Market Track, Trends in Advertising Volume, Estimated Annual US Advertising Expenditures, 2004-2006, 2001-2003, 1998-2000, TVB.org, *available at* http://www.tvb.org/rcentral /mediatrendstrack/Trends_In_Advertising_Volume.asp (showing total national and local advertising expenditures rising over time). *See also* NAA, *Advertising Expenditures, 1950-2006*, *available at* http://www.naa.org/ TrendsandNumbers/Advertising-Expenditures.aspx (visited Nov. 26, 2007).

[87] *See* Pew People and the Press Report, *Online Newspaper Readership Countering Print Losses* at 5-7, *available at* http://peoplepress.org/reports/pdf/248.pdf (visited Nov. 26, 2007); Project for Excellence in Journalism, *The State of the News Media 2007, Online: Audience*, *available at* http://www.stateofthenewsmedia.org/2007/narrative_online_ audience.asp?cat=2&media=4 (growth in online audience suggests that "the newspaper audience may not be shrinking, something also evident in survey data. But it reinforces the imperative that the Internet model needs to (continued...)

several years from 41 million in January 2004, to 43 million in January 2005, 57 million in January 2006, and 59 million in January 2007.[88]

27. Other sources, however, paint a more pessimistic picture.[89] Even as the population of the country has increased more than 80 percent in the last half-century,[90] the number of daily newspapers being published and their readership have decreased significantly.[91] In 1975, there were more than 1,756 daily newspapers, with a total circulation of about 60.7 million readers.[92] By 2005, the number had dropped to 1,452 daily newspapers, with a total circulation of 53.3 million.[93] In the six-month period ending September 2007, the Audit Bureau of Circulations shows further declines in circulation for 700 daily newspapers across the country.[94] Of the top 25 papers in daily circulation, only four showed gains. Circulation for newspapers such as *The New York Times, The Washington Post, The Denver Post*, and *The Boston Globe* showed declines ranging from 3.2 percent to 10 percent.[95]

28. The steep reduction in newspaper circulation in recent years has triggered a cascade of negative impacts on the media industry. One such effect – which has particular import for the public interest – is the recent and sharp reduction in the number of professional journalists employed in the newspaper industry.[96] In 2006, the industry began with roughly 3,000 fewer full-time newsroom staff

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figure out a way to 'monetize' those readers.... Online news consumption may also be undercounted because people don't consider the places they go to be 'news' sites. More than half the people said they got campaign news last year from blogs, candidate sites, government Web sites, comedy sites, and interest-group sites, where often they were reading wire stories.").

[88] NAA, *Newspaper Websites: Total Web Audience*, *available at* http://www.naa.org/TrendsandNumbers/Newspaper-Websites.aspx (visited Nov. 26, 2007).

[89] *See*, *e.g.*, NAA Comments at 41-43 ("While newspaper circulation has been declining at a rate of one percent each year since 1990, these losses accelerated in 2005 ... [when] [c]irculation went down 2.6 percent for daily newspapers and 3.1 percent for Sunday newspapers." NAA describes how "[a]dvertising revenue also has taken a substantial hit" and how analysts have been lowering their revenue predictions for the newspaper industry. NAA observes the declining share price of *The New York Times*, Knight Ridder's "forced sale," and turmoil at the Tribune Company. *See also*, Tribune Comments at 33-34 (compared to every other medium of mass communications, newspaper readership is the only category to decline steadily in use since 2000).

[90] According to the 1990 Census, there were 151,325,798 people in the United States in 1950, and according to the 2000 Census there were 281,421,906 people in the United States, an increase of 86 percent. *See 1990 Census of Population and Housing*, *available at* http://www.census.gov/prod/www/abs/decennial/1990.htm (visited Dec. 27, 2007); *Population Change and Distribution 1990 to 2000*, *available at* http://www.census.gov/prod/2001pubs/c2kbr01-2.pdf (visited Dec. 10, 2007).

[91] Brendan Buckley, Mike Simonton, *et al*. FitchRatings, *U.S. Media Outlook*, Jan. 18, 2007 at 4; NAA, *The Source: Newspaper by the Numbers* at 22, 24; U.S. Dept. of Commerce, Bureau of the Census, *Abstracts 2007*, *available at* http://www.census.gov/prod/2006pubs/07statab/infocomm.pdf.

[92] U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstracts 1951-1994*, *available at* http://www.census.gov/prod/www/abs/statab1951-1994.htm (visited Nov. 15, 2007).

[93] U.S. Dept. of Commerce, Bureau of the Census, *Statistical Abstracts 2007*, Information and Communications 711, *available at* http://www.census.gov/prod/2006pubs/07statab/infocomm.pdf. (visited Nov. 15, 2007). NAA states in its comments that as of September 30, 2005, the total circulation of daily newspapers was approximately 55 million, a drop from roughly 58 million in 2003. NAA Comments at 25.

[94] Jennifer Saba, *First FAS-FAX Numbers: Many Top Papers Take Big Hits*, Editor & Publisher, Nov. 5, 2007, *available at* http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003667950.

[95] This is consistent with recent trends in the industry generally. *See*, note 89, *supra*.

[96] Our concern is based on the recognition that significant reductions in the capacity of a newsgathering organization to effectively gather news carries with it the concomitant risk of degradation in the quality of the news output. (continued...)

than it had at its peak of 56,400 in 2000.[97] NAA provided detailed data concerning the economic pressures faced by newspapers in recent years, which have resulted in significant layoffs of professional journalists and the shuttering of news bureaus by major newspapers around the country.[98] For example, Gannett announced in November 2007 that it would cut 45 newsroom positions (equal to 9 percent of its staff) for its *USA Today* publication in response to a decline in revenue of 6.6 percent over the prior year. NAA also noted additional announced cuts occurring solely in or for the year 2007 at a number of major newspapers, including *The Boston Globe* (24 newsroom staff cut in 2007, including two Pulitzer Prize-winning journalists), *The Minneapolis Star-Tribune* (50 newsroom staff cut in 2007), *The San-Jose Mercury News* (17 percent newsroom reduction in 2007), *The Rocky Mountain News* (20 newsroom staff cut in 2007), *The Denver Post* (16 journalists in voluntary buy-outs and 5 journalists laid off in 2007), *The Spokesman-Review* (announcing 8-12 layoffs in 2007), *Detroit Free Press* (announcing 16-22 newsroom staff cuts in 2007), *Detroit News* (announcing 6 newsroom staff cuts in 2007), *Los Angeles Times* (70 newsroom staff cut in 2007), *The San Francisco Chronicle* (25 percent newsroom staff reduction in 2007, equal to about 100 jobs), and *The Santa Cruz Sentinel* (8 permanent news staff terminated in July 2007), all reportedly due to recent economic losses at those papers. At some newspapers, the job layoffs have not been simply careful pruning of staff but rather severe reductions at – or wholesale abandonment of – news bureaus located in Washington, D.C., state capitals, and regional centers within their states.[99]

29. We note that the cuts described above comprise only those announced for the year 2007. The record contains evidence of additional significant cuts in newsroom staff in prior years as well.[100] In its comments in this proceeding, CWA emphasizes the conclusions reached in the Project for Excellence in Journalism's *2006 State of the Media* report, that recent job cuts in the media industry have been "ominous."[101] CWA posits that the "deep cuts did not ultimately satisfy Wall Street" and may have even gone too far for purposes of retaining readers and advertisers.[102] As we note in further detail below, concurrent with the loss of circulation over time has been a leveling off of advertising dollars available to

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Accordingly, we view reductions in the number of professional journalists employed in the newspaper industry as a negative effect more likely than not to result in a diminution of service to the public.

[97] *See* Project for Excellence in Journalism, *The State of the News Media 2007: An Annual Report on American Journalism: News Investment*, *available at* http://www.stateofthenewsmedia.org/2007/narrative_ newspapers_newsinvestment .asp?cat=5&media=3 (citing American Society of Newspaper Editors, News Employment Census –Table A, (rel. Apr. 25, 2006)).

[98] *See* Letter from Martha E. Heller, Counsel for Newspaper Association of America, to Marlene H. Dortch, Secretary, FCC, Attach at 1-4 ("NAA Dec. 11, 2007 *Ex Parte*").

[99] *See id*. (reporting, *e.g.*, that the *Pittsburgh Post-Gazette* cut its award-winning Washington bureau to one reporter, the *Sacramento Bee* closed its San Francisco and Los Angeles bureaus, and the *Louisville Courier-Journal* cut three state bureaus).

[100] *Id.* at 2-5. CWA cites to references in the *2006 State of the Media* report by the Project for Excellence in Journalism, that notes: "*The New York Times* cut 60 people from its newsroom, *The Los Angeles Times* cut 85; Knight Ridder's *San Jose Mercury News* cut 16 percent, *The Philadelphia Inquirer* dropped 15 percent, and that after cutting another 15 percent only five years earlier. As recently as 1990, *The Philadelphia Inquirer* had 46 reporters covering the city, in 2005 it had 24." CWA Comments at 46-49.

[101] *Id.*

[102] CWA Comments at 46-49. "In post-mortem after the sale [of Knight-Ridder], a Merrill Lynch analyst acknowledged that 'you can't cut the journalism and still put out a good paper' while a Goldman Sachs analyst concluded that 'financial restructuring is not the answer to what ails the newspaper industry.'" CWA also points out that "[e]ven Wall Street analysts, rarely opponents of costcutting, worried that newsroom cuts were going too far." Peter Appert of Goldman Sachs noted that downsizing was '"dramatic to the point where readers will notice' and circulation and ad losses might follow."' *Id*.

the newspapers still competing in the marketplace, and an attendant shift of those dollars to Internet-based services.

30. The decline in newspapers' print circulation has, predictably, affected the advertising dollars that keep newspapers alive. Advertising revenues, which currently account for slightly more than 80 percent of the industry's total revenues, steadily increased for decades, but appear to have leveled off after 2000.[103] Unfortunately, experts believe that the future looks worse. SNL Kagan, for example, predicts declines in the number of daily newspapers, declines in circulation, and declines in all categories of newspaper advertising revenue, including online ad revenue, through 2011.[104]

Compound Growth Rate (%)		
Years	Total Ad.	GDP
1950-1960	5.9%	6.0%
1960-1970	4.5%	7.0%
1970-1980	10.0%	10.4%
1980-1990	8.1%	7.6%
1990-2000	4.2%	5.4%
2000-2006	-0.7%	5.1%

31. Aside from declining circulations, the Internet has also had a particularly noteworthy effect in taking away advertising from newspapers, particularly classified advertising.[105] Advertising-oriented websites such as craigslist,[106] eBay,[107] and Zillow[108] have siphoned off a large amount of revenue that newspapers large and small have counted on for decades to provide a significant and relatively stable flow of revenue.[109] For instance, there was a $2.3 billion decline in classified revenues over five years, as reported by the NAA, from $19.6 billion in 2000 to $17.3 billion in 2005. Newspapers' hold on classified

[103] *See Advertising Expenditures, 1950-2006*, Newspaper Association of America, at http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx (visited Nov. 26, 2007). *Newspaper Projections*, MEDIA TRENDS 2007, SNL Kagan LLC, at 135.

[104] *Newspaper Projections*, MEDIA TRENDS 2007, SNL Kagan LLC, at 138-139. SNL *Kagan* analysis and estimates are based on NAA, Editor and Publisher, company and industry data.

[105] *See* FOEF Comments at 18; Belo Comments at 18 and NAB Reply at 87. A 2006 Merrill Lynch report raises the concern about the $2.3 billion decline in classified revenues, as reported by the NAA, from $19.6 billion in 2000 to $17.3 billion in 2005. The classified category fell from 40 percent of total advertising revenues in 2000 to 35 percent in 2005. *Merrill Lynch Raises Alarm on Health of Newspaper Industry*, *available at* http://www.newswatch.in/news-analyses/markets-companies/4938.html (quoting Lauren Rich Fine, former managing director-corporate strategy and research, Merrill Lynch, New York (May 26, 2006). *See also Advertising Expenditures 1950-2006*, Newspaper Association of America, *available at* http://www.naa.org/TrendsandNumbers/Advertising-Expenditures.aspx; Washington Post Company *Annual Report 2006*, at. 2 ("It was a poor year, however, for the business we are named for, *The Washington Post*. Circulation continued to fall and a sharp drop in classified advertising raised questions about the future of the business.").

[106] *See Craigslist Factsheet*, http://www.craigslist.org/about/factsheet.html ("Local classifieds and forums for 450 cities worldwide – community moderated, and largely free.").

[107] *See About eBay*, http://pages.ebay.com/aboutebay.html?_trksid=m40 ("eBay is The World's Online Marketplace®, enabling trade on a local, national and international basis. With a diverse and passionate community of individuals and small businesses, eBay offers an online platform where millions of items are traded each day.").

[108] *See About Zillow Real Estate*, http://www.zillow.com/corp/About.htm ("Zillow.com is an online real estate service dedicated to helping you get an edge in real estate by providing you with valuable tools and information.").

[109] NAA Comments at 42-43; Gannett Comments at 21-22; NAB Comments at 32-33.

advertising was never seriously threatened by the new media rivals that emerged earlier in the 20th Century because neither broadcasting stations nor multichannel video programming distributors such as cable systems were well-suited to compete for short-term, inexpensive ads.[110] Product- or service-oriented advertising websites, on the other hand, may provide as good, or arguably better, means for sellers, particularly small sellers, to reach potential buyers efficiently. Moreover, it is noteworthy that none of the revenues from these sites is used to directly support the operations of newsgathering and reporting functions. Thus, this revenue shift undermines local newsgathering and reporting.

32. The newspaper industry faces other problems as well. At the same time that advertising revenues have flattened and circulation has declined, newspaper operational expenses have continued to rise. An index of input costs for the industry has risen steadily in recent years; climbing from 106.3 in 2000 to 122.9 in 2005 (on an index that sets 1992 input costs at 100).[111] This means that total input costs rose by 6.3 percent in the eight years from 1992 to 2000 and by 15.6 percent in the five years from 2000 to 2005. Newspaper managers responded with renewed cost-cutting efforts, including reductions in professional staff.[112]

33. In the face of these adverse financial conditions, stock prices for many of the major newspaper companies have fallen, and Wall Street analysts that follow the industry closely have expressed concern. In a report released May 26, 2006, Merrill Lynch analysts said, "[W]e are now concluding that the fundamental outlook for newspapers is even more challenging than we had previously thought; in essence profits generated from an almost monopolistic position within classifieds is being eliminated as the core listings business could become a loss leader for other online classified models."[113]

34. CU disagrees that a downward trend exists in the newspaper industry and states that consolidation is not necessary for the economic well-being of media companies. CU argues that, over the last three years, newspaper and television properties have sold at healthy multiples of cash flow and are experiencing profit margins comparable to other media properties. CU also claims that smaller chains and stand-alone properties are thriving.[114] However, we find that the evidence in the record, reviewed above, shows that that the newspaper industry is struggling. In particular, we find that the statistics over the past decade show an industry containing fewer newspapers, facing declining circulation, bringing in stagnant revenues, suffering from increased costs, and employing fewer journalists. Based on these competitive conditions, numerous commenters stress the need for relaxation of the newspaper/broadcast

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[110] *See, e.g.*, Media General Comments at 5-6; FOEF Comments at 18.

[111] Moody's Economy.com Industry Reports, Consumer & Health Services Sector, Newspaper Section, at 43 (May 2006).

[112] *Newspaper Newsroom Workforce 1977-2005*, The State of the News Media 2006, Project for Excellence in Journalism, *available at* http://www.stateofthenewsmedia.org/2007/chartland.asp?id=198&ct=line&dir=&sort=&col1 _box=1&col2_box=1; Journalism.org, *The State of the News Media 2007*, (citing American Society of Newspaper Editors, News Employment Census – Table A, released Apr. 25, 2006), *available at* http://www.stateofthenewsmedia.org/ 2007/narrative_newspapers_newsinvestment.asp?cat=5&media=3 (visited Nov. 15, 2007). *See* NAB Reply at 88; CWA Comments at 46-49.

[113] *See Merrill Lynch Raises Alarm on Health of Newspaper Industry*, http://www.newswatch.in/news-analyses/markets-companies/4938.html (quoting Lauren Rich Fine, former managing director-corporate strategy and research, Merrill Lynch, New York) (May 26, 2006).

[114] CU Comments at 16-17, Attach., Study 9, "Local Media and the Failure of the Consolidation/Conglomeration Model" by Mark Cooper at 157-69, and Attach., Study 10 "The Special Concerns About the Impact of Cross Ownership on Print Journalism," by Mark Cooper and Steven Cooper at 196-206; *see, also*, UCC 12/11/07 Comments at 5-7. CWA/AFTRA contends that when media owners tap into the opportunities to gain readers and advertising revenue from new distribution platforms such as the Internet and digital television opportunities, they will discover new business models that will enable them to regain their "traditional strength in newsgathering and quality entertainment." CWA/AFTRA 12/11/07 Comments at 3-4.

cross-ownership ban so that newspapers can remain competitive by providing information and news to consumers across other platforms, such as a broadcast station, and thereby strengthen the local newsgathering and reporting operations of both newspapers and broadcast stations.[115]

35. Notwithstanding the significant challenges that face newspaper operators in today's media marketplace, newspapers continue to play a critical role in the production of news and information in our society.[116] Newspapers and, to a somewhat lesser extent, broadcast stations still continue to serve as the most organized, systematic gatherers of news and information in their communities. Newspapers provide this news and information directly to citizens and also, through their online operations, offer the core content necessary to popular aggregator websites such as Google News and Yahoo News.[117] Newspaper and broadcast content also feeds online outlets such as blog sites, which typically provide commentary rather than original news reporting.[118] In light of the important role and current state of the newspaper industry, it is therefore critical that our rules do not unduly stifle efficient combinations that are likely to preserve or increase the amount and quality of local news available to consumers via newspaper and broadcast outlets.

36. Our decision to modestly relax the 32-year-old newspaper/broadcast cross-ownership ban is also bolstered by the way in which Internet use by both consumers and competitors is changing how traditional news media operate, not merely by fracturing their traditional advertising-based business models[119] but also by altering how newspapers and broadcasters gather information, respond to their

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[115] *See*, *e.g*., Block Comments at 6-9; Bonneville Comments at 5-7; Cox Comments at 5-7, 17-18; Media General Comments at 94; Media General Reply at 8-12; NAB Comments at 29-38; NAA Comments at 41-43; Tribune Comments at 33-34, 82.

[116] CU Comments, Attach., Study 7 and Study 8; *see also* Project for Excellence in Journalism, *State of the Media 2007*, *available at* http://stateofthemedia.org/2007/narrative_newspapers_newsinvestment.asp ("Gannett charges its newsrooms with seven tasks. On the traditional side are a strong watchdog function and local news effort. In addition, though, the newsrooms are asked to develop rich databases, convene community conversations, develop custom content for consumers, and expand multimedia and varied digital content").

[117] Hitwise US News & Media Report at 2 (Apr. 2007), *available at* http://www.hitwise.com/registration-page/us-news-media.php ("Search engines, portal frontpages, and news aggregators were the leading sources of traffic to News and Media websites in March 2007. The share of visits to News and Media websites from search engines increased over the past year, with traffic from Google increasing by 29.7 percent for Print websites and 35.9 percent for Broadcast Media websites."); Pew Research Center for The People & The Press, *Online Papers Modestly Boost Newspaper Readership*, Sec. I, (July 30, 2006), *available at* http://people-press.org/reports/display.php3?ReportID=282 ("As a whole, news aggregators such as Google News, Yahoo News and AOL News are a major source of online news. Not only are they frequently volunteered as websites used most often for news, but nearly half (45%) of Americans who regularly get news online (and 18% of the public overall) say they regularly visit these websites to get news. Roughly a third (32%) of online news consumers say they regularly visit the news sites of television networks such as CNN.com, MSNBC.com and ABCnews.com.").

[118] *State of the News Media 2006: Online: Intro, Project for Excellence in Journalism* (2006), *available at* http://www.stateofthenewsmedia.org/2006/narrative_newspapers_economics.asp?cat=4&media=3 ("Rivals on the Web that offer classified listings or aggregate other people's work, but produce very little journalistic content of their own, were continuing to steal revenues away. There still appears no clear path for transferring to this new medium all the wealth that has long financed journalism for the good of civil society. For now, unless things change, it appears that the resources devoted to skilled journalism will continue to shrink as the Web grows."); *id*. ("Virtually all original newsgathering, though, was still being done by the old media, and some of the major new Internet-only challengers appeared to have made less progress in content over the previous year than the sites of the old media.")

[119] *See* above at paragraphs 24-27; *see, e.g*., Belo Corp Comments at 18; Media General Comments at 63-66.

audiences, and compete for consumer attention.[120] Although the ultimate impact of the Internet on the old media is difficult to predict, developments since the Commission last reviewed its rules show that the diminishment of mainstream media power over information flow is real.[121]

37. As discussed above, the Commission's newspaper/broadcast cross-ownership ban arose in an era when daily newspapers and broadcast stations enjoyed relatively unrivaled power in their local markets to collect information and to decide what constituted "news" worth transmitting to their audiences.[122] They thereby influenced what topics people considered important, even if they had less power to shape the positions people took on those topics.[123] It is clear today that these "gatekeeping" aspects of the traditional media's role are in turmoil. The new and broader array of inputs from online sources[124] available to the American public not only affects mainstream journalists' decisions on what to report and how to report it,[125] but websites also act as competing outlets – even, at times, as work-around

[120] *See, e.g.*, Bruce A. Williams & Michael X. Delli Carpini, *Monica and Bill All the Time and Everywhere: The Collapse of Gatekeeping and Agenda Setting in the New Media Environment*, 47 AM. BEHAV. SCI. 1208, 1210 (May 2004) ("Williams and Delli Carpini"); Scott Lambert, *To Post Or Not To Post: Gatekeeping Effects of Breaking News On Internet Newspaper Websites*, Published at the Symposium on Online Journalism, at 2-5 ("Lambert"); Aaron Delwiche, *Agenda-Setting, Opinion Leadership, and the World of Web Logs*, FIRST MONDAY (2005), *available at* http://www.firstmonday.org/issues/issue10_12/delwiche/index.html ("Delwiche").

[121] The Internet remains a rapidly evolving medium. We expect that the trends supporting our conclusion that traditional media sources no longer enjoy the same degree of control over the gathering and delivery of news and information will grow stronger as the Internet and other communications networks develop.

[122] *See* Williams and Delli Carpini at 1208-1230 (discussing historical development of concept of journalists as "gatekeepers"); Lambert at 2-5 (same). The gatekeeping function was identified as early as the 1920s by Walter Lippman, *see* Williams and Delli Carpini at 1210. The Commission's 1975 Order indicates that the agency focused on the editorial processes involved in gatekeeping. *1975 Second Report & Order*, 50 FCC 2d at 1050, ¶14 ("[t]he significance of ownership from the standpoint of 'the widest possible dissemination of information' lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's concern with the public interest").

[123] *See generally* Delwiche (discussing the traditional agenda-setting power of the press throughout most of the 20th century).

[124] The development of new avenues of content distribution (as discussed below) has had the tandem effect of encouraging amateur journalists (or so called "citizen journalists") to participate by making available raw material online. For example, video sharing website YouTube allows users to upload and share video content with anyone with an Internet connection. *See* http://www.youtube.com /signup?next=/my_videos (visited Nov. 19, 2007). Additionally, growing numbers of professional, semiprofessional, or dedicated amateur bloggers reporting de facto eyewitness accounts at major news events also contribute to the availability of news content for consumers. *See* James Poniewozik, *The Beast With A Billion Eyes*, TIME, Dec. 25, 2006, at 64 ("Poniewozik") (discussing availability of front-line footage of events in war zone areas in Iraq).

[125] News media organizations are driven by two essential forces: first, the need to identify and then gather content that will be of interest to consumers; and second, the need to gather enough of that interesting content to fill the "news hole" of that organization's published or broadcast product. *See* Lambert at 2-5 (discussing function of news organizations in selecting news to cover and gathering information for publication). Traditionally, the selection of news source inputs – that is, the fundamental decision-making process about what stories are worthy for dissemination to the public – has been a largely one-way process, with editors and journalists using their own judgments, plus a stable circle of sources, to decide what stories to cover. *Id*. It has been observed that in the pre-Internet era, traditional media often relied upon active, ongoing relationships with government officials and other "elites" as a main source for news and information, particularly in the political/civic affairs sphere, which was then passed along to a largely passive citizenry. *See* Williams and Delli Carpini at 1208 ("the most profound impact of the new media environment may well be the way it undermines the ability of any elite to play [the] central role [of gatekeeper for politically relevant information]").

channels of information in cases where the mainstream media has been slow or reluctant to react.[126]

38. The nearly instantaneous speed with which consumers can now communicate via the Internet has created a vastly improved two-way flow in the sharing of ideas between traditional news gatherers and news consumers, with a consequent power to affect the priority that the traditional media place on coverage of certain events and topics.[127] Many previously passive consumers of news are already taking advantage of the opportunities the Internet allows to influence the newsgathering process.[128] More than ever before, readers and audiences are themselves communicating with news gatherers to demand, directly and indirectly, coverage of specific topics.[129] There are many high-profile examples of news organizations slow to pick up on a story which, after percolating among bloggers and others in the online arena, grows into an issue that traditional news media eventually cover.[130] The erosion of newspapers' traditional gatekeeping power convinces us that newspaper combinations no longer pose the same threat to diversity that they once did. For this reason as well, a total ban on cross-ownership can no longer be justified as necessary to protect viewpoint diversity.

39. *Policy Goals.* In the *2002 Biennial Review Order*, the Commission concluded that efficiencies from the common ownership of two media outlets may increase the amount of diverse, competitive news and local information available to the public.[131] We continue to find evidence that

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[126] The most dramatic changes to the traditional role of media outlets have occurred with respect to the aggregation and dissemination of content. Text, video, and audio content can be and already is widely delivered, live or recorded, via the Internet. In addition, the ongoing deployment of new content delivery applications made specifically for use by handheld mobile devices is likely to further erode the market share of traditional media outlets, which must compete for eyes and ears with these new entrants in the content delivery marketplace. With respect to the role of broadcasters and publishers as aggregators, we note that the Internet is rapidly developing new ways to aggregate content, particularly by means that allow individual consumers to tailor the types and amount of content that is delivered to them. Aggregation sites are rapidly growing in popularity, with the most popular sites reaching audiences that dwarf all but the largest and most widely distributed traditional media outlets.

[127] *See* Joel David Bloom, *The Blogosphere: How a Once-Humble Medium Came to Drive Elite Media Discourse and Influence Public Policy and Elections*, presented at the Second Annual Pre-APSA Conference on Political Communication: *Mass Communication and Civic Engagement*, and at the 2003 Annual Meeting of the American Political Science Association, August 2003, in Philadelphia, PA, http://darkwing.uoregon.edu/~jbloom/APSA03.pdf (visited Nov. 19, 2007) ("Bloom").

[128] *See, e.g,* Jose Antonio Vargas*, Storming the News Gatekeepers*, WASH. POST, Nov. 27, 2007, at C1.

[129] *See generally* J.D. Lasica, *Blogs and Journalism Need Each Other*, NIEMAN REPORTS, Fall 2003, at 70-74 (noting ability of bloggers to take part in editorial selection of newsworthy subjects).

[130] *See generally* Bloom (discussing effect of online discussion on the evolution of news coverage of Senator Trent Lott's public comments on Sen. Strom Thurmond's 1948 campaign for president); Poniewozik at 63-64 (discussing effect of online discussion on several high-profile news stories in 2006).

[131] *2002 Biennial Review Order*, 18 FCC Rcd at 13756-57, ¶¶ 347-49. In the *2002 Biennial Review Order*, the Commission defined advertising as the primary economic market in which broadcast stations and newspapers derive their primary sources of revenue. *Id*. at 13748-49, ¶ 331. The Commission also concluded that for purchasers of advertising time, "newspapers, television, and radio are not good substitutes and therefore make up distinct product markets." *Id*. at 13749, ¶ 332. The relevant product market was not challenged on appeal. We continue to support that conclusion and find no reason to deviate from the defined product market. UCC contends that we incorrectly focused on advertising dollars, instead of on whether newspapers and television compete for the provision of local news. UCC Petition at 33-34. In the *2002 Biennial Review Order*, the Commission did take this into consideration and concluded that consumers experience print and electronic media in very different ways: "These differences are significant from a competitive standpoint both for consumers and, as described above, for advertisers. For consumers this means that the programming or content is different between newspapers and broadcast TV." 18 FCC Rcd at 13753, ¶ 341. In conclusion, the Commission found that newspaper/broadcast combinations cannot adversely affect competition in any relevant product market. We continue to support this conclusion. *Id*.

cross-ownership in the largest markets can preserve the viability of newspapers without threatening diversity by allowing them to spread their operational costs across multiple platforms. In doing so, they can improve or increase the news offered by the broadcaster and the newspaper. Numerous media owners provide examples of cost savings and shared resources leading to more local coverage and better quality news coverage.[132]

40. Numerous parties cite to examples of the introduction of new or additional newscasts due to cross-owned combinations in markets.[133] Cox offers examples of its local programming and community service efforts in markets where it owns same-market broadcast stations and newspapers.[134] Media General notes that its six cross-owned stations provide between 20.5 and 32 hours of local news per week.[135] Media General adds that newspapers are similarly launching hyper-local initiatives including new daily, weekly, and other special-interest publications; web publication; podcasting; and enlistment of "citizen journalists."[136] Media General explains that several newspapers have launched free local publications over the past several years, which are intended to complement their subscription services and boost readership by delivering more accessible and more local content. In addition, Media General states that newspaper companies are also launching new Spanish-language publications and hyper-local inserts, such as *Neighbors,* which are tailored weekly magazine inserts that Belo Corp. distributes to 16 local communities as part of *The Dallas Morning News.*[137] Gannett points to its critically acclaimed Phoenix combination, which provides more and better local news, including lengthy investigative reports, while retaining separate editorial viewpoints.[138] In markets in which Belo currently owns and operates television duopolies, including Seattle-Tacoma and Phoenix, it cites to the introduction of daily newscasts for the first time on its stations.[139] Media General also notes that newspapers are utilizing Wi-Fi and mobile technologies to give their readers "on-the-road" access.[140] NAA indicates that

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[132] Belo Comments at 13-16; Clear Channel Comments at 80-90; Media General Comments at 7-11; Morris Reply at 5-6; NAA Comments at 66-79. *But see* CU Reply at 35. CU objects to cross-owned facilities sharing resources because it claims that in order to save costs, the consolidated company will share personnel and content emphasizing national, rather than local, programming. It cites the example of NBC's acquisition of Telemundo, which resulted in the closure of five local Telemundo news bureaus in areas with large Hispanic populations and relocation of those operations to one location in Dallas. *Id*. In 2003, after NBC purchased Telemundo, Robert Okun, Vice President and head of NBC's Washington Office, explained on *NewsHour with Jim Lehrer* that "in terms of a network-owned station on average we do 30 percent better than a non-network-owned station in terms of local news.... [W]e would argue we do a heck of a good job, sometimes better than even independent stations." NewsHour with Jim Lehrer Transcript, "Showdown at the FCC," PBS, *available at* http://www.pbs.org/newshour/bb/media/jan-june03/FCC_05-15.html.

[133] Belo Comments at 22-23 (stating that television duopolies lead to new daily newscasts on three stations); Cox Comments at 12-17 (citing to examples of local programming and community service efforts in markets where it owns newspaper/broadcast combinations); Gannett Comments at 26-31; Media General Comments at 3, 9-10 (citing to the Tampa, Florida market, where it owns a grandfathered newspaper/television combination and an online news publication); Morris Comments at 13-20; NAB Reply at 82-84 (citing numerous studies that found cross-ownership increases the quantity and quality of news and local programming).

[134] Cox Comments at 12-17 (citing to examples of local programming and news specials in the Atlanta market where it owns a newspaper/broadcast combination).

[135] Media General Reply at 6.

[136] *Id*. at 8. Media General defines hyper-local news as news coverage of local events such as video of high school sports, local pageants and festivals, local weather emergencies and disasters, and local charities. *Id*.

[137] *Id*. at 9.

[138] Gannett Comments at 26-31.

[139] Belo Comments at 22-23.

[140] Media General Reply at 9.

39 of the nation's top 40 daily newspapers now offer video on their websites, including complete newscasts. Media General and NAB cite to studies that demonstrate that newspaper/television combinations are likely to produce more news than stand-alone stations in the same market.[141] NAB cites studies that found that programming diversity increases when group ownership increases.[142]

41. In contrast, AFL-CIO objects to relaxation of the cross-ownership ban, asserting that media concentration diminishes localism in news media because it puts pressure on media firms to lower costs by decreasing local news coverage.[143] AFL-CIO lists budget and job cuts that resulted from reductions in local coverage.[144] AFL-CIO also cites to an example of how cross-owned media properties could serve as "a cross-promotional vehicle rather than as an independent editorial voice."[145] CCVM contends that only independent owners, not large conglomerates, are able to focus on a community's needs and therefore many communities lack sufficient local news, political discussion, and diverse programming choices.[146]

42. We have a considerable amount of empirical evidence in the record on both sides concerning the relationship between newspaper/broadcast combinations and localism. On balance, we believe the evidence suggests that some newspaper/broadcast cross-ownership combinations can enhance localism. Three Media Ownership Studies analyzed the effects of newspaper/broadcast cross-ownership on television news coverage and local content. Study 6 concluded that "local television newscasts for cross-owned stations contain on average about 1-2 minutes more news coverage overall, or 4 to 8 percent

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[141] Media General Comments at 23-29, App. 5, "Review of the Increases in Non-Entertainment Programming Provided in Markets with Newspaper Owned Television Stations: An Update" by Michael Baumann, Economists, Inc. (Oct. 2006)at 1-2. The Commission acknowledges that this study provides, at best, limited evidence of higher amounts of non-entertainment programming in markets with cross-ownership. As the peer review correctly notes, the study fails to adjust for unobserved market characteristics, and the sample is small and thus may not be representative of markets with and without cross-ownership. *See* Media General Study Peer Review by Kenneth C. Wilbur, Asst. Prof. of Marketing, Marshall School of Bus., Univ. of So. Ca., *available at* http://www.fcc.gov/mb /peer_review/reviews.html. Media General also cites to several additional materials: 1975 Commission Study, 50 FCC 2d at 1078 n.26, App. C, Belo Comments submitted in the *1998 Biennial Media Ownership* proceeding, MM Docket No. 98-35 (July 21, 1998), S. Robert Lichter, Ph.D., "Review of the Increases in Markets with Newspaper Owned Television Stations," submitted in Media General's Comments in MM Docket No. 01-235 (Dec. 2001), Victor B. Miller and Kevin R. Grunech of Bear Stearns & Co., Inc., Miller Study (cited in *2002 Biennial Review Order*, 18 FCC Rcd at 13761, ¶ 357, n. 800), and Thomas C. Spavins, *et al.* "The Measurement of Local Television News and Public Affairs Programs," (Sept. 2002) ("MOWG Study No. 7") (cited in *2002 Biennial Review Order*, 18 FCC Rcd at 13754, ¶ 343 n. 760). *See also* NAB Comments at 117-19 (citing John C. Busterna, *Ownership, CATV & Expenditures for Local TV News*, 57 J.Q. 287, 289 (1980) and Stanley Besen & Daniel O'Brien, Charles Rivers Assoc., Inc., "An Economic Analysis of the Efficiency Benefits from Newspaper- Broadcast Co-Ownership," attached as App. B to Gannett Comments submitted in MM Docket No. 98-35 (July 21, 1998) (finding that consumers of information may experience higher prices, less attractive product offerings, or slower innovation than if owners of broadcast stations and newspapers were free to operate under common ownership)).

[142] NAB Reply at 38-40.

[143] AFL-CIO Comments at 22-33. *See also* Remarks by Robert Dardenne, Assoc. Prof. Journalism and Media Studies, USF-St. Petersberg, Media Ownership Hearing in Tampa Bay, Florida (Apr. 30, 2007), Transcript at 39-40 (questioning whether streamlined news operations produces better quality local news).

[144]AFL-CIO Comments at 22-25 (citing to newsroom cutbacks at *The LA Times* when bought by Tribune and layoffs at the *San Jose Mercury News*, *The Philadelphia Inquirer* and *The Daily News*).

[145] *Id*. at 26 (citing to MidWest Families Comments submitted in MM Docket No. 01-235, which provided examples of the results from radio/newspaper combinations.)

[146] Center for Creative Voices In Media ("CCVM") Comments at 9.

more than the average for non-cross-owned stations."[147] The author further concluded that newspaper cross-ownership is also "significantly and positively associated with both local news coverage and local political news coverage," finding that cross-owned stations show 7-10 percent more local news than do non-cross-owned stations. The study author also found that on average, cross-owned stations broadcast about 25 percent more coverage of state and local politics.[148] The author also generally noted that newspaper/broadcast cross-ownership is associated with more candidate coverage, more candidate speaking time and more coverage of opinion polls.[149] Study 3 analyzed the relationship between the

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[147] "The Effects of Cross-Ownership on the Local Content and Political Slant of Local Television News," by Jeffrey Milyo, Center for Applied Econ., Univ. of Kansas, School of Bus. and Dept. of Econ. and Truman School of Public Affairs, Univ. of Missouri (Rev. Sept. 2007) ("Media Ownership Study No. 6"), *available at* http://www.fcc.gov/ownership/studies.html, at abstract. Media Ownership Study 6 underwent two peer reviews, one by Matthew Gentzkow ("Gentzkow review") and one by Kenneth Goldstein, Matthew Hale, and Martin Kaplan ("Goldstein, *et al*. review"). *See* Media Ownership Study 6 Peer Review, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. In response to the Gentzkow review, the study author submitted a revised study that corrected some data errors and added the average marginal effects of cross-ownership for all variables in the report. As such, we find that all issues raised in the Gentzkow review have been dealt with. The Goldstein, *et al*. review raises six problems with the conclusions of Study 6, essentially due to what the reviewers term "*empirical data in the study [that] are so limited that the study's conclusions do not and cannot possess the reasonable level of confidence necessary to provide policy makers with useful evidence on which to base their regulatory decisions*" (emphasis in the original.) We first note that, in contrast, the Gentzkow review found that the data for Study 6 are of "very high quality" and "give a rich, fine-grained picture of the news coverage of local television stations unlike anything that was available before." The Goldstein, *et al*. review then states that (1) it cannot be assumed that Study 6's sample of evening news is representative of stations' news coverage, (2) there is evidence that the quantity of news coverage immediately before an election is different than that over the entire campaign, (3) there is evidence that the quality of news coverage immediately before an election is different than that over the entire campaign, (4) Study 6's author was mistaken in coding state political stories as "local" stories, (5) a key indicator of bias went unmeasured due to the types of stories included in the dataset, and (6) the study emphasizes statistically weak findings supporting newspaper/television cross-ownership while downplaying "possibly stronger" findings that argue against cross-ownership.

These criticisms, either in whole or in part, do not invalidate the findings of Study 6. Most importantly, the findings of Study 6 concerning newspaper/television cross-ownership agree with Studies 3 and 4 on this matter. Thus, Study 6 is only an exemplary snapshot within the larger picture of the effect of cross-ownership on news production. This answers criticism (6) of the Goldstein, *et al*. review: while it is possible to disagree with the methods or conclusions of Study 6, we find that it provides part of a larger picture and thus is useful even accepting reasonable criticism. We note that the author of Study 6 acknowledges the limitations of his data, which is sufficient for the Gentzkow review, and, we find, answers criticisms (1) through (3) and (5) of the Goldstein, *et al*. review. Criticism (4) simply involves a judgment call on what to define as "local" news, and we find that Study 6 made a reasonable judgment that may be disputed but that is not inherently incorrect. For these reasons, we reject the argument by the Institute for Public Representation that relying on Study 6 would violate the Data Quality Act. *See* Letter from Angela J. Campbell, Institute for Public Representation, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 29, 2007) ("IPR Nov. 27, 2007 *Ex Parte*"). We find that Study 6 has sufficient "objectivity" within the meaning of the Data Quality Act, the implementing guidelines issued by the Office of Management and Budget, and our own data quality guidelines. *See* Section X, note 462, *infra*.

[148] Media Ownership Study 6 at abstract and Tables 2-5.

[149] *Id*. *But see* Further Comments of Consumers Union, Consumer Federation of America, and Free Press ("CU Comments on Media Ownership Studies") at 78, 190, 213, etc. (questioning Study 6's findings on the basis that it uses unrepresentative data, overstates (or fails to explain) findings that might be taken to support newspaper/television cross-ownership, and downplays findings that show the much more significant negative impact of radio cross-ownership on television station local news). As noted above, we reject the complaint concerning unrepresentative data because Study 6 represents one piece of evidence in a larger body of evidence. *See* note 147, *supra*. We accept that it may not represent the behavior of all news outlets all the time, but it does provide evidence consistent with overall trends and patterns for the period of time that it studies. In regard to the findings that the author of Study 6 highlighted as opposed to other findings, every study performs multiple regressions and must (continued...)

ownership structure of television stations and quantity and quality of television programming between 2003 and 2006, finding that cross-owned television stations broadcast (approximately 3.0 percentage points) more local news programming.[150] Study 4.1 collected data on the news and public affairs programming provided by television stations and analyzed the relationship between the quantity of such programming and the ownership structure of each television station.[151] After examining the

(Continued from previous page)
choose preferred specifications. The author of Study 6 reported several specifications and highlighted several, and the others provide additional evidence. CU, for example, also presents many specifications, some of which supported their positions, and some that did not, as noted by other commenters. *See* Tribune Reply to Media Ownership Studies at 8-12; NAA Reply to Media Ownership Studies at 11-15. We also note that the Gentzkow review did not find the methodological choices that were made by the author of Study 6 troubling. *See* note 147, *supra*.

[150] "Television Station Ownership Structure and the Quantity and Quality of TV Programming" by Gregory S. Crawford, Dept. of Econ., Univ. of Arizona (Jul. 2007) ("Media Ownership Study 3"), *available at* http://www.fcc.gov/ownership/studies.html) at 4. We find that Study 3 is reasonably reliable because peer review revealed no material bias in this study. *See* Media Ownership Study 3 Peer Review, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. The peer review report also notes that each of the study's findings is based on data derived from primetime broadcasting. We are not troubled by this limitation because this represents the time period when the most people are watching, and is thus of the greatest interest from a policymaking perspective. In addition, we find that data obtained during sweeps is reasonably reliable because sweeps is a formalized national ratings period upon which advertisers base their business decisions, and any potential resulting biases are likely to be small and unlikely to affect the basic result concerning the spread of advertising prices.

[151] "The Impact of Ownership Structure on Television Stations' News and Public Affairs Programming," by Daniel Shiman, FCC (Rev. Sept. 2007) ("Media Ownership Study of 4.1"), *available at* http://www.fcc.gov/ownership/studies.html ("Media Ownership Study 4.1"). The study underwent three peer reviews, one by Phillip Leslie ("Leslie review"), one by Philip Napoli ("Napoli review"), and one jointly by Kenneth Goldstein, Matthew Hale, and Martin Kaplan ("GHK review"). *See* Media Ownership Study 4.1 Peer Review, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. In his peer review, Leslie notes the limitations of the data, provides three suggestions for improvement, and expresses concern about determining the rationale for some of the implied conclusions of the paper. In his response to the peer review, Shiman implemented Leslie's suggestions, and found that while adjusting standard errors for clustering is appropriate, the other suggestions yielded inferior models. We note that Prof. Leslie's concerns about interpreting the results did not focus on the television/newspaper cross-ownership result, except for the general concern that local and national news were combined in the analysis.

The Napoli review focused on the combination of local and national news and public affairs minutes in the data, and how this limits the analysis to news and public affairs programming *distributed* by television stations, and not on the programming *produced* by the stations. Napoli also suggests employing different variables, expresses concern about the potential bias to the results from collecting data only for "sweeps" weeks, and about relying on the classification of programming by TMS. We believe that his concerns should not affect the results concerning the impact of television/newspaper cross-ownership on news programming. As noted in the Napoli review, much of the impact of sweeps weeks is on the content of shows, which is not measured here, and not on the programming schedule.

The GHK review focused their criticisms on the implications of the use of unweighted total news and public affairs minutes for policy analysis. They claimed that: there is no basis for using scheduled news programming as a metric to assess diversity, competition, or localism; local and non-local news should be distinguished; minutes should be weighted according to the number of viewers; and non-commercial stations should be excluded from the analysis. The use of the quantity of scheduled news and public affairs programming is well-founded in the scholarly literature (*see* the bibliography in Study 4.1). The study included a control variable for non-commercial television stations, and the study results are robust to weighting the data by time-of-day. Because the analysis in Shiman's study and response were performed using accepted statistical practices and were peer reviewed, we find that we can rely on this Study. For these reasons, we reject the argument by the Institute for Public Representation that relying on Study 4.1 would violate the Data Quality Act. *See* IPR Nov. 29, 2007 *Ex Parte*. We find that Study 4.1 has sufficient "objectivity" within the meaning of the Data Quality Act, the implementing guidelines issued by the Office of Management and Budget, and our own data quality guidelines. *See infra* note 462.

programming of approximately 1700 stations between 2002 and 2005, the author concluded that cross-owned stations provided 11 percent (18 minutes) more news programming per day than other stations.

43. CU criticizes Studies 3, 4.1, and 6 for focusing on the effect of cross-ownership on the local news output of the particular cross-owned television station. CU argues that the studies should have focused on the local news output of all outlets in the entire market in which the cross-owned television station competes.[152] Specifically, CU states that while in some cases there may be an increase in news output at the individual cross-owned station there is a decline in the amount of local news for the market as a whole.[153] CU submits an analysis showing that newspaper/television combinations do not increase the total quantity of local news in the market.[154]

44. Due to numerous difficulties with CU's analysis, we find that we cannot rely on its conclusions. It is not clear what measure CU used for total quantity of local news, but it appears that the measure is limited to broadcast television news, which measures only a portion of local news, and ignores local news from newspapers, radio, local cable news stations, and other sources. As a result, CU's measurements are incomplete, and we cannot rely upon them. Additionally, the thrust of CU's argument is that if cross-ownership does not increase total local news (as CU measures it), the ban should be maintained. This argument may have been formed because CU statistical results do not show a statistically significant effect of cross-ownership. This lack of statistical significance may arise from CU's choice of specification and measure of local news, and as such may be unreliable. Media General submits a critique of CU's criticisms that agrees with these findings.[155] In his Econometric Review, Dr. Harold Furchtgott-Roth states that CU makes several economic and econometric mistakes that undermine the reliability of its results. First, he states that CU's decision to examine the effect of cross-ownership by aggregating to the market level is incorrect. CU's revised regressions fail to measure total news and diversity of news at the market level. In addition, he states that one of the strongest predictors of the quantity of broadcast news in a market would be the number of stations in the market. That variable, however, is omitted in the specifications by CU, resulting in regressions that are much less precise.[156] We agree that it is improper to aggregate to the market level without adjusting for the number of outlets in the market.

45. McGannon Research Center submitted a study by Michael Yan that analyzes how cross-owned stations compared with non-cross-owned stations in the provision of local news and public affairs programming.[157] The Yan Study shows that while cross-owned stations are more likely to have local news programming, they do not broadcast more local news than other stations that also provide local news, and that cross-ownership has no significant relationship with the presence or the quantity of local public affairs programming on commercial television.[158] NAA submits a statement by Professor Jerry

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[152] CU Comments to Media Ownership Studies at 7, 87-89.

[153] *Id*.

[154] *Id*. at 87-109, and 190-208.

[155] Media General Reply to Media Ownership Studies, App. A, Econometric Review by Dr. Furchtgott-Roth, at 10-11 ("Furchtgott-Roth Statement").

[156] *Id*. at 2, 10, 11-12. *See also* NAA Reply to Media Ownership Studies at 6-10 and Attach. 1, Statement of Kent W. Mikkelsen, Senior V.P., Economists Inc. at 2-6; NAB Reply to Media Ownership Studies at 18 ("Given the contrary results of other studies, the results of Consumers Union, et al.'s recent research must be treated with caution and evaluated carefully, especially in light of their speculative underpinnings and their consistent overstatement of statistically insignificant results.").

[157] The Donald McGannon Communication Research Center ("McGannon Research"), Attach., "Newspaper/television Cross-Ownership and Local News and Public Affairs on Television Stations: An Empirical Analysis" by Michael Z. Yan (Oct. 2006) ("Yan Study").

[158] Yan Study at 2.

Hausman disagreeing with results of the Yan Study.[159] Professor Hausman states that the Yan Study actually shows that cross-owned stations air considerably more minutes of local news (242 minutes over the two-week study period or approximately 17 minutes per day), even when the sample size is effectively limited through Yan's econometric model to stations that air local news and when other variables are taken into account.[160] Professor Hausman explains that Yan's conclusion is misleading because the absence of statistical significance most likely stems only from the small size used in the Study, not from any lack of relationship between cross-ownership and the quantity of local news aired.[161] The Commission submitted the Yan Study and the Hausman analysis of the Yan Study to outside peer review.[162] Professor Hausman's analysis, as well as both peer review reports, are in agreement that Yan's econometric work does not support his conclusion and that the data instead provide support for the proposition that cross-owned stations actually supply more local news and more local public affairs programming, with the evidence strong in the case of news.

46. We recognize that there is disagreement in the studies. On balance, however, we conclude that the weight of evidence indicates that cross-ownership can promote localism by increasing the amount of news and information transmitted by the co-owned outlets. The inconclusiveness of some of the data and disagreement as to the outcome of the studies, however, supports our decision to undertake a case-by-case review of particular combinations in particular markets, rather than providing hard, across-the-board limits. Under our method, we can consider facts in a particular case, with a presumption in favor of allowing newspaper and radio station or non-top four television station combinations in the top 20 markets, and a presumption against combinations in all other markets. A case-by-case approach will enable the Commission to make a more fully informed assessment that a proposed transaction in a particular market actually will increase the total amount of local news generated by the combined outlets.

47. The Commission found in the *2002 Biennial Review Order* that retaining some cross-ownership limits is necessary in order to ensure diversity.[163] The *Prometheus* court agreed.[164] We continue to believe that some restrictions on cross-ownership are necessary to protect diversity.

48. Many commenters claim that consolidation will harm diversity because there are no substitutes for traditional news sources. Despite the proliferation of new media, numerous parties contend that media ownership limits are needed to preserve diversity, localism, and competition because many of the new types of media do not serve as independent voices.[165] CWA states that it is essential to retain the newspaper/television ban to preserve diversity and competition in local news, particularly because most markets have only one newspaper and three to four broadcast outlets.[166]

49. We reaffirm our findings in the *2002 Biennial Review Order* that some cross-ownership limits are necessary to guard against "an elevated risk of harm to the range and breadth of viewpoints that

[159] NAA Reply at 29-34, Attach., Statement of Professor Jerry Hausman, MIT, Concerning Studies Submitted in FCC MB Docket No. 06-121 (Jan. 16, 2007) ("Hausman Statement") at ¶¶ 3-11.

[160] NAA Reply at 30, Hausman Statement at ¶ 14.

[161] *Id*., Hausman Statement at ¶ 8.

[162] *See* Referee Report by Stefano Della Vigna, Univ. of Ca. Berkeley and Statement of Charles Romeo, *available at* http://www.fcc.gov/mb/peer_review/reviews.html.

[163] *2002 Biennial Review Order*, 18 FCC Rcd at 13775-76, 13806-07, ¶¶ 391, 481.

[164] *Prometheus*, 373 F.3d at 400-01.

[165] *See, e.g.,* AFL-CIO Reply at 19-21.

[166] CWA Comments at 4, 54.

may be available to the public."[167] We are not in a position to conclude that ownership can never influence viewpoint. Nor are we in a position to quantify nontraditional media outlets' contribution to diversity. The record provides examples of commonly owned outlets exercising independent editorial control.[168] The record also includes examples of existing media outlets, such as newspapers, introducing a new media outlet into the market, such as an Internet website, but using both outlets to provide the same local content for consumers.[169] Therefore, our new rule is designed to promote diversity by presumptively prohibiting combinations in the markets with the fewest number of voices, while presumptively permitting certain combinations in the largest markets where the loss of diversity is not a significant risk.

50. The necessity of such cross-ownership limits for the protection of diversity depends on the particular nature of both the market at issue and the transaction at issue. An inflexible "one-size-fits-all" rule, such as the blanket newspaper broadcast cross-ownership ban, fails to recognize the diversity of media markets across the country as well as the diversity of media transactions. What may make sense for Portland, Maine, does not necessarily make sense for New York City. And certain combinations may lead to increased local news reporting and may operate with outlets retaining independent editorial voices while others may not. The revised newspaper broadcast cross-ownership rule we adopt today takes account of these realities.

51. In sum, the record before us reveals a state of tumult in the business environment that has supported the traditional local media's production of news and information for decades. We recognize that technology advancements have triggered upheavals for these entities' business models beyond any they have previously experienced. Data gathered since 2002 make plain that the roiling of the media environment has accelerated recently, with obvious losses in professional personnel employed by traditional media entities to gather and report news and information. Yet we also see some hopeful trends suggesting that the traditional media will adapt and survive in the new digital and online era.[170] Against this backdrop, we believe that our revised newspaper/broadcast rule is an appropriately cautious measure. It takes into account the realities of the modern media marketplace and will allow newspapers and broadcast stations to explore synergies in certain circumstances, but maintains safeguards to ensure that consumers continue to enjoy the benefits that flow from the operation of multiple, competing sources of news and information.

52. We replace the blanket ban on newspaper/broadcast cross-ownership with a rule that establishes clear presumptions as to the limited circumstances when we will presume a newspaper/broadcast transaction will be in the public interest and thus a waiver of the ban should be

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[167] *2002 Biennial Review Order*, 18 FCC Rcd at 13793-94, ¶ 442*; see also Prometheus*, 373 F.3d at 402.

[168] Belo Comments at 16 (stating that its cross-owned outlets WFAA-TV and The Dallas Morning News historically have not coordinated their opinions or viewpoints); FOEF Comments at 13-14 (stating that newspaper/broadcast combinations are more likely to produce more public affairs programming, and such firms are unlikely to present a monolithic viewpoint on any or all issues of public importance); Media General Comments at 34-35 (stating that its various news and information platforms, regardless of their method of disseminating content, operate separately in developing their content.); NAA Comments at 79-85 (providing examples of programming and viewpoint diversity to argue that evidence reinforces the Commission's prior conclusion that newspaper/broadcast combinations do not speak with a single coordinated voice).

[169] CU Comments, Study 8 at 136-47; AFL-CIO Comments at 24-26, 28-29, 32 (stating that cross-owned media properties serve as cross-promotional vehicles rather than as independent editorial voices, citing examples in Austin, Texas and Los Angeles, California); AFTRA Comments at 21 (stating that media conglomerates impose homogeneous editorial views across commonly owned properties).

[170] *See, e.g*. paragraph 26, note 87, *supra*.

granted.[171] Establishing presumptions, as opposed to a bright line, will allow for the evaluation of proposed newspaper/broadcast combinations under defined circumstances on a case-by-case basis. In limited cases, we will presume that a proposed combination would be in the public interest. In the vast majority of cases, we will presume that a proposed combination would not be in the public interest, and we therefore would not permit the combination. Nevertheless, no matter which presumption applies, we will consider specific factors in determining whether permitting a particular combination in a particular market would be in the public interest. In addition, our case-by-case approach should partially alleviate the concerns of the newspaper industry commenters who believe the revised rule is too modest in scope to provide sufficient opportunities for cross-ownership and that it fails to recognize the marketplace changes since 1975.[172] Moreover, because our rule presumes combinations are not consistent with the public interest in markets 21 and below and because we will continue to scrutinize combinations of newspapers and the top four television stations in markets 1-20, our rule will not harm diversity or localism, as discussed below.

1. Presumption Favoring Certain Combinations in Top 20 Markets

53. We adopt a presumption that it is not inconsistent with the public interest for an entity to own in the top 20 Designated Market Areas ("DMAs")[173] either (a) a newspaper and a television station if (1) the television station is not ranked among the top four stations in the DMA,[174] and (2) at least eight independent "major media voices" remain in the DMA; or (b) a newspaper and a radio station. We expect that, as a result of this presumption, a waiver of the newspaper/broadcast cross-ownership ban generally would be granted in such cases.[175]

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[171] For the same reasons as discussed in the *2002 Biennial Review Order*, we reaffirm that for purposes of the new rule, we will define a daily newspaper to include non-English dailies printed in the primary language of the market. The former Note 6 to the multiple ownership rule defined a daily newspaper as "one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication." 47 C.F.R. § 73.3555(c) (2002). The exclusion of non-English language daily newspapers in areas where the dominant language of the market is not English creates a discrepancy in treatment that must be ended. In adopting the original newspaper/broadcast cross-ownership rule, the Commission recognized that the need for diversity in Puerto Rico was the same as that elsewhere. Since the definition of a daily newspaper was adopted in 1975, the percentage of households in which Spanish has spoken has approximately doubled. *2002 Biennial Review Order*, 18 FCC Rcd 13799-800, ¶¶ 457-58. It is appropriate, therefore, at this point in time, that we apply the newspaper/broadcast cross-ownership rule to the non-English daily papers in markets in which the language that they are printed in is the dominant language of their market. Those whose primary language is not English deserve the same protections of diversity and competition as do English speakers. For consistency, we also are making the same modification to the definition of newspapers for determining voices in a market for the radio/television cross-ownership rule. *See* 47 C.F.R. § 73.3555(c)(3)(iii).

[172] Belo 12/11/07 Comments at 2-3; Gannett 12/11/07 Comments at 3-5; Morris 12/11/07 Comments at 4, 6; NAA 12/11/07 Comments at 7-9; Bonneville 12/11/07 Comments at 4. Bonneville, Shamrock, and NAA specifically oppose the rule for retaining restrictions on newspaper/radio combinations, arguing that the record shows that radio is not considered to be the equal of newspapers or broadcast television as a source of news and information. Bonneville 12/11/07 Comments at 7-9; NAA 12/11/07 Comments at 3; Shamrock 12/11/07 Comments at 2.

[173] DMAs are determined by Nielsen Media Research.

[174] We will consider ratings, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service, at the time the application is filed.

[175] We disagree with NAA's argument that inclusion of a presumption in the rule runs counter to *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). NAA 12/11/07 Comments at 12-13, n.24. Contrary to NAA's suggestion, the presumption is rebuttable and allows for consideration of an application for exemption based on special circumstances. We also disagree with criticisms that a waiver standard effectively opens the door to any proposed newspaper/broadcast combinations. CWA/AFTRA 12/11/07 Comments at 7; CU 12/11/07 Comments at (continued...)

54. Although we concluded in the *2002 Biennial Review Order* that, on balance, the benefits of precision that case-by-case review of every transaction would provide were outweighed by the benefits of bright-line rules, we believe that the built-in presumptions and the public interest test provide adequate predictability for the industry, particularly when coupled with the older "bright-line" rules that we are retaining.[176] The Commission previously has noted that bright-line rules can be over-inclusive or under-inclusive depending upon the particular rule at issue.[177] Our approach addresses such concerns. In addition, in comparison to the number of applications triggering the local radio, local television, and radio/television ownership rules, we do not anticipate that there will be as many newspaper/broadcast applications filed; thus, the more case-specific nature of the review under this cross-ownership rule will not be unduly burdensome for the industry or the Commission.[178]

55. *Top 20 Markets*. As an initial matter, the presumption that a particular newspaper/broadcast station combination is not inconsistent with the public interest will apply only to proposed combinations in the largest 20 DMAs in the country. Such combinations in the largest markets in the country generally raise fewer diversity concerns because such media markets are more vibrant and have more media outlets.[179] As CU explains, "[t]he evidence in this proceeding shows quite clearly that the larger the market, the less concentrated the media tend to be."[180] We admit that it is not possible to draw with mathematical precision the line that should separate those largest media markets where the positive presumption should apply from those smaller markets where it should not. In looking at the media marketplace in the largest DMAs in the country, however, we believe that it is most appropriate to draw the line at the top 20 DMAs.[181]

56. We find notable differences between the top 20 markets and all other DMAs, both in

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13-14; MAP 12/11/07 Comments at 4-5; UCC 12/11/07 Comments at 10-12. The Commission must always give a hard look to waiver applications – it may never close the door altogether – and arguments that the waiver threshold will be too low under the modified rule are entirely speculative.

176 *2002 Biennial Review Order*, 18 FCC Rcd at 13645, ¶ 82 (noting certain benefits of bright-line rules, such as certainty of outcome, conservation of administrative resources, reduction of administrative delays, and lowering of transaction costs.).

177 *Id*. at 13646, ¶ 84.

178 Accordingly, we disagree with commenters who argue that a case-by-case approach will impose undue regulatory burdens and runs counter to the Commission's bright-line approach to other media ownership rules. *See* Belo 12/11/07 Comments at 4; CU 12/11/07 Comments at 42-43; Gannett 12/11/07 Comments at 5; NAA 12/11/07 Comments at 13; Morris 12/11/07 Comments at 8; News Corp./Fox 12/11/07 Comments at i; UCC 12/11/07 Comments at 12-13. We note that many parties support a case-by-case approach, claiming that it affords the Commission the opportunity to consider challenges to proposed transactions would otherwise be prohibited or approved pursuant to bright-line rules. *See*, *e.g.*, CFA/CU Petition at 41; FOEF Comments at 31; UCC Comments at 73-74.

179 NAB 12/11/07 Comments at 11 n.20.

180 CU 12/11/07 Comments at 14.

181 We disagree with CU that we should use Arbitron markets rather than DMAs for purposes of applying the rule. *See* CU 12/11/07 Comments 30-31. Although the Commission analyzed radio data at the level of Arbitron radio Metro markets for purposes of developing the Diversity Index, *see 2002 Biennial Review Order*, 18 FCC Rcd at 13789-90, ¶ 429, we decline to reinstate the cross-media limits or rely on the DI here. *See supra*, paragraph 17. Further, as the Commission observed in the *2002 Biennial Review Order*, "DMAs are exhaustive classifications, covering the entire United States, and it is straightforward to count the number of television stations in a DMA," *id.* at 13789 ¶ 428. Thus, use of DMAs facilitates application of the major media voices test, which for the reasons discussed below focuses exclusively on newspapers and television stations. In addition, television stations are generally seen throughout a DMA because of mandatory carriage requirements. *See* 47 C.F.R. § 76.56 (Cable) and § 76.66 (DBS).

terms of voices and in terms of television households. We evaluated the range of media outlets available in the top 20 DMAs, and conclude that diversity in those largest markets is healthy and vibrant in comparison to all other DMAs. For example, while there are at least 10 independently owned television stations in 18 of the top 20 DMAs, none of the DMAs ranked 21 through 25 have 10 independently owned television stations. Additionally, while seventeen of the top 20 DMAs have at least two newspapers with a circulation of at least 5 percent of the households in that DMA, four of the five DMAs ranked 21 through 25 have only one such newspaper. Moreover, the top 20 markets, on average, have 15.5 major voices (independently owned television stations and major newspapers), 87.8 total voices (all independently owned television stations, radio stations, and major newspapers), and approximately 3.3 million television households.[182] Markets 21 through 30, by comparison, have, on average, 9.5 major voices, 65.0 total voices, and fewer than 1.1 million television households, representing drops of 38.5 percent, 25.9 percent, and 56.3 percent from the top 20 markets, respectively. Markets 31 through 40 and 41 through 50 have average numbers of voices for each category similar to markets 21 through 30, and even fewer television households on average, 837,800 and 679,200, respectively. Markets 50 through 210 show even more dramatic drops, with on average, 6.7 major voices, 31.2 total voices, and approximately 231,000 television households, representing drops of 56.4 percent, 61.7 percent, and 90.7 percent from the top 20 markets, respectively. The diversity in the number and types of traditional media outlets in the largest markets ensures that the public is well served by antagonistic viewpoints. Markets outside of the top 20 DMAs do not feature diversity to such an extent.

57. *Major Media Voices*. For purposes of determining the applicability of our presumption, we define major media voices as full-power commercial and noncommercial television stations and major newspapers[183] because we believe that such sources are generally the most important and relevant outlets for news and information in local markets today. Indeed, there is relatively unanimous support for the position that consumers continue predominantly to get their local news from daily newspapers and broadcast television. Data shows that consumers rely mostly on newspapers and television for news and information. The record demonstrates that traditional media still represent the most important source for local news for the majority of individuals. Media Ownership Study Number 1 ("Nielsen Survey") indicates, for example that 38.2 percent of all respondents consider broadcast television stations and 30.1 percent consider local newspapers "the most important source of local news or local current affairs,"[184] whereas only 6.7 percent of all respondents say the same concerning the Internet.[185] AFL-CIO agrees, finding that a majority of consumers cite newspapers as the most important source of local news and television as the most important source of national news.[186] CU attaches two studies to its comments in response to the *Further Notice* finding that local newspapers and television are the most commonly used sources for local news. CU's studies conclude that traditional media, television, and newspapers,

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[182] Information on television stations, radio stations, and newspapers is from BIA's Media Access Pro Database. We note that we are not able to make any adjustments for radio/television cross-ownership in any market.

[183] Major newspapers are newspapers that are published at least four days a week within the DMA and have a circulation exceeding 5 percent of the households in the DMA. *See* 47 C.F.R. § 73.3555(c)(3)(iii). We disagree that the rule is inconsistent because it limits combinations of daily newspapers and broadcast stations but counts major newspapers towards the major media voices requirement. *See* Tribune 12/11/07 Comments. As explained above, we are proceeding cautiously by relaxing the existing ban on cross-ownership of a daily newspaper and broadcast station only in the largest markets with the greatest levels of viewpoint diversity. Counting as major media voices only those outlets that consumers rely upon most as sources of local news and information will ensure that we do not presume that sufficient diversity of major local news sources will remain in a top 20 market if such a presumption is not warranted.

[184] Media Ownership Study 1 at 90.

[185] *Id.* at 91.

[186] AFL-CIO Reply at 9-11.

followed by weekly newspapers and broadcast radio, are the most frequently used and most important sources of local and national news and that those that use the Internet for news and information overwhelmingly go to the web sites of local or national television sources or to the sites of daily newspapers.[187] Based on our findings, therefore, we have taken a cautious approach in designating which outlets to include as major media voices, the presence of which would support the presumption that a newspaper/broadcast combination will serve the public interest. Counting as major media voices only those outlets that consumers most rely on as sources of local news and information will ensure that we do not presume that sufficient diversity of major local news sources will remain in a top 20 market if such a presumption is not warranted.[188]

58. We fully acknowledge that other types of outlets contribute to diversity. In the *2002 Biennial Review Order*, the Commission cited to numerous sources: cable networks, weekly and college

[187] CU Comments, Attach., Study 7 at 128-33 and Study 8 at 134-47. CU's Study 7 found that, by far, newspapers and broadcast television are the most frequent and most important source of news and information followed by weekly newspapers and radio. According to the Study, 54 percent of the respondents most often use daily newspapers and television for local news, and 53 percent consider daily newspapers and television to be the most important source of local news. An additional 33 percent of the respondents answered that they most often use weekly newspapers and radio for local news, while 31 percent consider weekly newspapers and radio to be the most important source of local news. Therefore, according to the Study, at least 84 percent of the respondents look to traditional media for local news. CU's Study 8 finds that among the 11 percent of respondents who say that the Internet is their first or second most frequent source of news, the websites of local television and daily newspapers account for 51 percent of the primary sites they visit most frequently. The peer review for CU's Study 7 raises issues regarding the breadth of the Study's conclusions, but the review does not undermine its basic conclusions. *See* CU Study 7 Peer Review, Steve Wildman, Michigan State University, *available at* http://www.fcc.gov/mb/peer_review/reviews.html. Specifically, the peer review concludes that CU's Study 7 is overly broad in its rejection of the Nielsen Survey that it was intended to correct. Nonetheless, the peer review finds that CU's Study 7 provides valuable evidence for the Commission, specifically the fact that CU's Study 7 shows that the majority of Internet sites that consumers use for news are owned by the same major news organizations that own traditional broadcast media. As such, we use as evidence of the fundamental points that consumers continue to rely primarily on traditional media sources for their local news and that they use newer media sources as supplemental. Similarly, the peer review for CU's Study 8 raises questions concerning the phrasing and ordering of survey questions, and concerning the aggregation of survey responses. *See* CU Study 8 Peer Review, *available at* http://www.fcc.gov/mb/peer_review/reviews.html. The reviewer concludes that these concerns may raise questions concerning the conclusions of the Study. We note these concerns, and accept that the precision of the survey may have been reduced due to these problems, but we do not reject CU Study 8 in its entirety. Rather, we treat it as another piece of evidence that newer sources of information, including news web sites and blogs, are lesser sources of information for consumers compared to traditional sources of information. Because this study agrees fundamentally with other evidence in the record, we find that the problems raised in the peer review may reduce its precision but they do not completely undermine its results.

[188] We acknowledge that some concerns have been raised in regard to the Nielsen Survey, Media Ownership Study 1, such as the nature of the questions and the response rate. *See, e.g.,* Media Ownership Study 1 Peer Review, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html; CU Comments to the Media Ownership Studies at 8-9 and 110-23 (highlighting, for example, that broadcast television or newspapers are the first or second most important source of news for 86 percent of respondents, whereas all other forms of media are first or second most important for only 14 percent of respondents); Media General Reply to the Media Ownership Studies at 12-24 (criticizing the study, but emphasizing that non-traditional outlets are important sources of news and should be counted as "voices"); NAA Comments to the Media Ownership Studies at 4-8 and Reply at 15-21 (stating that newspapers and television are still important sources of news but that Internet and other "emerging" sources are growing quickly). Nonetheless, we are not aware of figures showing the contrary. In fact, the peer review of the Nielsen Survey, Media Ownership Study 1, suggested a Pew Internet & American Life Project Study as an alternative source; the Pew Study has different percentages, but substantially the same results: 59 percent of respondents got news "yesterday" from local television, 38 percent from a local paper, but only 23 percent from the Internet. Pew Internet & American Life Project, "Online News: For Many Home Broadband Users, the Internet is a Primary News Source" (Mar. 22, 2006).

newspapers, and the Internet.[189] However, we cannot conclude that other voices are major sources of local news or information. Our data reflects only that most consumers primarily rely on newspapers and broadcast television for local news. For instance, several parties argue that cable television should count as a source of local news,[190] while others discount its contribution to local news.[191] The *Prometheus* court affirmed the Commission's decision to discount cable television as an important news source, but there remains little information on how to quantify its contribution.[192] In addition, there is much controversy centered on whether and to what degree the Internet is a source for local news.[193] AFL-CIO argues that the Internet merely repurposes the news, and should not count as a diverse voice.[194] Conversely, Belo provides examples of locally oriented Internet news sources, including websites and blogs, some of which are offered by WFAA-TV and *The Dallas Morning News*, its co-owned outlets in the Dallas DMA. CU claims that only a small percentage of people use the Internet frequently for local news and information, and about half the web sites they visit are web sites of traditional media, which generally use "repurposed" content.[195] Belo states that the Internet offers a vehicle for ongoing discussion and direct public input that is not practical to the same extent on either a local television station or via traditional print.[196]

59. Because we cannot conclude that other media sources are major sources of local news and information, we do not include them as major media voices for the eight-voice count for purposes of the presumption in the top 20 markets. We do, however, consider them as contributing to diversity in local markets. To the extent that all of the top 20 DMAs include numerous independent sources, we are comfortable in our presumption that allowing a newspaper and a radio station or a newspaper and a non-top four television station in these 20 markets to combine will not harm diversity.[197]

60. The Commission historically has used voice-count tests in other contexts (*e.g.*, in waiver standards for the radio-television cross-ownership rule) as a means of promoting diversity.[198] Here, the eight independent voices component of the rule provides an appropriate benchmark for indicating that a minimum number of sources of local news and information are present before we presume that a combination of a newspaper and a television station is not inconsistent with the public interest.[199] The

[189] *2002 Biennial Review Order*, 18 FCC Rcd at 13765, ¶ 365.

[190] Belo Comments at 14-15; Cox Comments at 17-18; NAA Comments at 40-41; Media General Reply at 6, 12-14.

[191] AFL-CIO Comments at 15; UCC Comments at 70.

[192] *Prometheus*, 373 F.3d at 404-05.

[193] *Id*. at 405-06.

[194] AFL-CIO Comments at 15; *see also* AFTRA Comments at 11-13.

[195] CU Comments at 10-12, Attach., Study 8 at 136-47.

[196] Belo Comments at 11-13.

[197] While UCC objects that the "major voices" test and the top four restriction do not apply to newspaper/radio combinations, *see* UCC 12/11/07 Comments at 15, more stringent protections are appropriate for newspaper/television combinations than newspaper/radio combinations in light of the fact, discussed above, that television stations are more important sources of local news for consumers.

[198] *See, e.g.*, *Review of the Commission's Regulations Governing Television Broadcasting*, Report & Order, MM Docket No. 91-221, 14 FCC Rcd 12903, 12933-36, ¶¶ 64-70 (1999) ("*Local TV Ownership Report and Order*"); *clarified in* Memorandum Opinion & Second Order on Reconsideration, 16 FCC Rcd 1067 (2001).

[199] In light of the characteristics of the top 20 markets and the adoption of the top four restriction, we reject CU's arguments, *see* CU 12/11/07 Comments at 24, that the voice count test used to determine the applicability of the presumption should take into account market share or be dependent on the level of local news programming aired by a commercial television station. Nevertheless, the Commission would appropriately look at such information in (continued...)

standard we adopt today takes into account current marketplace conditions and strikes what we believe to be an appropriate balance between the efficiencies of cross-ownership and the need to safeguard diversity, as discussed above.[200] We have selected the number eight for the major media voice count because we are comfortable that assuring that minimum number of major media voices in the top 20 markets – along with the other unquantified media outlets that are present in those markets – will assure that these markets continue to enjoy an adequate diversity of local news and information sources. As noted above, there are at least 10 independently owned television stations and two major newspapers in the great majority of the top 20 markets. Further, all of those markets have at least eight television stations and one major newspaper. As we do not want to allow a significant decrease in the number of independently owned major media voices in any of those markets, we will presume that a merger is in the public interest only if at least eight major media voices will remain post-merger.

61. *Top Four Prohibition*. The presumption in the top 20 DMAs that a newspaper/television combination would not be inconsistent with the public interest will not apply to proposed combinations between a daily newspaper and a television station ranked among the top four television stations in a DMA. In the *2002 Biennial Review Order*, the Commission retained its top four restriction in the local television ownership rule, which prohibits a combination between any of the top four ranked stations in a DMA. The *Prometheus* court agreed that the Commission was justified to limit combinations to those that would not create excessive market power.[201] We consider a daily newspaper and the top four stations to be the most influential providers of local news in their markets. Thus, such combinations are likely to cause a greater harm to diversity in a market.[202] CU/CFA/Free Press support the top four restriction, while others believe that there should be no cross-ownership restrictions in the largest markets, including allowing newspapers to combine with top four television stations.[203]

62. We also believe that combinations of newspapers and non-top four television stations are more likely to result in the production of more local news in furtherance of our localism goal. Our data shows that stations below the top four are less likely to carry local news, and therefore more likely to

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performing its case-by-case review of a proposed combination, particularly under the "concentration" factor discussed *infra*.

[200] Accordingly, we disagree with Media General's argument that the rule's eight independent voice component is inconsistent with the D.C. Circuit's decision in *Sinclair*, 284 F.3d at 164. *See* Media General 12/11/07 Comments at 14. *Sinclair* stands for the proposition that the Commission must provide a rational explanation for using different voice count tests for the purposes of different media ownership rules, not that the Commission is bound to employ the same test regardless of the goals it seeks to achieve.

[201] Evidence showed that there is a significant drop in Nielsen ratings between the fourth and fifth stations in a market, which indicates a significant difference in viewership and hence influence in the respective local markets. *Prometheus*, 373 F.3d at 416.

[202] Without submitting the relevant data, MAP asserts that nearly half of the television stations owned by people of color are in the top 20 markets and that none is rated among the top four in its market. Thus, MAP argues that those stations will be acquisition targets and the rule will have a negative impact on minority ownership. *See* MAP 12/11/07 Comments at 5-6. We note that our rule revisions will not force any owner to sell his or her station. Further, although we believe that it is appropriate to adopt measures to encourage minority ownership, as we do in the *Diversity Order* that we adopt today, we do not think it is appropriate to deny minority owners the opportunity to sell their stations in accordance with otherwise applicable Commission rules, *see* note 7, *supra*.

[203] NAA supports cross-ownership of newspapers and top four stations because it claims it is precisely those stations that are most capable of sustaining full-scale news operations. NAA 12/11/07 Comments at 2, 10; *see also* CU 12/11/07 Comments at 20-23; Gannett 12/11/07 Comments at 6; Media General 12/11/07 Comments at 18-20; News Corp./Fox 12/11/07 Comments at 10-11. NAA also opposes the cross-ownership rule because it is considerably more limiting than any of the other existing local broadcast ownership rules. NAA 12/11/07 Comments at 2, 9-10.

carry "new news" as a result of a newspaper combination. Specifically, 86 percent of stations ranked first through fourth in all DMAs provide local news, averaging 2083 minutes, while only 40 percent of stations ranked fifth and below in all DMAs provide some local news, averaging 458 minutes.[204] Based on this data, stations ranked first through fourth provide 355 percent more local news than stations ranked fifth and below.[205] Because stations outside of the top four are less likely to have top-ranked local news shows and are therefore more likely to benefit from the extensive news gathering resources of the newspaper, we presume that combinations of newspapers and television stations ranked fifth and below are in the public interest.

2. Presumption Against All Other Combinations

63. In adopting our new newspaper/broadcast cross-ownership rule, we presume that it is not inconsistent with the public interest for an entity to own, operate or control, in one of the top 20 DMAs, a daily newspaper and one commercial AM or FM radio station or one TV broadcast station under certain circumstances. As discussed above, we base this presumption on the vibrancy and number of voices in the top 20 DMAs. In all DMAs ranked 21 and below, we adopt a presumption that it is inconsistent with the public interest for an entity to own newspaper and broadcast combinations.[206] We adopt this presumption as a measure to protect competition and media diversity.[207] In adopting the newspaper/broadcast cross-ownership rule over 30 years ago, the Commission sought to promote competition and diversity of viewpoints.[208] Indeed, diversity of viewpoint has been especially important in the context of newspaper/broadcast cross-ownership, given the reliance the public has placed on these

[204] Staff analysis of television schedule data from TMS for May 12-18 and November 10-16, 2005.

[205] *Id*. *See also* CU 12/11/07 Comments at 22 (indicating that top four stations are far more likely than non-top four stations to provide local news).

[206] Despite the fact that radio stations generally have less of an impact on local diversity than television stations, we disagree with commenters who argue that the retention of any limits on newspaper/radio cross-ownership is not justified. *See* Bonneville 12/11/07 Comments at 1-2, 7-9, 10; Morris 12/11/07 Comments at 4-5; Shamrock 12/11/07 Comments at 1-2. The combination of a daily newspaper with one or more radio stations may have significant negative implications for the range of viewpoints available in a local market. Our action will allow licensees to realize the benefits of newspaper/radio cross-ownership in the largest markets, *see, e.g.,* Bonneville 12/11 Comments 8, n.18 (citing evidence that cross-owned radio stations are more likely to adopt a news format), while fostering viewpoint diversity in small and medium markets where such combinations pose a greater risk to viewpoint diversity. We also disagree that the newspaper/broadcast cross-ownership rule's numerical limit of one newspaper and one broadcast station is inconsistent with the radio/television cross-ownership rule's higher numerical limits. *See* Tribune 12/11/07 Comments at 8. The Commission traditionally has been more cautious in allowing newspaper/broadcast combinations than in allowing broadcast-only combinations due to the unique attributes of newspapers. Moreover, as discussed above, given the long history of the newspaper/broadcast cross-ownership rule, we conclude that it is appropriate to proceed cautiously in relaxing it.

[207] The Commission has previously explained that its cross-ownership and multiple ownership rules encourage "outlet" and "source" diversity as indirect means to achieve viewpoint diversity. *See 2002 Biennial Review Order,* 18 FCC Rcd at 13629-30, 13632 ¶¶ 26-27, 30, 38-39; *see also Review of the Commission's Regulations Governing Television Broadcast; Television Satellite Stations Review of Policy and Rules,* Further Notice of Proposed Rule Making, MM Docket Nos. 99-221 and 87-8, 10 FCC Rcd 3524, 3549-50 (1995). "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." *Id.*

[208] The Commission stated that "[t]he multiple ownership rules," such as the newspaper/broadcast cross-ownership rule, "rest on two foundations: the twin goals of diversity of viewpoints and economic competition." *1975 Second Report & Order*, 50 FCC 2d at 1074. Ensuring that the public has access to a diversity of viewpoints promotes First Amendment values.

media as sources of local news and information.[209] This reliance may be particularly acute in markets below the top 20 DMAs. As indicated earlier, the top 20 DMAs share a robustness in media and outlet diversity that is not matched in smaller markets. We are not certain that the degree of media consolidation that the largest, more competitive markets can withstand is yet mirrored in smaller markets, and thus, we conclude that there should be a presumption against newspaper/broadcast cross-ownership in markets below the top 20.[210] We set forth in detail below policies we will adopt to safeguard the public interest as we consider proposed transactions under the new newspaper/broadcast cross-ownership rule.[211]

64. As the record establishes, the top 20 DMAs are media-rich, highly populated markets, where we believe it is appropriate to apply the presumption that limited newspaper/broadcast cross-ownership is not inconsistent with the public interest.[212] However, in addition to the presumption in favor of cross-ownership, we will also evaluate whether a proposed transaction is in the public interest by considering the specific factors enumerated below. In addition, although the action we take today establishes a presumption against newspaper/broadcast cross-ownership in DMAs ranked 21 and below (and the less populated the DMA, the heavier the presumption against cross-ownership), we acknowledge the difficulty in identifying a definitive line to draw between markets. We also recognize the need to consider factors particular to each market and proposed transaction. Thus, just as a petitioner could rebut the presumption that a transaction in markets 1-20 would be in the public interest by showing (for example) that the resulting market would be unduly concentrated, applicants in markets below DMA 20 could overcome the relevant presumption that a merger would not be in the public interest by showing countervailing benefits of the proposed transaction. While we expect such cases to be rare, we acknowledge that a particular market may have unique attributes or that the proposed transaction may present unique advantages. In either event, the Commission is resolved to analyze each transaction on its merits. Our guiding principles, of course, will be preserving competition, localism, and diversity.

65. *Reversal of Negative Presumption*. In two special circumstances, we will reverse the negative presumption that applies to those proposed combinations that do not otherwise qualify for a positive presumption. First, we adopt a failed/failing station model, based upon the same criteria that we apply in the local television waiver criteria.[213] Although this standard was not formalized until 1999, the Commission has been applying this type of analysis for over 25 years in evaluating waivers of ownership

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[209] *See* paragraph 57 & note 187, *supra.* Consumers still rely predominantly on newspapers and television for public affairs. *Id.* At the Commission's media ownership hearing in Nashville, Alex Jones, co-owner of *The Greenville Sun,* Greenville, Tennessee, explained that the vast majority of "accountability news," *i.e.*, the news of politics, policy, public affairs, business, the news that is considered essential to democracy, comes from the newspaper and local television. Jones maintains that the reported news that comes from these entities is the news of verification as opposed to the "talk that has now gotten confused with real news." Jones contends that it is talk, not news, which is in extraordinary abundance. Jones is the Director of the Joan Shorenstein Center on the Press, Politics and Public Policy at Harvard University's Kennedy School of Government. Testimony of Alex Jones, Media Ownership Hearing, Nashville, Tennessee, Dec. 11, 2006.

[210] We therefore do not agree with commenters who urge repeal of the ban, particularly in small markets, due to the unique plight of broadcasters in these markets to retain increasingly costly news operations. *See, e.g.,* Media General Comments at 7-13; Shamrock 12/11/07 Comments at 1-2; NAB Comments at 116-20.

[211] The policies we adopt herein incorporate the suggestions of commenters who, although opposed to a lifting of the ban on newspaper/broadcast cross-ownership, propose that any modification of the rule include criteria to determine whether cross-ownership would presumptively serve the public interest. *See, e.g.,* UCC Comments at 73-74.

[212] As with all applications seeking transfer of control or assignment of a broadcast license or authorization, any party may file a petition to deny any license transfer or assignment. 47 U.S.C. § 309(d).

[213] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12938-40, ¶¶ 79-81.

limits.[214] Under this model, if a newspaper or broadcast outlet is failed or failing, we would apply a positive presumption. In order to qualify as failed, the newspaper or broadcast outlet has to have stopped circulating or have been dark for at least four months immediately prior to the filing of the assignment or transfer of control application, or must be involved in court-supervised involuntary bankruptcy or involuntary insolvency proceedings.[215] To qualify as failing, the applicant must show that (1) the broadcast station has had a low all-day audience share (*i.e.*, 4 percent or lower), (2) the financial condition of the newspaper or broadcast station is poor (*i.e.*, a negative cash flow for the previous three years), and (3) the combination will produce public interest benefits.[216] In addition, as with requests for failed station waivers of the local television ownership rule, the applicant must show that the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the failed or failing newspaper or station and that selling the newspaper or station to any out-of-market buyer would result in an artificially depressed price.[217] The longstanding policy implementing the waiver criteria for television duopolies is also relevant for newspaper/broadcast combinations because it could permit two entities to merge while posing minimal harm to our diversity and competition goals. In such situations, the financial situation of one of the entities typically "hampers their ability to be a viable 'voice' in the market":

> "These stations rarely have the resources to provide local news programming, and often struggle to provide significant local programming at all. Allowing a "failing" station to join with a stronger station in the market can greatly improve its ability to improve its facilities and programming operations, thus benefiting the public interest. This waiver standard may be of particular assistance to struggling stations in smaller markets that are not covered by the eight voice/top four ranked station test."[218]

66. In the past, the Commission has also considered the financial survival of a newspaper

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[214] *See, e.g.*, *1975 Second Report & Order*, 50 FCC 2d at 1085, ¶ 119 (The Commission established the following waiver standards when it adopted the cross-ownership rule, anticipating that requests would be filed. Applicants would have to show (1) an inability to sell the station, (2) that the only sale possible would be at an artificially depressed price, (3) that separate ownership and operation of the newspaper and the broadcast station could not be supported in the locality, or (4) the purposes of the rule would be disserved by its application); *Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket No. 96-197, Notice of Inquiry, 11 FCC Rcd 13003 (1996) (The Commission considered modifying waiver criteria for cross-ownership rule); *Voice of the Caverns, Inc*., 4 FCC 2d 946 (1966) (The Commission granted dual ownership of a satellite television station and VHF station when previous three owners were unable to maintain operations due to financial hardship); *Multiple Ownership Report and Order*, 29 Fed. Red. 7535, 7539 (1964) (adopting Note 4 to 47 C.F.R. § 73.636(a)(1), which creates an exemption to the television duopoly rule for satellite stations because of special financial hardship considerations); *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, Docket No. 18110, First Report & Order, 22 FCC 2d 306 (1970) (The Commission grandfathered existing AM-FM combinations when it amended the multiple ownership rules "where a showing was made that establishes the interdependence of the stations and the impracticability of selling and operating them as separate stations).

[215] *See Local TV Ownership Report and Order*, 14 FCC Rcd at 12937, ¶ 75.

[216] The applicant will be required to show that the tangible and verifiable public interest benefits of the combination outweigh any harms. At the end of the station's license term, the owner of the combined entities must certify to the Commission that the public interest benefits of the combination are being fulfilled, including a specific, factual showing of the program-related benefits that have accrued to the public. Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing. *See id* at 12939, ¶ 81.

[217] As with the showing required of failed station waiver applicants under the local television rule, one way to satisfy this fourth criterion will be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the station, and that no reasonable offer from an entity outside the market has been received. *See id* at 12938, ¶ 76.

[218] *Id.* at 12938-39, ¶ 79.

outlet in deciding whether to waive the newspaper/broadcast cross-ownership rule. Among other things, the Commission considered whether, under the circumstances presented, a permanent waiver was necessary to effect a long-term stratagem for the *New York Post*'s survival.[219]

67. Second, we also will reverse the negative presumption when a proposed combination results in a new source of a significant amount of local news in a market. Specifically, we will presume that a proposed newspaper/broadcast combination is not inconsistent with the public interest when it initiates local news programming of at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations. In reviewing whether broadcasters have carried out their obligations to serve the public interest with responsive programming, the Commission has historically considered their news and public affairs programming to be uniquely and particularly important. A positive presumption under this limited circumstance will increase diversity of choices, provide more local programming, and allow better local service by media outlets. We believe that it is important, however, that the Commission closely monitor whether combinations taking advantage of this reversed presumption live up to their commitment to provide new local news. Therefore, broadcast station licenses that are approved as a result of this reversed presumption will need to report to the Commission annually regarding how they have followed through on their commitment to initiate at least seven hours a week of local news.

68. *Rebutting the Presumption*. To the extent that a proposed combination does not qualify for a positive presumption, it will have a high hurdle to cross to win Commission approval. Similarly, parties objecting to a transaction with a positive presumption will have a high hurdle to persuade the Commission that the transaction should not be approved. We will require any applicant attempting to overcome a negative presumption about a major newspaper and television station combination to demonstrate by clear and convincing evidence that, post-merger, the merged entity will increase the diversity of independent news outlets (*e.g.*, separate editorial and news coverage decisions) and increase competition among independent news sources in the relevant market.[220] Our analysis of the following four factors will inform this determination: (1) the extent to which cross-ownership will serve to increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the owner's commitment to invest significantly in newsroom operations.[221] We believe assessment of these factors in the context of each specific transfer application will enable the Commission to preserve and potentially increase localism and viewpoint diversity, while also providing the means for newspapers and broadcast stations to achieve the synergies available from cross-ownership.[222]

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[219] *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).

[220] Because radio is generally a less influential voice than television, proposed newspaper/radio combinations will not face as high a hurdle. Similarly, combinations involving non-major newspapers (*i.e*., those with a circulation of fewer than 5 percent of the households in the DMA) will not face as high a hurdle as those involving major newspapers.

[221] We disagree with arguments that the four factors are too vague. *See generally* Media General 12/11/07 Comments; UCC 12/11/07 Comments. Each of the factors is discussed in detail below. The Commission's application of the factors to particular cases will provide further guidance to interested parties over time.

[222] CU argues that the newspaper/broadcast cross-ownership rule is flawed because the factors (no top four station and eight independent major media voices) that must be present in the top 20 markets to give rise to the presumption that a combination of a newspaper and a television station is not inconsistent with the public interest do not apply in the smaller markets. *See* CU 12/11/07 Comments at 13-14. Thus, they argue that the smaller markets, which are the most vulnerable, are the least protected under the rule. *Id*. These commenters misapprehend how the rule will (continued...)

69. *Increased Local News*. The record suggests that some entities operating both a newspaper and a broadcast television station may have achieved superior news operations that benefit local audiences. For example, Belo maintains that its experience as both the publisher of *The Dallas Morning News* and the owner and operator of WFAA-TV in Dallas has been the catalyst for increasing the amount and quality of local news and public affairs coverage, as well as the number of local news outlets available to Dallas residents.[223] Belo states that the fact that it co-owned media outlets in Dallas permitted it to host and cover the October 2006 gubernatorial debate and broadcast them both in English and Spanish.[224] Similarly, Media General asserts that the pooling of news-gathering resources has significantly increased the output of news content, ensuring the delivery of better, faster, and deeper news in Tampa, Florida, where it owns *The Tampa Tribune* and WFLA-TV.[225] The convergence of newspaper and broadcast outlets, according to Media General, has led to more news specials and investigative reports, more so than either outlet could have produced on its own.[226] Given the record, we believe it is appropriate that we evaluate whether a proposed newspaper/broadcast combination will increase the amount of local news disseminated and thereby further the goal of localism.

70. We reiterate that establishing and maintaining a system of local broadcasting that is responsive to the unique interests and needs of individual communities is, as the Commission has emphasized, an extremely important policy goal.[227] In the *2002 Biennial Review Order*, we noted that "Federal regulation of broadcasting has historically placed significant emphasis on ensuring that local television and radio stations are responsive to the needs and interests of their local communities."[228] And, in reviewing whether broadcasters have carried out their obligations to serve the public interest with responsive programming, the Commission has historically considered their news and public affairs programming to be of particular importance. We remain committed to promoting localism and local service by media outlets and intend that our actions here will foster and promote increased localism among media outlets. Therefore, when determining whether a cross-ownership combination would increase the amount of local news, we will be looking for a significant increase in the broadcast of local news. As previously discussed, we consider a significant increase to be at least seven hours a week of additional news in the market. The term "local news" includes traditional newscasts as well as programming that addresses issues of local political interest or issues of public importance in the market. In addition, we will examine the resources that the broadcast entity will be devoting to the coverage of local news, such as the hiring of additional reporters and newsroom staff. As noted in the previous section, our data show that television stations ranked fifth and below in their DMAs are less likely to

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function. The factors referred to by these commenters must be present before we will presume that a newspaper/television station combination is not inconsistent with the public interest. In the smaller markets, all such combinations are presumed to be inconsistent with the public interest, so it is not necessary to list those factors. Moreover, in considering whether an applicant has presented adequate evidence to overcome the adverse presumption in a smaller market, one of the factors that the Commission will consider is the level of concentration in the DMA. In considering this factor, the Commission will certainly take into account whether the television station that the applicant seeks to co-own is a top four station and the number of independently owned media voices in the market. Thus, contrary to CU's argument, the smaller markets will have greater, not lesser, protection under the rule.

[223] Belo Comments at 13-14.

[224] *Id.* at 15. Belo added that it aired the debate on each of its Dallas and other Texas-based platforms, on DallasNews.com, the host television stations' associated websites, and Texas Cable News ("TXCN"), its 24-hour regional cable news network.

[225] Media General Comments at 8-10.

[226] *Id.* at 10-12.

[227] Statement of FCC Chairman Kevin Martin, Public Hearing on Localism, Washington, D.C. (Oct. 31, 2007).

[228] *2002 Biennial Review Order*, 18 FCC Rcd at 13643, ¶ 74.

carry local news, and therefore hold the potential, as a result of a merger with a newspaper, to provide additional news programming to the local community.[229] It is thus appropriately an important factor that we will consider in determining whether to allow a newspaper/broadcast combination. The weight we afford this factor will be commensurate with the amount of new local news the cross-owned combination would be committing to airing.

71. *Independent News Judgment.* In adopting the newspaper/broadcast cross-ownership ban in 1975, the Commission stated that, "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run."[230] Today's record now reveals, however, that some co-owned newspaper/broadcast facilities are capable of maintaining separate editorial operations. Thus, Belo explains that although its television station and newspaper share newsgathering and promotional resources, WFAA-TV is "generally not privy" to the editorial positions to be taken by *The Dallas Morning News.*[231] We agree that the public is not well served when the news disseminated by a cross-owned newspaper and broadcast station represent a mirror image in their coverage of issues of vital importance to the public. We adhere to the Commission's long-standing view that independence of news sources is important to civic life and the public welfare. Therefore, in evaluating this factor, the Commission will analyze whether applicants have demonstrated that their respective media outlets will exercise independent news and editorial judgment.[232] In order to satisfy this second factor, commonly owned media outlets must each maintain their own separate news and editorial staff. In other words, the combined entity must have two separate editorial decisionmakers exercising independent judgment as to what news will be carried by each outlet. Also, the combined entity must maintain separation among any personnel who control editorials and commentaries, such as editorial boards. This requirement will help ensure that each outlet will make its own independent and separate judgment concerning what news to air and what news to publish. Other factors that will help demonstrate compliance with this factor include staff titles and descriptions of duties, facilities and technologies management; organizational charts; and any other proof that cross-owned outlets will exercise independent editorial decisions.[233] Assurance of the continued exercise of independent news judgment by each outlet will help to indicate that a particular combination would not undermine the goal of diversity of viewpoint. We note that compliance with this factor should not preclude the economic and operational synergies that we aim to encourage by allowing certain combinations. Accordingly, maintaining editorial independence does not mean that a combination will be unable to take advantage of the potential opportunity for additional newsgathering that cross-ownership may provide or require that the outlets abstain from sharing some newsgathering inputs. It is critical, however, that the broadcast outlet and the newspaper separately and independently decide their editorial positions, what stories to air and publish, how to edit those stories, and whether and how prominently to air or display them.

72. *Market Concentration.* The third factor in our public interest determination is the level of concentration in the Nielsen DMA, that is, the extent to which media outlets in a particular market

[229] *See* paragraph 62, *supra*.

[230] *1975 Second Report & Order*, 50 FCC 2d at 1079-80, ¶ 111.

[231] Belo Comments at 17.

[232] *Cf.* CWA Comments at 4-5 (proposing application of public interest factor to cross-ownership proposals modeled after the Newspaper Preservation Act, an antitrust exemption which allows common ownership and joint operation of two newspapers under certain circumstances but requires that there shall be no combination of editorial or reportorial staffs and that editorial policies be independently determined) (citing 15 U.S.C. § 1801-1804).

[233] We stress that this factor is content neutral. In assessing editorial independence, the Commission will review the structure and operation of cross-owned newspapers and broadcast stations as it relates to news dissemination, not what stories are covered, programs are aired or articles are written.

compete in the provision of local news and information to consumers within that market and the impact that the proposed combination would have on such concentration. Examining the level of concentration existing in the market at the time the Commission undertakes its review of a transaction serves both our diversity and competition goals. Indeed, such considerations informed our decision above to limit the positive presumption to the top 20 markets and to combinations involving non-top four television stations. Nevertheless, we recognize that circumstances unique to a particular market could produce a transaction that would result in a market that is too concentrated despite being in the top 20, as well as the opposite in a market below the top 20. Reviewing this factor with respect to each transaction will ensure that we consider this important measure on a case-by-case basis, taking into account both characteristics of the market and the nature of the proposed combination. Many commenters express concern about the level of concentration in local media markets, and the resulting effect of that concentration on the viability of smaller, independently owned outlets.[234] CWA asserts that most markets have only three to four broadcast outlets and one newspaper.[235] As such, CWA maintains that mergers between news outlets may harm diversity of ownership in local markets and reduce the number of independent voices.[236] Other commenters have stated that media consolidation has spurred the financial distress of independently owned outlets due to a decrease in advertising revenue, and other negative economic factors.[237] We believe it appropriate that we ascertain the level of concentration in local markets in assessing the public interest *bona fides* of any transaction that will result in newspaper/broadcast cross-ownership.

73. In evaluating this factor, we will conduct a fact-specific inquiry into the characteristics of the market in question as well as characteristics of the proposed combination. In particular, we will look at the number of independent voices that would remain in the market after the combination as well as the relative power and influence of those voices and the outlets that the applicant proposes to own. Thus, we note that proposed newspaper/radio combinations will generally be less likely to raise concentration concerns than proposed newspaper/television combinations in light of the fact that radio is generally not as influential a voice as is television.[238] This, of course, will affect our overall analysis and make it less difficult for newspaper/radio combinations to overcome the negative presumption. We will not employ any single metric, such as the Diversity Index, because, as the Commission has learned from experience, there are too many qualitative and quantitative variables in evaluating different markets and combinations to reduce the task at hand to a precise mathematical formula. Measuring concentration across platforms in the local news and information market for the purposes of preserving diversity is not akin to measuring concentration in the market for automobiles or washing machines for antitrust purposes. Moreover, the record does not reveal any "silver bullet" formula in this regard. We stress, however, that in future adjudicative proceedings addressing proposed combinations parties are free to point to any metric of their choosing in arguing that a proposed combination either should or should not be approved. Some parties,

[234] CWA Comments at 4; AFL-CIO Reply at 41-42; Hubbard 12/11/07 Comments at 1-2; CWA/AFTRA 12/11/07 Comments at 4-5; Koplar 12/11/2007 Comments at 2-3.

[235] CWA Comments at 4, 54-55.

[236] *Id.*

[237] Commenters indicate that larger, more consolidated media entities draw advertisers from smaller, independently owned media outlets. Because the economic model for these outlets continues to be primarily an ad-supported model, when advertisers shift to entities that can offer numerous platforms for their ads and a more flexible pricing structure, commenters argue that smaller outlets cannot compete, often relinquishing ownership of their facilities to larger media concerns, thus, reducing competition and viewpoint diversity in local markets. Alex Jones contends that relaxing cross-ownership would inevitably create a link between the local newspaper and one, or even more, of a town's handful of radio and television stations, thereby creating a combination that would dwarf all other news organizations. Testimony of Alex Jones, Media Ownership Hearing, Nashville, Tennessee, Dec. 11, 2006.

[238] *See* paragraph 57 & note 187, *supra* (discussing studies indicating that Americans rely on newspapers and television more than radio for local news and information).

for example, may wish to provide an analysis of concentration in the local advertising market or local news market. Or, as CU/CFA suggest, others may attempt to apply the Herfindahl-Hirschman Index (HHI) to the local media market in a manner informed by the Department of Justice's Merger Guidelines. Any such submission should, of course, include a thorough explanation of the metric proposed for use and why that metric is relevant to the task of evaluating whether a particular combination will or will not unduly undermine diversity and increase concentration in the provision of news and information in the local media market. Such submissions will then be subject to comment by others and evaluated by the Commission as part of the adjudicative process.

74. *Financial Condition.* We will evaluate whether a newspaper or a broadcast station in a proposed combination is in financial distress. To show financial distress, the applicant will have to show that either the newspaper or the broadcast station is operating at a loss. An applicant wishing to make a showing of financial distress may do so through tax filings, earnings statements, annual reports or other records showing that the newspaper has had several years of losses. The Commission may assess the reasonableness of the showing by comparing data regarding the newspaper's or the broadcast station's expenses with industry averages. In the case of a broadcast station, we will take into consideration factors set forth in our failed or failing waiver standards. Specifically, we will consider the situation in which a station has been struggling for an extended period of time both in terms of its audience share and in its financial performance. A failed or failing station would rarely have the resources to provide local news programming, and often struggles to provide significant local programming at all. Thus, allowing a "failing" or "failed" station to join with a stronger newspaper outlet can improve its facilities and programming operations, thus benefiting the public interest.[239] With regard to the newspaper industry, we are cognizant of the significant turmoil that has erupted since we last embarked on a media ownership review.[240] The rapidly evolving media environment, brought on in large part by new media, has wrought dramatic economic consequences for newspapers. The record indicates that the financial downturn for newspapers has in recent years been significant. NAB states that newspapers are suffering from declining circulation, increasing printing and production costs, and advertising revenues that are stagnant at best, in large part due to the movement of advertising business to other media, including Internet competitors.[241] Entities that have cross-owned newspaper and broadcast facilities, such as Belo, Tribune, and Media General, have documented on the record the unstable financial circumstances in which newspapers currently operate.[242] In light of this evidence, it is appropriate that we consider as part of our public

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[239] *Cf.*, *Field Communications*, 65 FCC 2d 959 (1977) (Commission granted a permanent waiver of the newspaper/broadcast cross-ownership rule primarily due to the history of financial losses suffered by the television station in the proposed transaction).

[240] Sarah Ellison, *Ad Woes Worsen at Big Newspapers*, WALL ST. J., Oct. 20, 2006, at B4; Sarah Ellison, *Tribune to Consider Radical Action*, WALL ST. J., Sept. 21, 2006, at A3. *See also supra* para. 32. In October 2007, Belo Corporation announced that it would spin off its newspaper assets to shareholders, thus separating those assets from Belo's television stations. Following the spin-off, Belo would hold licenses for 20 television stations in 15 markets, reaching 14 percent of U.S. households and generating $750 million in annual revenue. The newspaper entity, A.H. Belo, will hold newspaper and related online assets, including *The Dallas Morning News* and *The Providence Journal.* Those assets reach 3.7 million people and generate $750 million in annual revenue. Jon Hemingway, Belo Spin Off TV and Newspaper Assets, BROAD. & CABLE, Oct. 1, 2007, *available at* http://www.broadcasting cable.com/article/CA6485750.html?industryid+47171&q+A%2EH%2E+Belo (visited Dec. 21, 2007).

[241] NAB Comments at 116; *see also* Gannett Comments at 21-25 (discussing cuts to the newsroom functions at newspapers based on financial pressures). Gannett states that newspaper circulation declined at a rate of one percent each year between 1990 and 2004. *Id.* at 21 n.75 (citing PEW Charitable Trusts, *State of the News Media Fact Sheets: Newspapers* (Mar. 2004)).

[242] Belo Comments at 18; Tribune Comments at 33-34; Media General Comments at 63. In addition, Media General states that new digital services and sources are having an impact on broadcast television. It references NBC Universal's recent announcement that it plans to reduce its workforce by 5 percent and provide lower cost, unscripted programming in the first hour of prime time in order to cut $750 million from its budget. Media General (continued...)

interest analysis the financial condition of newspapers and broadcast facilities. We seek to maintain the vitality of media voices and ensure their continued service to the public. To the extent that our newspaper/broadcast cross-ownership rule forecloses a viable avenue for a struggling newspaper or a broadcast station to prevent the loss of a source of local programming, our rule would be undermining, rather than promoting, our goals of competition, localism, and diversity. Allowing a struggling newspaper or broadcast station to combine with a stronger outlet can, under certain circumstances, improve its ability to provide local news and information, thus benefiting the public interest.

75. In those instances where a newspaper or broadcast entity makes a showing of financial distress, we will look for evidence of the owner's commitment to invest significantly in newsroom operations as a result of a proposed combination. We recognize the concern expressed by some commenters that cross-owned entities may experience a cut in staff or news operations in order to maximize economic synergies.[243] Indeed, the pressure to take such steps may be particularly acute when a newspaper is in financial distress. On the other hand, there is also evidence on the record substantiating that when newspapers and broadcast stations are permitted to consolidate, the combination results in an increase in the amount and quality of local news and public affairs programming. Going forward, we will evaluate whether adequate investment in newsroom operations will be allocated and expended in deciding whether to grant approval for such newspaper/broadcast combinations. This factor is particularly relevant where the entity is operating under financial constraints.[244] Therefore, we expect applicants to explain in detail their plans and commitments to enhance the news operations of the broadcast and newspaper outlets following transfer of control and state when those measures will be implemented.[245]

76. *Additional Matters*. As an initial matter, we do not require divestiture of the combinations grandfathered in the 1975 decision; rather these combinations remain grandfathered. In the context of the 1975 rulemaking, the Commission evaluated each of the existing newspaper/broadcast combinations to determine whether divestiture was appropriate in light of its decision to adopt the cross-ownership ban. Even in that more restrictive environment, the Commission felt that requiring the divestiture of certain combinations would be harmful and that certain combinations remained appropriate and consistent with its localism, diversity, and competition goals. Thus, the Commission required divestiture only in the most "egregious" cases (17 out of approximately 150) and grandfathered or granted

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notes other industry announcements regarding restructuring or sales transactions, including those of CBS to sell its small-growth radio stations; Clear Channel's plans to sell its smaller market radio stations; *The New York Times*' intention to sell its television stations; and LIN TV's agreement to sell its Puerto Rican assets and take steps to reduce the number of staff needed to put live newscasts on the air. *Id*. at 65. Media General states that repeal of the 1975 rule would help to reverse some of this negative trend by freeing newspaper owners and broadcasters to enter into ownership arrangements that would eliminate overlapping costs, while putting these savings into local news production to bring quality local news and information to the largest possible audiences in the market. Media General Comments at 65-66; *see also* NAA Comments at 41-43 (indicating that a natural corollary of the increasing fragmentation in the news and information marketplace has been a decline in the prominence and economic performance of local daily newspapers and broadcast outlets, and no improvement is expected in 2006). NAA states that "[w]hile newspaper circulation has been declining at a rate of one percent each year since 1990, these losses accelerated in 2005…. [when] [c]irculation went down 2.6 percent for daily newspapers and 3.1 percent for Sunday newspapers." NAA describes how "[a]dvertising revenue…also has taken a substantial hit" and how analysts have been lowering their revenue predictions for the newspaper industry. *Id.* at 42-43.

[243] AFL-CIO asserts, for example, that increased concentration puts pressure on media firms to lower costs by decreasing local news coverage, and identifies in its comments the budget and job cuts that result from reductions in local coverage. AFL-CIO states that cross-owned media properties serve as a "'cross-promotional vehicle rather than as an independent editorial voice.'" AFL-CIO Comments at 23-27.

[244] *See, e.g.,* Gannett Comments at 21-25.

[245] We authorize the Media Bureau to modify the necessary FCC filing forms in order to implement the changes we adopt herein. *See*, *e.g*., FCC Forms 314, 315, and 316.

waivers for other existing combinations. In doing so, the Commission did not simply grandfather all existing combinations as a matter of due course; instead, it established standards and criteria it applied to evaluate each existing combination.[246] We have no reason to disrupt those decisions. Similarly, all permanent waivers from the prior rule that previously have been granted will continue in effect under the new rule.[247] Given that the Commission previously determined that these combinations warranted a waiver from the prior more restrictive rule, we see no reason why such combinations should not continue to receive a waiver under our less restrictive rule. Moreover, we believe that requiring divestitures of these combinations would disrupt longstanding symbiotic relationships that have provided tangible public interest benefits for affected communities.

77. We note that several temporary waivers of our former newspaper/broadcast cross-ownership rule are still pending awaiting the conclusion of our quadrennial review proceeding.[248] We will grant a limited number of pending waiver requests to permit the continuance of existing combinations of a newspaper and a single broadcast station that were formed by acquisitions occurring after the date of the broadcast station's last renewal because we find that the public interest would be served by such waivers. We thus grandfather these combinations in the same manner as the Commission did in 1975. All of these combinations were acquired prior to 2001. As the Commission has previously recognized, "divestiture introduces the possibility of disruption for the industry and hardship for individual owners."[249] One commenter notes that "there is potential for both harm to the public from the disruption from the divestiture as well as harm to employees and station and newspaper operations to consider in requiring divestiture."[250] Specifically, in the following cases, we have determined that the public interest warrants a waiver in light of the synergies that have already been achieved from the newspaper/broadcast station combination,[251] the new services provided to local communities by the combination, the harms (reviewed above) associated with required divestitures, the prolonged period of uncertainty surrounding the status of the newspaper/broadcast cross-ownership ban, and the length of time that the waiver request has been pending: Gannett's combination in Phoenix[252] as well as Media

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[246] *1975 Second Report & Order*, 50 FCC 2d at 1080-84, ¶¶ 112-17.

[247] There are three such waivers: one involving the *New York Post* and WNYW-TV; one involving the *Chicago Tribune*, WGN-TV, and WGN(AM); and one involving WSCG-AM and *The Daily News* in Greenville, Michigan.

[248] Several commenters express concern about the status of those waivers and suggest resolutions, including (1) granting permanent waivers or grandfathered status to existing newspaper/broadcast combinations that were created pursuant to "footnote 25" of the 1975 decision adopting the ban or have been granted temporary or conditional waivers of the restriction, or (2) adding a new note to § 73.3555 that would indicate that the new newspaper/broadcast cross-ownership rule would not apply to the cross-ownership of a broadcast station and a daily newspaper for which the Commission has previously granted a permanent waiver of any rule that would have otherwise prohibited such cross-ownership. Tribune 12/11/07 Comments at 10-11; News Corp./Fox 12/11/07 Comments at 12. In addition, Media General asserts that any divestitures that might result from the Commission's proposal could violate First and Fifth Amendment rights. Media General 12/11/07 Comments at 17. Tribune notes that forcing divestiture would potentially harm the public, company employees, and the combined operations of broadcast stations and newspapers. Tribune 12/11/07 Comments at 11.

[249] *1975 Second Report & Order*, 50 FCC 2d at 1078, ¶ 109.

[250] Tribune 12/11/07 Comments at 11.

[251] For example, Media General has submitted extensive evidence demonstrating how, during the past seven to nine years, it has integrated the operations of the media outlets in these DMAs to expand the volume of local news and information communicated to local residents and to improve the quality of their offerings. Media General Comments at 13-22. *See also id.* at App. 4A, Exhs. B-F (Statement of Professor Adam Clayton Powell, III, reviewing local convergence benefits in each of the four markets).

[252] Gannett Co., Inc. has owned KPNX-TV, Phoenix, Arizona and *The Arizona Republic* since 2000. Gannett has submitted evidence demonstrating how, during the past seven years, it has integrated the operations of the two media outlets to expand the volume of local news and information communicated to Phoenix residents and to improve the (continued...)

General's combinations in Myrtle Beach-Florence, South Carolina[253]; Columbus, Georgia[254]; Panama City, Florida[255], and the Tri-Cities, Tennessee/Virginia DMA.[256]

78. Where a pending waiver request involves an existing combination consisting of more than one newspaper and/or more than one broadcast station[257] or an entity has been granted a waiver to hold such a combination pending the completion of this rulemaking, [258] we will afford the licensee 90 days after the effective date of this order to either amend its waiver/renewal request or file a request for permanent waiver. Because each of these combinations involves multiple newspapers and/or multiple broadcast stations, they potentially raise heightened diversity concerns, and it would be inappropriate to grant these requests or grandfather these combinations across-the-board. Rather, we will examine them on a case-by-case basis. In its filing with the Commission, the licensee should address the factors considered in this order and the impact that the combination has on the diversity of independent voices in the market, particularly as it affects news and information programming. We will hold pending waiver

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quality of its offerings. *See, e.g.,* Gannett Comments at 26-29. For example, combined efficiencies have enabled KPNX-TV to expand its local programming. *Id.* at 27. New programs include a weekday 4:30 p.m. newscast, a weekly travel and tourism program titled "Arizona Highways," and a daily news broadcast in Spanish on "12 News En Español" on KPNX-TV's Separate Audio Program ("SAP") channel. *Id.* at 26-27.

[253] In the Myrtle Beach-Florence, South Carolina DMA, Media General has owned television station WBTW(TV), which is licensed to Florence, South Carolina, and the *Morning News*, which is published in Florence, since 2000, and its waiver request has been pending for over three years. Media General reports that WBTW(TV) has found access to the archives of the *Morning News* to be crucial to ongoing coverage of news in the area and to the development of special and investigative reports, enabling WBTW(TV) to provide greater depth and expand its coverage of major events and issues in the DMA. Media General Comments at 15-16. Media General provides examples of the news staffs of WBTW(TV) and the *Morning News* collaborating on recurring features and series "that, because of convergence, are more informative and achieve wider distribution throughout the DMA." *Id*. at 16-18.

[254] In the Columbus, Georgia DMA, Media General has owned television station WRBL(TV), which is licensed to Columbus, and the *Opelika-Auburn News*, which is published in Opelika, Alabama, since 2000, and its waiver request has been pending for three years. A WRBL(TV) reporter is permanently assigned to the station's Opelika bureau, which is housed in the newspaper's building. From this facility, WRBL(TV), which does not operate a satellite truck, has the capability of transmitting live video for broadcast on WRBL(TV), which has enabled the station to broadcast improved coverage of breaking news and other events occurring in the western portion of its DMA. *Id*. at 18.

[255] In Panama City, Florida, Media General has owned television station WMBB(TV) in Panama City, and the *Jackson County Floridan*, which is published in Marianna, Florida, since 2000, and its waiver request has been pending for over three years. During that time, Media General states that these outlets have worked effectively together to increase the coverage of local news in the DMA, offering examples of the two media outlets' hurricane coverage, political forums, and investigative reporting. *Id*. at 19-22.

[256] In the Tri-Cities DMA, Media General has owned television station WJHL-TV, which is licensed to Johnson City, Tennessee, and the *Bristol* (*Virginia Tennessee) Herald Courier*, which is published in Bristol, a city that straddles the state border, since 1998, and its waiver request has been pending for over two-and-a-half years. Since 2000, WJHL-TV has added 90 minutes of additional local news coverage every weekday, which has enabled it to greatly expand its political coverage and broadcast numerous special reports and regularly televised series that would not be possible without access and input from the newspaper's staff. *Id*. at 13-15.

[257] We are aware of the following waiver/renewal applicants with existing combinations that fall into this category: Cox Enterprises, Inc. (Atlanta, Georgia, and Dayton, Ohio DMAs); Tribune-Review Publishing Co. (Pittsburgh, Pennsylvania DMA); Bonneville International Corp. (Salt Lake City, Utah DMA); and Scranton Times Ltd. Partnership (Wilkes Barre-Scranton, Pennsylvania DMA).

[258] Morris falls into this category with regard to its newspaper/broadcast combinations in the Amarillo, Texas, and Topeka, Kansas, DMAs. *See* Morris Comments at 13-21.

requests and renewal applications in abeyance until we receive an appropriate amendment. With respect to current temporary waivers that have been granted pending the completion of the rulemaking proceeding, those waivers will be temporarily extended pending our action on requests for permanent waivers filed within the time frame set forth above.

79. We also address one additional matter related to the processing of waiver requests. UCC argues that the modified rule will not provide adequate notice of proposed newspaper/broadcast combinations. We note that applications for Commission approval of proposed newspaper/broadcast combinations are subject to the local public notice filing requirements of Section 73.3580 of the Commission's rules. Nevertheless, to further ensure adequate local public notice, the Commission will flag such applications in its public notices as seeking waiver of the newspaper/broadcast cross-ownership rule pursuant to Section 73.3555(d) of the Commission's rules.

IV. RADIO/TELEVISION CROSS-OWNERSHIP RULE

80. As explained in more detail below, we retain the current radio/television cross-ownership rule. The radio/television cross-ownership rule limits the number of commercial radio and television stations an entity may own in the same market, with the degree of common ownership permitted varying depending on the size of the relevant market.[259] In contrast to the newspaper/broadcast cross-ownership

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[259] 47 C.F.R. § 73.3555(c) (2002); *2002 Biennial Review Order*, 18 FCC Rcd at 13767-68, ¶ 370. The current rule allows a party to own up to two television stations (provided it is permitted under the local television ownership rule to do so) and up to six radio stations (to the extent permitted under the local radio ownership rule) in a market where at least 20 independently owned media "voices" would remain post-merger. In markets where parties may own a combination of two television stations and six radio stations, the rule allows a party alternatively to own one television station and seven radio stations. A party may own up to two television stations (as permitted under the current local television ownership rule) and up to four radio stations (as permitted under the local radio ownership rule) in markets where, post-merger, at least 10 independently owned media voices would remain. A combination of two television stations (as permitted under the local television ownership rule) and one radio station is allowed regardless of the number of voices remaining in the market. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12947, ¶ 100. For purposes of applying the radio/television cross-ownership rules the Commission counts (1) all independently owned and operating full-power commercial and noncommercial broadcast television stations licensed to a community in the DMA in which the community of license of the television station in question is located; (2) all independently owned and operating commercial and noncommercial broadcast radio stations that are either licensed to a community within the Arbitron radio Metro market in which the community of license of the television station in question is located or radio stations outside the radio Metro market that Arbitron or another nationally recognized audience rating service lists as having a reportable share in the Metro market; (3) all independently owned daily newspapers that are published in the DMA at issue and that have a circulation exceeding 5 percent of the households in the DMA; and (4) cable systems, which count as a single voice, provided cable service is generally available to television households in the DMA. *See id.* at 12950-52, ¶ 111. The voice test counts more voices than the revised newspaper/broadcast cross-ownership rule or current local television ownership rule. The local television ownership rule counts only broadcast television stations as voices because the local television ownership rule is designed to preserve competition in the local television market. The radio/television cross-ownership rule, by contrast, is designed to protect viewpoint diversity and thus takes into account a broader range of voices than does the local television rule. Furthermore, we count more voices in the radio/television cross-ownership rule than in the newspaper/broadcast cross-ownership rule because newspapers and television station combinations involve the two most important types of sources for news and information. *See* CU Comments at 124 ("newspapers and television are far and away the most important sources [of local news]"). It is thus appropriate that the relevant voices test applied to such combinations includes major voices in order to ensure that diversity in the market is safeguarded. The radio/television cross-ownership rule, however, involves combinations that include radio stations, and the record reflects that radio is a significantly less important source of news and information than newspapers or television. As a result, we consider additional sources of viewpoint diversity that are less significant than newspapers and television stations within the context of this rule. Moreover, given that the rule involves radio/television combinations, we find it appropriate to also count radio stations for its purposes. In this regard, we note that the revised newspaper/broadcast cross-ownership rule's voices test applies to proposed newspaper/television combinations only, not to newspaper/radio combinations.

ban, this rule has been substantially relaxed over the years.[260]

A. Background

81. In adopting the current rule in 1999, the Commission explained that it balanced diversity and competition concerns with the desire to permit broadcasters and the public to realize the benefits of common ownership.[261] Some commenters argued for the rule's elimination, but the Commission found that it "continues to be necessary to promote a diversity of viewpoints in the broadcast media."[262] In the *2002 Biennial Review Order*, the Commission eliminated the radio/television cross-ownership rule in its entirety by finding that it no longer remained "necessary in the public interest to ensure competition, diversity or localism."[263] The Commission reasoned that the removal was warranted because "diversity and competition goals [would] be adequately protected by the local ownership rules" adopted in that proceeding.[264] These rules included cross-media limits that were "specifically designed to protect diversity of viewpoint in those markets [where] consolidation of media ownership could jeopardize such diversity."[265] The cross-media limits were challenged in *Prometheus*.[266] The *Prometheus* court concluded that although "the Commission's decision to replace its cross-ownership rules with cross-media limits" was "not of itself constitutionally flawed and [did] not violate § 202(h)," it would not uphold the cross-media limits because the "Commission [did] not provide a reasoned analysis to support the limits that it chose."[267]

B. Discussion

82. We retain the radio/television cross-ownership rule currently in effect[268] to provide protection for diversity goals in local markets and thereby serve the public interest. Our conclusion in the *2002 Biennial Review Order* that the radio/television cross-ownership rule was no longer necessary to ensure viewpoint diversity was based in large part on our adoption of the cross-media limits in that proceeding.[269] Now that the court has invalidated the cross-media limits, we must adopt diversity protection provisions to act in their place, and therefore retain the current radio/television cross-ownership rule.[270] In doing so, we reaffirm the Commission's conclusion that "fostering the availability of diverse viewpoints remains an important policy goal, and that diversity of ownership promotes diversity of

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[260] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12943-44, ¶ 92.

[261] *Id.* at 12948, ¶ 102.

[262] *Id*. at 12948, ¶ 104.

[263] *2002 Biennial Review Order*, 18 FCC Rcd at 13768, ¶ 371.

[264] *Id.* at 13768, ¶ 371. *See id*. at 13775, ¶ 389 (explaining that the radio/television cross-ownership rule was made "unnecessary and anachronistic" by the Commission's adoption of cross-media limits).

[265] *Id*. at 13775, ¶ 389, *et seq*. *See generally id*. at 13790-807, ¶¶ 432-81.

[266] 373 F.3d at 397.

[267] *Id.*

[268] 47 C.F.R. § 73.3555(c) (2002).

[269] 18 FCC Rcd at 13774-75, ¶ 389.

[270] CBS observes that the radio/television cross-ownership rule "was uncontested on appeal"; it therefore contends that the rule "is therefore not subject to review on remand." CBS Reply at 15. As we have explained, however, because the Commission eliminated the radio/television cross-ownership limits based on its adoption of the protections provided by the cross-media limits, the *Prometheus* court's vacatur of the Commission's cross-media limits necessarily revived the issue of those limits on remand. In any event, the Commission is under a continuing and independent obligation under Section 202(h) of the 1996 Act to determine quadrennially whether its ownership rules remain "necessary in the public interest as a result of competition." *See* 1996 Act, § 202(h).

viewpoints."[271]

83. Several commenters urge us to maintain or tighten the radio/television cross-ownership rule.[272] We agree with the AFTRA that the radio/television cross-ownership rule is an "essential tool[] for protecting the availability of diverse editorial perspectives and entertainment programs to local communities."[273] We also remain mindful of radio/television combinations that could potentially hamper individual editorial content and therefore act to retain limits on such combinations.[274] We see no reason to tighten the rule at this time, however, and thereby upset the balance the rule strikes between the protection of diverse viewpoints and the "efficiencies" and "public service benefits" that can result from "joint ownership and operation of both television and radio stations in the same market."[275]

84. By the same token, we disagree with those commenters who urge us to further relax or eliminate the radio/television cross-ownership rule.[276] The record does not indicate that local radio and television ownership limits provide sufficient protection to assure a diversity of viewpoints in those media markets.[277] Local service-specific limits are chiefly concerned with competition and rivalry among entities providing the same service. In contrast, cross-ownership rules aim to maintain a vibrant marketplace of ideas to ensure a diversity of editorial content. What the Commission said in 1999 remains true today – the fact that "[t]he public continues to rely on both radio and television for news and

[271] *2002 Biennial Review Order*, 18 FCC Rcd at 13774, ¶ 389. Clear Channel's comment that "the FCC found [in the *2002 Biennial Review Order*] that diversity is not a justifiable reason to support a radio/television cross-ownership rule" is in error. Clear Channel Comments at 84. The Commission only found its radio/television cross-ownership rule was not necessary to ensure viewpoint diversity because it was adopting "modified service-specific local ownership rules" and a "new cross-media limit rule" to "protect diversity of viewpoint in those markets in which [it] believe[d] consolidation of media ownership could jeopardize such diversity." *2002 Biennial Review Order*, 18 FCC Rcd at 13774-75, ¶ 389.

[272] *See* AFTRA Comments at 22-23; UCC Comments at 74-76; and Prometheus Reply at 42-44. *See also* Remarks by John Carlson, Radio Talk Show Host, KVI-AM, Media Ownership Hearing in Seattle, Washington (Nov. 9, 2007), Transcript at 86; Remarks of Karen Bond, Executive Director, National Black Coalition for Media Justice, Media Ownership Hearing in Chicago, Illinois (Sept. 20, 2007), Transcript at 79 (generally advocating against further media consolidation).

[273] AFTRA Comments at 13.

[274] *See id*. at 22-23.

[275] *See* CBS Reply at 18-19 (radio/television cross-ownership "allows both stations to go live in breaking news situations when just one outlet has a reporter on the scene"). *See also* Remarks by Elizabeth B. Hindman, Associate Professor, Edward R. Murrow School of Communication at Washington State University, Media Ownership Hearing in Seattle, Washington (Nov. 9, 2007), Transcript at 110 (advocating tightening of radio/television cross-ownership rules) *and* Remarks by George Jones, Member, American Federation of Television and Radio Artists, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006) (opposing radio and television ownership consolidation). For the same reasons, we reject UCC's contention that we should ban radio/television cross-ownership entirely. UCC Comments at 76. Such a step would even more clearly foreclose the opportunity for "broadcasters and the public to realize the benefits of radio-television common ownership." *Local TV Ownership Report and Order*, 14 FCC Rcd at 12948, ¶ 102; *see also* Remarks by Joe Lewin, President and General Manager WHTM, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007), Transcript at 54-56 (broadcasters face many challenges and benefit from consolidation). We also believe that neither the *Prometheus* nor *Sinclair* decisions prohibit us from reinstating the 1999 rules. *Prometheus* invalidated the cross-media limits, which we no longer apply. We also answer *Sinclair*'s critique by justifying why we count non-broadcast media in our cross-ownership rules and not in our local television rule. *See Sinclair*, 284 F.3d at 162; *see also supra,* text accompanying note 259 and Section V, Local Television Ownership Rule, paragraph 100.

[276] *See* Clear Channel Comments at 80-90, CBS Comments at 4-6, and NAB Comments at 120-124.

[277] Clear Channel Comments at 86-87.

information" supports the conclusion that "the two media both contribute to the 'marketplace of ideas' and compete in the same diversity market."[278] Because the two media "serve as substitutes at least to some degree for diversity purposes," there remains a need to retain a cross-ownership rule "to ensure that viewpoint diversity is adequately protected."[279] The Commission's determination in the *2002 Biennial Review Order* that the radio/television cross-ownership rule was no longer necessary to provide such protection for diversity was based on the adoption of cross-media limits specifically designed to provide adequate alternative protection. Because the cross-media limits have now been vacated, we have determined to retain the radio/television cross-ownership rule to maintain the status quo.

85. We are not persuaded by Clear Channel's assertion that Congress' repeal of the cable/broadcast cross-ownership ban calls for us to now repeal the radio/television cross-ownership rule.[280] If Congress had desired to repeal or modify the radio/television cross-ownership rule, it could have done so explicitly; its failure to do so leaves us free to retain or eliminate the rule as the public interest warrants.[281]

86. We also reject Clear Channel's contention that the radio/television cross-ownership rule conflicts with the 1996 Act "to the extent" that such a rule would "shrink an entity's right to own radio stations" below the level permitted by the local radio ownership levels specified in Section 202(b).[282] It is Section 202(d), not Section 202(b), that addresses the Commission's radio/television cross-ownership rule. That section only requires the Commission to extend its waiver policy governing its one-to-a-market ownership rules "to any of the top 50 markets, consistent with the public interest, convenience, and necessity"; in all other respects the Commission's authority to establish or retain a radio/television cross-ownership rule remains unchanged.[283] We therefore retain the radio/television cross-ownership rule currently in effect in order to provide protection for diversity goals in local markets and thereby serve the public interest.

V. LOCAL TELEVISION OWNERSHIP RULE

87. We find that restrictions on common ownership of television stations in local markets continue to be necessary in the public interest to protect competition for viewers and in local television advertising markets. As discussed below, we conclude that, in order to preserve adequate levels of competition within local television markets, the local television ownership rule as it is currently in effect should be retained. Accordingly, an entity may own two television stations in the same DMA if: (1) the Grade B contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination. To determine the number of voices remaining after the merger, the Commission counts those broadcast television stations whose Grade B signal contours overlap with the Grade B signal contour of at least one of the stations that would be commonly owned.[284]

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[278] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12949, ¶ 104.

[279] *Id*. The record shows, however, that newspapers and television are "far and away the most important sources" of news and information, with radio a distant third. *See, e.g.*, CU Comments at 11.

[280] Clear Channel Comments at 88.

[281] *See* Prometheus Reply at 44 (Congress "made a conscious decision to retain the restriction on television-radio cross ownership" when it chose to eliminate the broadcast/cable cross-ownership restriction).

[282] Clear Channel Comments at 89; *see also* NAB Reply at 91-92.

[283] *See* 1996 Act, § 202(d).

[284] 47 C.F.R. § 73.3555(b)(2)(ii) (2002) ("Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combinations"). As discussed below (continued...)

A. Background

88. Unlike the newspaper/television cross-ownership rule, which has not been modified since 1975, the local television ownership rule was relaxed as recently as 1999. In *Sinclair*, the U.S. Court of Appeals for the District of Columbia Circuit reviewed the Commission's 1999 decision modifying the local television ownership rule to the form currently in effect.[285] The court held that the Commission had adequately explained how the rule advanced its goals of preserving diversity of viewpoints and competition.[286] In reviewing the eight-voice count threshold, it acknowledged that the Commission "has wide discretion to determine where to draw administrative lines,"[287] that "[c]hoosing the number eight and defining 'voices' are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results[,]"[288] and that the court is generally "unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that the lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem."[289] While the court did not decide whether eight voices is an appropriate numerical limit, it held that the Commission had not demonstrated that the exclusion of non-broadcast media from the eight-voice test was "necessary in the public interest" under Section 202(h) of the 1996 Act.[290] Accordingly, it remanded the rule for further consideration.

89. After analyzing the rule in the *2002 Biennial Review Order*, the Commission determined that the existing rule was not necessary to promote viewpoint diversity.[291] Moreover, the Commission found that the restrictions did not foster its goals of localism and program diversity.[292] The Commission concluded, however, that restrictions on local television ownership remained necessary to promote competition among local broadcast stations.[293] It concluded that there are two potential competitive harms that may be caused by a single firm owning multiple television stations in a local market. First, multiple ownership may result in "unilateral effects," *i.e.,* one firm acquiring multiple licenses and finding it profitable to alter its competitive behavior unilaterally to the detriment of viewers.[294] Second, it concluded that multiple ownership may lead to "coordinated effects," *i.e.,* inducing a joint change in competitive behavior by market participants that harms viewers.[295]

90. The Commission decided in the *2002 Biennial Review Order* to revise the local television ownership rule to permit an entity to own up to two television stations in markets with 17 or fewer

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in this section, the rule was revised in the *2002 Biennial Review Order*, but the revised rule, set forth in the current version of the Code of Federal Regulations, was remanded and stayed.

285 *Sinclair*, 284 F.3d at 152, 163-65 (demonstrating that the *Sinclair* court reviewed the *Local TV Ownership Report and Order*, 14 FCC Rcd at 12903 *et seq*.; *on recon.*, 16 FCC Rcd 1067 (2001)).

286 *Sinclair*, 284 F.3d at 159-162.

287 *Id*. at 162, *quoting AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000).

288 *Id*. at 162.

289 *Id*. (quoting *Cassell v. FCC*, 154 F.3d 478, 485 (D.C. Cir. 1998) (*quoting Home Box Office, Inc. v. FCC*, 567 F.2d 9, 60 (D.C. Cir. 1977)).

290 *Id*. at 165.

291 *2002 Biennial Review Order*, 18 FCC Rcd at 13686, ¶ 171.

292 *Id.* at 13668, ¶ 133.

293 *Id*. at 13692-93, ¶¶ 189-91.

294 *Id*. at 13693, ¶ 190.

295 *Id*.

television stations, and up to three television stations in markets with 18 or more television stations.[296] The Commission retained the prohibition on combinations involving more than one station ranked among the top four in the market, thus prohibiting combinations in markets with four or fewer television stations.[297] The Commission eliminated consideration of overlapping Grade B contours,[298] however, and decided to look instead only at whether a station is assigned by Nielsen to a DMA.[299] The *2002 Biennial Review Order* also modified the Commission's criteria for waiver of the local television ownership rule.[300] Although the Commission stated that it would continue to allow entities to seek a waiver if at least one of the stations in the proposed combination is failed, failing, or unbuilt,[301] it removed the requirement that the waiver applicant demonstrate that there is no buyer outside the market willing to purchase the station at a reasonable price.[302]

91. *The Prometheus Decision*. On review in *Prometheus*, the court upheld the Commission's determination that "broadcast media are not the only media outlets contributing to viewpoint diversity in local markets."[303] In light of its decision to remand the Commission's numerical limits, the court found that it need not decide "the degree to which non-broadcast media compensate for lost viewpoint diversity to justify the modified [local television] rule."[304] In addition, in light of evidence in the record, including evidence that "commonly owned television stations are more likely to carry local news than other stations" and studies showing that "consolidation generally improved audience ratings," the court rejected petitioners' contention "that the Commission's finding of localism benefits from consolidation was unsupported."[305] The court also upheld the Commission's decision to retain the top four-ranked station restriction, stating that it "must uphold an agency's line-drawing decision when it is supported by evidence in the record."[306] It found "ample evidence in the record" to support the Commission's reliance on a "cushion" of audience share percentage points between the fourth- and fifth-ranked stations in most markets to restrict combinations among the top four-ranked stations "as opposed to the top three or some other number."[307]

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[296] *Id.* at 13668, ¶ 134.

[297] *Id.* As under the existing rule, the revised rule provided that a station's rank would be based on the station's most recent all-day audience share, as measured by Nielsen or any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed. *Id*. at 13692, ¶ 186.

[298] *Id.* at 13692, ¶ 187. Combinations in existence as of the time of the *2002 Biennial Review Order* were grandfathered. *Id.* at 13807-08, ¶¶ 482-84.

[299] *Id.* at 13692, ¶¶ 186-87.

[300] *Id.* at 13708, ¶ 225 (eliminating requirement to show that no out-of-market buyer is available for failed, failing and unbuilt station waivers); *id*. at 13710, ¶ 231 (stating that the Commission also would consider waivers of the local television ownership rule where the stations at issue are in the same DMA, but are not available over-the-air or via MVPDs in any of the same geographic areas); *id.* at 13708-10, ¶¶ 227-30 (in markets with 11 or fewer stations, parties can seek a waiver of the top four-ranked restriction by making certain showings).

[301] *Id.* at 13708, ¶ 225. *See* 47 C.F.R. 73.3555 Note 7 (setting forth the criteria that must be met in order for a station to qualify as "failed, failing, or unbuilt").

[302] *2002 Biennial Review Order*, 18 FCC Rcd at 13708, ¶ 225.

[303] *Prometheus,* 373 F.3d at 414.

[304] *Id.* at 415.

[305] *Id*. at 415-16.

[306] *Id.* at 417 (citing *Sinclair,* 284 F.3d at 162; *AT&T Corp.,* 220 F.3d at 627).

[307] *Id.* at 417-18.

92. Nonetheless, the court remanded the numerical limits in the new rule for further justification. The limits were premised on the need to ensure six equal-sized competitors. The size of an owner was tied to the number of stations owned, rather than the audience shares of those stations. The court held that the Commission had unreasonably failed to consider the audience shares of stations in setting its numerical limits, finding that "[n]o evidence supports the Commission's equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share."[308] Further, although the court recognized that the Commission did not intend the numerical limits to be a mechanical application of the *DOJ/FTC Merger Guidelines*, it concluded that the rule was unreasonable because it would allow levels of concentration exceeding the 1800 HHI benchmark relied upon by the Commission in setting its numerical limits.[309]

93. The court also remanded for further consideration the Commission's elimination of the requirement to demonstrate that no out-of-market buyer is reasonably available when seeking a failed, failing, or unbuilt television station waiver. The court found that "in repealing the [rule] without any discussion of the effect of its decision on minority television station ownership[,]" the Commission "entirely failed to consider an important aspect of the problem."[310]

94. *Issues Raised by Commenters.* Some commenters support retention of the rule in its current form.[311] Other commenters suggest that the current rule should be tightened.[312] On the other hand, several commenters appear to prefer elimination of the rule.[313] Still other commenters ask the Commission to loosen the rule in some manner.[314]

95. Several commenters identify negative effects of consolidation they claim would result if the Commission repealed the local television ownership rule.[315] Other commenters extol the competitive benefits that would result from the ability to merge television stations.[316] Some commenters seek elimination of the top four prohibition.[317] Some commenters favor a failed station solicitation rule,[318]

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[308] *Id.* at 420.

[309] *Id.* at 419-20.

[310] *Id.* at 421 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co*., 463 U.S. 29, 43 (1983).

[311] *See*, *e.g.*, CWA Comments at 61.

[312] *See* AFL-CIO Comments at 45; AFTRA Comments at 15; CU Comments at 21; UCC Comments at 45-47.

[313] *See* Fox Comments at 18-20; Gannett Comments at 39-45; Gray Comments at 1-6; Sinclair 12/11/07 Comments at 4.

[314] *See* KTBS Comments at 1-4; Belo Comments at 18; Belo 12/11/07 Comments at 7-8; Block Comments at 1-6; Cascade Comments at 1-3; Entravision Comments at 5-9; Hearst-Argyle Comments at 4, 26; KVMD Comments at 3-7; NAB Comments at 87; NAB 12/11/07 Comments at 15-23; Nexstar Comments at 22; Smaller Market Television Station ("SMTS")12/11/07 Comments at 8-9; SMTS Comments at 13.

[315] *See* Cequel Comments at 2-4 (asserting that consolidation increases broadcasters' negotiation leverage with cable operators, allowing them to seek "inflationary" retransmission consent terms); Children's Media Policy Coalition Comments at 9-11, 13-15 (stating that media consolidation reduces the availability of children's programming); CWA Comments at 13 (stating that consolidation results in job losses).

[316] *See, e.g.,* Belo Comments at 25; Cascade Comments at 1-3; Entravision Comments at 9-10; KVMD Comments at 6-7; NAB 12/11/07 Comments at 22-23; Nexstar Comments at 14-16; SMTS 12/11/07 Comments at 8-9.

[317] *See* Gannett Comments at 46-48; Granite Comments at 2-6; Hearst-Argyle Comments at 33-46; Hoak Media Comments at 8-9; Sinclair Comments at 34-38; NAB Comments at 107.

[318] *See* Hearst-Argyle Comments at 30; SMTS Comments at 26.

while others oppose it.[319] Other commenters provide no specific guidance as to the type of rule, if any, that the Commission should adopt.[320]

B. Discussion

96. As discussed below, we are persuaded from the evidence in the record that the current rule is consistent with the public interest. Therefore, we will continue to allow an entity to own two television stations in the same DMA if: (1) the Grade B contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination. To determine the number of voices remaining after the merger, the Commission will continue to count those broadcast television stations whose Grade B signal contours overlap with the Grade B signal contour of at least one of the stations that would be commonly owned. With respect to the waiver standard for the local television ownership rule, we will reinstate our requirement that a waiver applicant demonstrate that there is no buyer outside the market willing to purchase the station at a reasonable price.[321]

97. We base our decision on our assessment that the Commission's local television ownership rule promotes competition for viewers and advertisers within local television markets. The public is best served when numerous rivals compete for a viewing audience. In the video programming market, competitors profit by attracting new audiences and by attracting existing audiences away from their competitors. Competition thus provides an incentive to television stations to invest in better programming and to provide programming that is preferred by viewers. The local community benefits from competition among broadcast television stations in the form of higher quality programming provided to viewers. As the Commission concluded in the *2002 Biennial Review Order*, we cannot rely on competition from cable programmers to respond to local needs and interests because most cable programming is provided by cable networks, and those networks respond primarily to national and regional forces. Local broadcast television stations have incentives to respond to conditions in local markets, and those incentives may be diminished by mergers between stations that reduce competition to anticompetitive levels. Competition among local broadcast television stations is also necessary to preserve competition for advertising by local businesses that want to advertise their products on television. Lower advertising costs benefit consumers by promoting efficiency and by allowing firms to pass the savings on to consumers of the advertised products. In the *2002 Biennial Review Order,* the Commission determined that the exercise of market power in broadcast television markets would result in targeted and non-uniform price increases to those advertisers that do not have good substitutes for broadcast television, without raising prices for those advertisers that do have good substitutes for broadcast television.[322]

98. We decline to tighten the local television ownership rule, as requested by some commenters. We recognize that owning a second in-market station can result in substantial savings in overhead and management costs and can allow the local broadcaster to innovate by spreading its fixed costs and operating capital over a larger number of operating units and to better compete with non-

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[319] *See* UCC Comments at 30-32 (stating that the Commission should not grant waivers for failing stations, but that if it does, it should retain the failed station solicitation rule).

[320] *See generally* NBC Universal Comments; Equity Broadcasting Comments.

[321] We decline to broaden our waiver standard, as suggested by some commenters. *See* Belo 12/11/07 Comments at 8 (urging the adoption of a general waiver standard that would "permit a broadcaster to demonstrate that, regardless of market size or the number of other local television stations, an individual combination would benefit its local community"); Sinclair 12/11/07 Comments at 4 (arguing that a waiver should be granted whenever the applicant can demonstrate that no harm would be caused and that public interest benefits would ensue).

[322] *See 2002 Biennial Review Order,* 18 FCC Rcd at 13676, ¶ 152.

broadcast content providers for advertising dollars.[323] We find that these potential significant benefits of duopolies permitted under the parameters of the rule, in markets with a plethora of diverse voices, outweigh commenters' speculative claims that duopolies harm diversity and competition.

99. We find that a minimum of eight independently owned-and-operated television stations is appropriate to ensure that there will be robust competition in the local television marketplace.[324] As an initial matter, the "eight voices" test will ensure that each market includes four stations affiliated with the four major networks in each market (*i.e*., ABC, NBC, CBS, and Fox), plus at least an equal number of independently owned-and-operated broadcast television stations that are not affiliated with a major network. Preserving the independent ownership in each local market of four stations that are neither owned by or affiliated with a major network nor commonly owned with a network affiliate in that market will help to ensure that local television stations, spurred by competition, will provide dynamic and vibrant alternative fare, including local news and public affairs programming. Recognizing the vital competitive role played in local television markets by stations that are not owned by or affiliated with the major networks' stations, we believe that it is important that there be a sufficient number of such stations that are truly independent of the major network stations in each market and that will therefore vigorously compete with each of the major network stations for viewers. Such vibrant competition will improve the programming aired by both independent stations and major network stations. In addition, we believe that the eight voices test is supported by the general structure of the local television marketplace. While our 2003 rule was premised on maintaining the presence of six equal-sized competitors in the marketplace, the Third Circuit in *Prometheus* pointed out that this assumption of equal-sized competitors was flawed. Indeed, the Commission itself has found that there is generally a significant gap between the top four stations in a market and the remaining stations. In light of this concentration among the top four stations in most markets, we believe that it is prudent to require the presence of at least four (rather than two) competitors not affiliated with a major network in order to ensure vibrant competition in the local television marketplace.[325] We believe that such competition will ultimately benefit the public by spurring more innovative programming and more programming responsive to local needs and interests.

100. For purposes of the local television ownership rule, we include only full-power television stations in counting voices because our primary goal in preserving the rule is to foster competition among local television stations. We conclude that the local television ownership rule is no longer necessary to foster diversity because there are other outlets for diversity of viewpoint in local markets, and a single-service ownership restriction is not necessary to foster diversity. Therefore, although we recognize that other types of media, such as radio, newspapers, cable, and the Internet, contribute to viewpoint diversity within local markets,[326] we do not believe they should be counted as voices under the local television

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[323] *See* Belo Comments at 25; Cascade Comments at 2-3; Entravision Comments at 9-10; KVMD Comments at 5-7; Nexstar Comments at 10; *see also, e.g.,* Remarks of Joe Lewin, President and General Manager of WHTM-TV, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007), Transcript at 51-56; Remarks of Paul Quinn, President and General Manager of WGAL-TV, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007), Transcript at 64-69.

[324] As the court in *Sinclair* stated, "[c]hoosing the number eight and defining 'voices' are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results." 284 F.3d at 162.

[325] We note that the eight voices test is based on the unique characteristics of local television markets rather than general HHI analysis. As a result, it is not directly tied to the actual market shares of stations in a particular market. Nevertheless, we think that it is appropriate for us to consider the general characteristics of market structure (*i.e.*, the disparity between the top four stations in a market and the remaining stations) in formulating an appropriate rule that will promote competition.

[326] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13668, ¶ 133.

ownership rule.[327] In *Sinclair*, the court found that the Commission failed to provide an adequate explanation for defining "voices" differently in the radio-television cross-ownership rule and the local television ownership rule.[328] We believe that, given our conclusion that the local television ownership rule is necessary to preserve competition among broadcast television stations in local markets, it is appropriate to limit our voices test to television stations in that rule. In contrast, because the cross-ownership rules are designed to foster viewpoint diversity, it is appropriate within the context of those rules to consider additional sources of viewpoint diversity.[329]

101. We recognize that the Commission concluded in the *2002 Biennial Review Order* that the current local television ownership rule was not necessary to protect competition given "the competitive impact of other video programming outlets" on local broadcasters.[330] We now reverse that determination because we find that eliminating the rule could harm competition among broadcast television stations in local markets. CWA, for example, asserts that "the Commission has ample justification for retaining the rule."[331] AFL-CIO states that the Commission should retain the rule currently in effect and asserts that failure to do so would trigger multiple station mergers in local markets, resulting in a loss of newscasts and shared news product.[332] We agree with UCC when it states that competition, and not concentration of market players, leads to better programming.[333] Because we are retaining the rule primarily to foster competition among local television stations, our determination regarding the continued need for the rule does not depend on the competitive impact of other video programming outlets.[334] While other outlets contribute to the diversity of voices in local markets, we still find that it is necessary in the public interest to ensure that there are at least eight independently owned local television stations in order to ensure robust competition for local television viewers and the continued provision of video programming responsive to the needs and interest of viewers in local markets.

102. As we found in the *2002 Biennial Review Order*, we continue to believe that combinations of top four stations should be prohibited because mergers of those stations would be the most deleterious to competition. In the *2002 Biennial Review Order*, the Commission determined that mergers of stations owned by any of the top four firms often would result in a single firm with a significantly larger market share than the others.[335] The Commission determined that combinations among the top four would reduce incentives to improve programming that appeals to mass audiences.[336] We find that the top four prohibition remains necessary to prevent deleterious levels of concentration.

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[327] *But see* Nexstar Petition at 7-8 (suggesting that the Commission failed to consider local cable competition adequately).

[328] 284 F.3d at 164.

[329] We therefore disagree with commenters that there is no reasoned basis under *Sinclair* for defining voices differently for different ownership rules. *See* SMTS 12/11/07 Comments at 3-4; Sinclair 12/11/07 Comments at 2-3.

[330] *2002 Biennial Review Order*, 18 FCC Rcd at 13668, 13671, ¶¶ 133, 140.

[331] CWA Comments at 61; *see also* CWA Comments at 13-15 (citing examples of television broadcast mergers that led to job losses); CU Comments at 26.

[332] AFL-CIO Comments at 42-44.

[333] UCC Comments at 53-54.

[334] *But see, e.g.*, NAB 12/11/07 Comments at 19-21 (asserting the relevance of cable and satellite viewing and advertising with respect to the competitive position of local television stations); Remarks of Paula Madison, President and General Manager of KNBC-TV, Media Ownership Hearing at El Segundo, California (Oct. 3, 2006), Transcript at 29-33 (discussing competition from cable providers).

[335] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13695, ¶ 194.

[336] *Id.* at 13697, ¶ 200.

The top four prohibition minimizes the likelihood that the market share of two merged stations will significantly overtake the market share of the largest station in a local market, which, as discussed in the *2002 Biennial Review Order*, could create welfare harms.[337] We also find that, in general, a significant "cushion" of audience share percentage points continues to separate the top four stations from the fifth-ranked stations. As noted above, the number of locally owned stations remained fairly constant, with only a slight increase in the number of stations and a slight decrease in the number of owners, from 2002 to 2005. In addition, allowing two top four stations to merge would harm competition in the local broadcast television advertising market because the top four networks (whose affiliates tend to be the top four broadcasters in a given market) enjoy a large and growing advantage over other broadcasters with regard to advertising volume and prices. Accordingly, we find that comments suggesting that the rule is no longer justified are unpersuasive. Prohibiting mergers between the top four television stations in a market prevents well-established competitive harms.

103. In the *2002 Biennial Review Order*, we also concluded that the current rule potentially threatens local programming and that the efficiencies to be gained by relaxing the rule could result in a higher quantity and quality of local news and public affairs programming.[338] We find that the record now before us is unpersuasive regarding the effects of multiple ownership on local programming. Some commenters argue that multiple ownership of television stations enhances local programming,[339] and others claim the opposite.[340] We reject as contrary to the record evidence UCC's contention that there is little evidence that corporations reinvest efficiency-enabled cost-savings into better local programming.[341] Belo states that multiple ownership has permitted it to develop and produce innovative news products because it can spread its fixed costs and operating capital over a larger number of operating units.[342] Entravision contends that group ownership creates efficiencies that enable stations to compete more effectively with non-broadcast content providers and suggests that group ownership results in expanded local news and additional programming responsive to local communities.[343] Nexstar similarly asserts that station groups can experience increased efficiencies, which permit more local programming and community involvement.[344] NBC states that station combinations advance the public interest by creating efficiencies, through combined resources, that result in more local news offerings.[345] Given our finding that there is insufficient evidence to conclude that the current rule threatens local programming, we conclude that it serves the public interest to retain it in order to preserve vigorous competition among local television stations.

104. We maintain the current rule's Grade B overlap provision to avoid disruption to current ownership arrangements and to promote television service in rural areas. In the *2002 Biennial Review*

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[337] *Id.* at 13694, ¶ 194.

[338] *Id*. at 13678-83, ¶¶ 155-64.

[339] *See, e.g.,* Belo Comments at 25; Belo 12/11/07 Comments at 7-8; Cascade Comments at 1-3; Entravision Comments at 9-10; KVMD Comments at 6-7; NAB 12/11/07 Comments at 16-19; Nexstar Comments at 14-16; SMTS 12/11/07 Comments at 9.

[340] *See, e.g.,* AFL-CIO Comments at 42-44; AFTRA Comments at 14-15; Remarks of James C. Joyce, Vice President, Nat'l Assoc. of Broadcast Employees and Technicians, CWA, Media Ownership Hearing in El Segundo, California (Oct. 3, 2006), Transcript at 43-47.

[341] UCC Comments at 50-53

[342] Belo Comments at 25.

[343] Entravision Comments at 9-10.

[344] Nexstar Comments at 14-16.

[345] NBC Reply at 8-9.

Order, the Commission eliminated the Grade B contour test for allowing duopolies based on its finding that the DMA is the relevant geographic market in which television broadcasters compete.[346] The Commission's finding was not new. When the Commission changed the geographic scope of the rule to DMAs in 1999, it noted that DMAs are a better measure of actual viewing patterns than the Grade B signal contour standard.[347] Nonetheless, the Commission kept the Grade B overlap test as part of the rule in 1999, noting that it was not the Commission's intent to further restrict the duopoly rule and that the rule without the Grade B provision might be more restrictive in some large DMAs, particularly those west of the Mississippi River.[348] The Commission noted that keeping the Grade B overlap provision "avoids disrupting current ownership arrangements involving stations in the same DMA with no Grade B overlap."[349] In the *2002 Biennial Review Order*, because the Commission significantly relaxed the local television ownership rule, the elimination of the Grade B overlap provision would have been less likely to cause disruption. We do not revise our decision that DMAs are the more precise geographic markets. Nonetheless, in the instant Order, unlike in the *2002 Biennial Review Order*, we are not relaxing the local television ownership rule, and, accordingly, to avoid disruption to settled expectations, we retain the Grade B overlap provision. Furthermore, we believe that maintaining the Grade B provision will promote television service in rural areas by continuing to enable station owners to build or purchase an additional station in a remote corner of the DMA, beyond the reach of their Grade B signal, without regard to the top four/eight voices restriction.

105. *Issues Raised by the Prometheus Court on Remand.* We find that with one exception, the issues remanded by the *Prometheus* court all regarded the new local television ownership rule adopted in 2003. Because we reject that rule and instead retain the eight-voices rule, those issues are moot. The one exception is the court's criticism that the Commission did not consider the potential impact on minority owners when it eliminated the out-of-market buyer requirement for the waiver standard.[350] To ensure that we do not negatively impact minority owners, we now reinstate that requirement in the waiver standard.

106. *Issues Raised in Petitions for Reconsideration.* Various parties sought reconsideration of the revisions the Commission made to the local television ownership rule in the *2002 Biennial Review Order*, arguing that the Commission's analysis was flawed.[351] As discussed above, others appealed these revisions and, ultimately, the Third Circuit remanded them to the Commission.[352] We will not revisit the findings on which the Commission based its earlier decision to revise the local television ownership rule and we dismiss as moot those petitions for reconsideration. Instead, as required by the Third Circuit's remand and by Section 202(h), we reexamine this rule based on the record developed in response to the *Further Notice* and *Second Further Notice*.

107. We also note that a number of parties sought reconsideration of the Commission's decision to retain the prohibition on combinations that would result in a single entity owning more than

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[346] *2002 Biennial Review Order*, 18 FCC Rcd at 13692, ¶ 187.

[347] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12926, ¶¶ 47-48, *clarified on recon.*, 16 FCC Rcd at 1070, ¶ 9.

[348] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12928-29, ¶¶ 51, 53.

[349] *Id.* at 12929, ¶ 53.

[350] *See Prometheus*, 373 F.3d at 420-21.

[351] CFA/CU Petition at 5, 19-20; MMTC Petition at 28-36; UCC Petition at 17-26; *see also* Duff, Ackerman & Goodrich Petition for Clarification, MB Dkt. No. 02-277 at 1-3 (seeking clarification that, under the revised rule, noncommercial stations that duplicate the programming of an in-market parent station would be excluded from the count of television stations).

[352] *Prometheus*, 373 F.3d at 418-20.

one station that is ranked among the top four stations in the market based on audience share.[353] Others appealed that prohibition and, ultimately, it was upheld in *Prometheus*. We discussed above our decision to retain the top four prohibition.

108. UCC challenged our decision to consider, among other things, whether a merger is needed to facilitate the digital transition in deciding whether a waiver of this "top four" restriction is justified.[354] UCC argued that such a consideration would render a waiver standard meaningless because every waiver applicant could make such an argument. We grant UCC's petition for reconsideration. Given that we are adopting the rule as it existed prior to the *2002 Biennial Review Order*, our waiver standard will not include this consideration.

109. Some parties sought reconsideration of our decision to eliminate the failed station solicitation rule, which required an applicant for a waiver to provide notice of the sale of the failed, failing or unbuilt station to potential out-of-market buyers before it could sell that television station to an in-market buyer.[355] To the extent these petitioners argued against this action, we grant their petitions for reconsideration. As discussed above, we have decided to reinstate this requirement, as it was part of the old rule, and we continue to believe that it is necessary to ensure that out-of-market buyers, including qualified minority broadcasters, have notice of, and an opportunity to bid for, a station before it is combined with an in-market station. A waiver of the rule should only be permitted when no out-of-market buyer is interested in purchasing the station. We think that it is inappropriate to assume, as the Commission did in the *2002 Biennial Review Order*,[356] that no out-of-market buyer will be interested unless an effort is made to find one.

VI. LOCAL RADIO OWNERSHIP RULE

110. For the reasons discussed below, we conclude that the current local radio ownership rule, including the market definition as revised in the *2002 Biennial Review Order*, remains "necessary in the public interest" to protect competition in local radio markets. As directed by the *Prometheus* court, we also provide a reasoned justification for our decision to retain the existing numerical limits on local radio ownership. In addition, we deny or dismiss a number of pending petitions for reconsideration of the Commission's action concerning the local radio ownership rule in the *2002 Biennial Review Order*. Accordingly, an entity may own, operate, or control (1) up to eight commercial radio stations, not more than five of which are in the same service (*i.e.*, AM or FM), in a radio market with 45 or more full-power, commercial and noncommercial radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market.[357]

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[353] Nexstar Petition at 1-14; LIN Television Corp. and Raycom Media, Inc. ("LIN/Raycom") Petition at 3-13.

[354] UCC Petition at 17-26.

[355] *Id*.; MMTC Petition at 28-36.

[356] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13708, ¶ 225.

[357] *See* 1996 Act § 202(b); 47 C.F.R. § 73.3555(a). A single AM/FM combination is always permitted. Note 539 of the *2002 Biennial Review Order*, 18 FCC Rcd at 13717, ¶ 250 n.539, specified that a single AM/FM combination is always permitted, citing 47 C.F.R. § 73.3555(a)(2). That section of the Commission's rules was inadvertently removed by the *2002 Biennial Review Order*. We are taking this opportunity to reinstate this rule to state "overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service."

A. Background

111. In the *2002 Biennial Review Order*, the Commission retained the local radio numerical limits and the AM/FM service caps that Congress adopted in the 1996 Act.[358] The Commission determined, however, that its contour-overlap methodology for defining radio markets and counting stations in the market was flawed as a means to protect competition in local radio markets.[359] The Commission therefore modified the definition of a local radio market by replacing the contour-overlap approach with an Arbitron Metro market definition where Arbitron markets exist.[360] In addition, the Commission decided to include noncommercial stations when determining the number of radio stations in a market for purposes of the ownership rules.[361] The Commission also decided to attribute certain radio station Joint Sales Agreements ("JSA") toward the brokering licensee's permissible ownership totals.[362] Recognizing that there could be some existing combinations of broadcast stations that would exceed the revised ownership limits, the Commission grandfathered existing combinations of radio stations and of radio and television stations.[363]

112. The *Prometheus* court upheld the Commission's decision to define the market using Arbitron Metros, to attribute JSAs, to count noncommercial stations in defining the size of a market and to impose restrictions on the transfer of grandfathered combinations.[364] Although the *Prometheus* court affirmed the Commission's rationale that numerical limits help guard against consolidation and foster opportunities for new entrants and therefore upheld the use of numerical limits, the court remanded the Commission's decision to retain the existing numerical limits. The court held that the limits were unsupported by the Commission's rationale that they ensure five equal-sized competitors in most markets.[365] The court held that the Commission had failed to justify five as the appropriate benchmark and did not reconcile that benchmark with the *DOJ/FTC Merger Guidelines* it had used to derive the local television ownership limits. The court also stated that the Commission had failed to show that the limits

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[358] *2002 Biennial Review Order,* 18 FCC Rcd at 13712, 13733-34, ¶¶ 239, 294. The Commission maintained the AM and FM ownership limits due to technical and marketplace disparities between the two services. *Id.* at 13733-34, ¶ 294.

[359] *Id.* at 13712, 13717-24, ¶¶ 239, 250-72.

[360] *Id.* at 13712, 13724-28, ¶¶ 239, 273-81.

[361] *Id.* at 13713, ¶ 239. The Commission held that its prior exclusion of these stations failed to account for their competitive impact on a radio market. *Id.* at 13730, ¶ 287. The Commission found that although they do not compete in the radio advertising market, noncommercial stations exert competitive pressure in the radio listening and radio program production markets. *Id*. at 13734, ¶ 295.

[362] *Id.* at 13742-46, ¶¶ 316-25.

[363] *Id.* at 13807-09, ¶¶ 482-86.

[364] *Prometheus,* 373 F.3d at 421-30. Although the Commission did not require owners to divest their interests in stations, it held that parties would have to comply with the ownership rules at the time a transfer of control or assignment application is filed, unless the entity acquiring control of the combination was an "eligible entity," which was defined as an entity that would qualify as a small business consistent with Small Business Administration ("SBA") standards for its industry grouping. *Id.* at 13809-13, ¶¶ 487-90. The *Prometheus* court subsequently lifted the stay with respect to using Arbitron Metro markets to define local radio markets, including noncommercial stations in determining the size of a market, attributing stations whose advertising is brokered under a JSA to a brokering station's permissible ownership totals, and imposing a transfer restriction. *See* paragraph 4 of this Order, *supra*.

[365] *Prometheus,* 373 F.3d at 432-34 (Because the Commission "has in the past extolled the value of audience share data for measuring diversity and competition in local radio markets," its "reliance on the fiction of equal-sized competitors, as opposed to measuring their actual competitive power, is even more suspect in the context of the local radio rule.").

ensured that five equal-sized competitors have emerged or would emerge under the numerical limits.[366] The court further faulted the Commission for not explaining why it could not take "actual market share" into account when deriving the numerical limits. Finally, the court held that the Commission did not support its decision to retain the AM subcaps.[367]

B. Discussion

113. Under Section 202(h), we consider whether the local radio ownership rule continues to be "necessary in the public interest as a result of competition." In determining whether the rule meets that standard, we consider whether the rule serves the public interest, which, in radio broadcasting, traditionally has encompassed competition, localism, and diversity.[368] For the reasons discussed below, we conclude that the current rule meets that standard. We also conclude that it is appropriate to maintain the current numerical limits on local radio ownership based on our examination of the record before us.

114. *Competition.* As an initial matter, we reaffirm our finding in the *2002 Biennial Review Order* that the relevant geographic market for purposes of our local radio ownership rule is the Arbitron Metro market. We also reaffirm our conclusions in the *2002 Biennial Review Order* that radio broadcasters operate in three relevant product markets: radio advertising, radio listening, and radio program production.[369] Contrary to the arguments of several commenters, there continues to be a lack of persuasive evidence that various entertainment alternatives (*e.g.,* reading and watching television) are

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[366] The court noted that the Commission's decision to rely on a five-firm theory for purposes of the local radio ownership rule conflicts with the *DOJ/FTC Horizontal Merger Guidelines*, under which a market with five equal-sized competitors is considered "highly concentrated." The court held this conflict "suspect" because, elsewhere in the *2002 Biennial Review Order*, the Commission had relied on the *DOJ/FTC Horizontal Merger Guidelines* to derive its local television ownership limits. The court directed the Commission to address this apparent discrepancy on remand. *See id.* at 433-34. In addition, the Commission had cited game theory articles to support its finding that a market that has five or more relatively equal-sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market. The court directed the Commission to respond to the argument that these game theory articles do not rule out market structures other than equal-sized competitors (such as one large firm and many small ones) as equally competitive markets. *Id*. at 432-33.

[367] *Id.* at 434-35.

[368] Some commenters take issue with the Commission's treatment of localism and diversity. For example, the FMC alleges that we failed to treat localism and diversity as separate policy goals in the context of radio regulation. FMC Petition at 2-5. Instead, FMC argues that the Commission treated localism and diversity as byproducts of competition. It states that the Commission lacks evidence to show that competition ensures localism and diversity. FMC urges the Commission to establish multiple measures of localism and diversity to ensure that the policy goals are met. *See id*. FMC also contends that the Commission failed to explain how its radio ownership rules support localism and to define "competitive market performance" as it relates to localism. *See id*. at 7-8. As indicated by examination of paragraphs 9-12 of this Order, FMC's assertions are incorrect. The Commission separately analyzes the effectiveness of the Commission's rules in promoting each of its three key goals. FMC also contends that the Commission failed to provide enough evidence to show how radio combinations are efficient and that the Commission inconsistently discussed entry conditions for the radio industry. *Id*. at 8-9. First, economic theory indicates that consolidation permits a firm to achieve economies of scale and scope in operations. This, in turn, provides that firm with the capability to achieve greater efficiencies than smaller firms. Firms that fail to achieve such efficiencies are unlikely to compete successfully. DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION, 35-48 (3d ed. 2000). Second, our entry analysis is not inconsistent because the evidence shows that a number of transactions are still taking place. *See* Media Ownership Study 2 at 7; "Review of Radio Industry," by George Williams, FCC (2007) ("Media Ownership Study 10"), *available at* http://www.fcc.gov/ownership/studies.html at 5. Thus, contrary to FMC's arguments, radio spectrum is not "locked up," and our ownership tiers are designed to prevent that from occurring.

[369] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13714-16, ¶¶ 243-47.

good substitutes for listening to radio.[370]

115. Having discussed the relevant product and geographic markets for radio, we now undertake our obligation under Section 202(h) to determine whether the current limits on radio station ownership are necessary to promote the public interest in competition. We conclude that the current rule meets that standard.

116. We reaffirm our conclusion in the *2002 Biennial Review Order* that the ownership tiers in the current rule represent a reasonable means for promoting the public interest as it relates to competition, and that numerical limits on radio station ownership help to keep the available radio spectrum from becoming "locked up" in the hands of one or a few owners, thus helping to prevent the formation of market power in local radio markets.[371]

117. We also conclude that retention of the existing numerical limits in the local radio ownership rule is necessary in the public interest. In so concluding, we depart from the Commission's rationale in the *2002 Biennial Review Order* that the existing limits are appropriate because they allow for roughly five equal-sized firms in each market.[372] Instead, we rest our decision on our conclusion that relaxing the rule to permit greater consolidation would be inconsistent with the Commission's public interest objectives of ensuring that the benefits of competition and diversity are realized in local radio markets. Making the numerical limits more restrictive would be inconsistent with Congress' decision to relax the local radio ownership limits in the 1996 Telecommunications Act and would disserve the public interest by unduly disrupting the radio broadcasting industry. Based on our examination of the record, we are persuaded that the current numerical limits strike the appropriate balance.

118. The evidence in the record indicates that retaining the numerical limits at the current level is necessary to protect against excessive market concentration. Prior to 1992, our radio ownership rules prohibited most radio mergers.[373] In 1992, we relaxed our local radio ownership rules in recognition of the fact that our rules prevented some firms from achieving the economies of scale that they needed to survive financially.[374] Congress further relaxed the local radio ownership limits in the 1996

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[370] Clear Channel Reply at 4-6, 10-13, 43-46 (citing competition from satellite radio, MP3 players, Internet radio stations, subscription-based music services from cable, DBS and IPTV providers, and Wi-Max); NAB Reply at 32-34, 50-52.

[371] *See 2002 Biennial Review Order,* 18 FCC Rcd at 13730-31, ¶ 288; *see also Prometheus,* 373 F.3d at 431-32.

[372] *See 2002 Biennial Review Order,* 18 FCC Rcd at 13731, ¶ 289; *see also Prometheus,* 373 F.3d at 433. Though UCC questions our former justification (based on a five equal-sized competitors theory) for retaining the existing numerical limit, we offer a new rationale for our decision, which renders UCC's questions on this issue moot. UCC Petition at 26-29.

[373] Before 1989, the Commission relied on interference contours to determine whether two commonly owned radio stations implicated the rule. *See* 47 C.F.R. § 73.3555(a)(1) & (a)(2) (1988). In 1989, the Commission began using principal community contours. In either case, parties could own a single AM-FM combination even if their contours overlapped. *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19861, 19863-64 ¶¶ 5-7 (2001); *see also Amendment of §73.3555 of the Commission's Rule, the Broadcast Ownership Rules*, MM Docket No. 87-7, First Report and Order, 4 FCC Rcd 1723, 1723, ¶ 1 (1989); 47 C.F.R. §73.3555(a)(1),(2) (1989) ("*1989 Multiple Ownership First Report and Order*").

[374] *See Revision of Radio Rules and Policies*, MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 2757-60, ¶¶ 4-10 (1992) ("*1992 Radio Ownership Order*"); *see also* 47 C.F.R. §73.3555(a)(1) (1995). Under the 1992 rules, a party could own two AM and two FM radio stations in markets with 15 or more commercial radio stations, and three radio stations of which no more than two could be AM or FM stations in smaller markets. The 1992 rule also imposed an audience share limit on radio station combinations in the larger market. *See* 47 C.F.R. §73.3555(a)(1) (1995).

Telecommunications Act.[375] Congress's 1996 radio ownership rules revisions have had a substantial effect on the market structure of radio broadcasting, resulting in further consolidation of radio station ownership at both the national and the local level.[376] By maintaining the current numerical limits, we seek to guard against additional consolidation of the strongest stations in a market in the hands of too few owners and to ensure a market structure that fosters opportunities for new entry into radio broadcasting. The number of commercial radio station owners declined by 39 percent between 1996 and 2007, with most of the decline occurring during the first few years after the 1996 Act.[377] Although the average number of commercial owners across all Arbitron radio markets currently is 9.4, the largest commercial firm in each Arbitron Metro market has, on average, 46 percent of the market's total radio advertising revenue, and the largest two firms have 74 percent of the revenue.[378] In 111 of the 299 Arbitron Metro markets, the top two commercial station owners control at least 80 percent of radio advertising revenue.[379] The top four commercial firms also dominate audience share.[380] And evidence in the record indicates that the increase in concentration in commercial radio markets has resulted in appreciable, albeit small, increases in advertising rates.[381] All of this data in the record supports the conclusion that the current numerical limits are not unduly restrictive and that additional consolidation would not serve the

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[375] 1996 Act § 202(b).

[376] *See* FMC Reply App., *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry* by Peter DiCola ("FMC DiCola Study") at 50-81; AFL-CIO Comments at 45-47; UCC Comments at 79-80; Remarks by James Wolfe, President of WFXK and WJAK Radio in Jackson, Tennessee, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006) (noting high concentration levels in the radio industry).

[377] Media Ownership Study 10 at 1 (the conclusions of Media Ownership Study 10 are based on an analysis of the commercial broadcast radio industry).

[378] *Id.* at 2.

[379] *Id.* at 7 ("In the 50 largest markets, on average, the top firm holds 34 percent of market revenue, the second firm holds 24 percent, and firms three and four split the next 26 percent. For the 100 smallest markets, on average, the first firm holds 54 percent, the second firm holds 30 percent, and the next two firms split 13 percent."); s*ee also* CU Reply at 19 ("at the local level, half of all local radio markets are effectively duopolies and almost 10 percent are monopolies"); FMC DiCola Study at 74 ("Numeric caps at the current level *or even lower levels* are needed to protect the public, the small business community, and the political sphere against excessive market concentration") (emphasis in the original); and at 68 ("Out of 297 Arbitron markets, 232 had HHIs greater than 1800 in Spring 2005. Sixty three more had HHIs between 1000 and 1800. [For the other two markets, no HHI measure was available.] In sum, the majority of local radio markets have levels of concentration that ordinarily give rise to antitrust concerns about excessive market power.").

[380] *See 2002 Biennial Review Order,* 18 FCC Rcd at 13731, ¶ 290, n.616 and accompanying text; *see also* UCC Comments to Media Ownership Studies at 16-17 ("Study 10 ... reveals that common ownership of media outlets in markets is alarmingly high, with four firm concentration ratios averaging 97% in smaller markets and 84% in the 50 largest markets.") (citing Media Ownership Study 10 at 22); CU Reply at 21-22, and Attach., Reply Study at 66-67 ("CU Reply Study") (showing that the top two owners have an average market share of 2/3, and the top four having 90 percent).

[381] *2002 Biennial Review Order,* 18 FCC Rcd at 13732, ¶ 290, n.620 and accompanying text (citing MOWG Study No. 4 at 18, which concluded that "[o]verall…, local consolidation appears to increase the prices paid by national and regional advertising agencies for local radio advertising … local concentration accounted for approximately 3-4% out of the 68% increase in real advertising rates.") *But see* "Station Ownership and Programming in Radio," by Tasneem Chipty, CRA International, Inc. (Jun. 2007) (:Media Ownership Study 5"), *available at* http://www.fcc.gov/ownership/studies.html at 41 (concluding that "[t]here are no differential effects of local radio consolidation of ownership across big and small markets."); Media Ownership Study 10 at 15-16 ("Overall, it appears that the cost of radio advertising has nearly doubled since the 1996 Act was passed. By contrast, the CPI … increased 29 percent during the same time period. In other words, the CPI increased approximately 3 percent per year during this time period, while the annual growth rate in radio prices was approximately 10 percent.").

Commission's competitive goals.[382]

119. We also conclude that making the numerical limits more restrictive is not justified based on examination of the current record.[383] Prior to 1992, the local radio ownership rules did not effectively recognize that a certain level of consolidation can be efficient. Given the generally difficult economic conditions at the time, the inability of stations to seek efficiencies through consolidation may have contributed to the industry's financial difficulties. We do not seek to undermine the benefits that consolidation has brought to the financial stability of the radio industry.[384]

120. In addition, further tightening of the local radio ownership rule would disrupt the marketplace by necessitating widespread divestitures. In this regard, the Future of Music Coalition cites data showing that at least one radio station owner was at the ownership cap in 194 of 297 Arbitron Metro markets.[385] Requiring widespread divestitures would undermine settled expectations in a market where broadcasters needed regulatory relief to achieve the economies of scale necessary to compete just 10 years ago.[386] Many broadcasters incurred significant financial risks by acquiring the additional stations permitted under this rule and are creating business development plans for the future based on these current economies of scale. Decreasing the limit would thus be a significant shock to the market.[387] Moreover, it could undermine efficiency gains that such firms otherwise might realize from their current economies of scale, efficiency gains that could bolster the stations' financial standing and increase their ability to provide their local communities with quality programming. We should not cause such a disruption absent persuasive evidence that further tightening of the local radio ownership rule would serve the public interest more effectively than the current rule.

121. Of course, we recognize that the need for widespread divestitures could be avoided by grandfathering existing station combinations, as the Commission chose to do in the *2002 Biennial Review*

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[382] Thus, we decline to relax our rule as recommended by some commenters. Clear Channel Comments at 50-59; Clear Channel 12/11/07 Comments at 9-12; NAB Reply at 50; NAB 12/11/2007 Comments at 24-27; CBS Reply at 11-13.

[383] UCC urges us to tighten the local radio ownership limits. UCC Comments to Media Ownership Studies at 39, 48. FMC urges us to either retain or lower the current limits. FMC Comments at 1-6.

[384] Our research has shown that radio firms have strong earnings, though they do carry high debt loads and thus experience a certain level of volatility in their stock market valuations. Through much of the period before 2000, the valuations of these radio companies outperformed the broad market of publicly traded companies, as reflected in Standard and Poor's 500 (S&P 500) index returns. After 2000, however, the returns of radio companies, on average, have fallen slightly below the S&P returns. While it is not our mandate to assure the profits of a given media sector, we are concerned with financial stability insofar as it assures the continued service that the public has come to expect. *See* Media Ownership Study 10 at 2. Several parties also describe the amount of consolidation that has occurred under the current ownership limits. *See* Remarks of Cheryl Salomone, Vice President and Marketing Manager of New Northwest Broadcasters, Media Ownership Hearing in Seattle, Washington (Nov. 9, 2007), Transcript at 128-32 (noting efficiencies of consolidation) ("Salomone Remarks"); Remarks of Bud Walters, President of Cromwell Radio, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006) (six of Cromwell's radio stations would be off the air if not for consolidation) ("Walters Remarks"); Remarks of Pat Roberts, President of Florida Association of Broadcasters, Media Ownership Hearing in Tampa, Florida (Apr. 30, 2007), Transcript at 65-59; Remarks of Joyce McCollough, General Manager of Radio Stations WLPO, WAJK, WKOT in LaSalle, Illinois, Media Ownership Hearing in Chicago, Illinois (Sept. 9, 2007), Transcript at 208-12 (touting efficiencies of consolidation) ("McCollough Remarks").

[385] *See* FMC Comments at 6-8 (citing Media Access Pro (Radio Version) and BIA data as of November 2005).

[386] *See, e.g., Costa de Ora Television, Inc. v. FCC,* 294 F.3d 123, 129 (D.C. Cir. 2002) (discussing the Commission's decisions to let prior rulings stand to "'avoid disturbing settled expectations'").

[387] Media Ownership Study 10 notes that publicly traded commercial radio firms "have generally used more debt than the typical S&P 500 company to finance operations and growth." Media Ownership Study 10 at 11-12.

Order. Again, however, doing so here would involve negative policy consequences that must be avoided if possible. Grandfathering existing combinations would exacerbate competitive imbalances enjoyed by current group owners – those that assembled combinations under the current rules – and would disfavor those that cannot assemble competing combinations because of new ownership restrictions. In other words, grandfathering would "lock in" the competitive advantage of the largest group owners and permanently disadvantage those who have not yet consolidated. Although the Commission previously chose to grandfather existing station combinations based on countervailing considerations,[388] we find that doing so now is not in the public interest.

122. Furthermore, we cannot conclude that tinkering with the existing numerical limits is warranted merely to rationalize the specific numerical limits that Congress chose in 1996 in light of the strong countervailing considerations set forth above. Congress adopted the existing limits in 1996, and mandated that the Commission periodically examine whether they remain necessary in the public interest. The *Prometheus* court rejected the Commission's attempt to rationalize the limits that Congress chose based on game theory and the *DOJ/FTC Horizontal Merger Guidelines*. Had the Commission initially established its own numerical limits, of course, it might have chosen different tiers and/or different caps. Nevertheless, we believe that it would be inconsistent with the public interest, as well as with the deference that we owe to Congress's line-drawing, to modify those limits merely to suit a new rationale, given the negative policy consequences associated with such tinkering. Instead, we believe that retaining the current numerical limits strikes the appropriate balance between protecting competition in local radio markets and enabling radio owners to achieve efficiencies through consolidation of facilities.[389]

123. We also find that the AM/FM subcaps are relevant to our consideration of competition issues, as well as our overall public interest goals in considering our media ownership rules. Thus, we explain our decision to retain the AM/FM subcaps below.[390]

124. *Localism*. Our localism goal stems from our mandate to ensure that licensed broadcast facilities serve and are responsive to the needs and interests of the communities to which they are licensed. By preserving a healthy, competitive local radio market, the local radio ownership rule helps promote our interest in localism. Aside from the positive effect on localism that ensues from a competitive radio market, however, the Commission has never found that the local radio ownership rule significantly advances our interest in localism.[391]

125. Although some parties suggest that localism has suffered as a result of consolidation, others forcefully argue that consolidation has benefited localism by giving group owners more resources to provide local news and public interest programming and to undertake initiatives responsive to the local needs and interests of the communities that they serve.[392] For example, some critics of consolidation cite

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[388] *Cf. 2002 Biennial Review Order*, 18 FCC Rcd at 13808-09, ¶¶ 484-86 (concluding that disparity between grandfathered and non-grandfathered owners did not outweigh the equitable considerations in favor of grandfathering under the circumstances).

[389] Thus, for the reasons discussed above, we dismiss petitions urging us to tighten our radio ownership limits and to create, through selective divestiture, more opportunities for small broadcasters. Amherst Alliance and Virginia Center for the Public Press Petition at 6.

[390] For further discussion of the AM/FM subcaps, see paragraphs 130-134 of this Order.

[391] *2002 Biennial Review Order,* 18 FCC Rcd at 13738, ¶ 303 (citing generally to the *1992 Radio Ownership Order*, 7 FCC Rcd 2755 and to the *1989 Multiple Ownership First Report and Order*, 4 FCC Rcd 1723).

[392] *Compare* AFL-CIO Reply at iii, 16; FMC Reply at 9-10, *and* Lockhart Informal Reply at 4-5, *and* Mt. Wilson Comments at 15-16, *and* Remarks of Kevin Brinson, CEO of CWAL, Inc., Media Ownership Hearing in Chicago, Illinois (Sept. 20, 2007), Transcript at 159-61, *and* Remarks of Mike Mills, Member of R.E.M. and Member of Recording Artists Coalition, Media Ownership Hearing in Los Angeles (Oct. 3, 2006), Transcript at 63-67, *and* Remarks of Rick Carnes, President of Song Writers Guild of America, Media Ownership Hearing in Nashville, (continued...)

to a Future of Music Coalition Study, which contends that consolidation permitted under our rule reduces opportunities to air music from local artists.[393] In addition, these commenters refute studies showing that large radio groups air a greater number of local programs.[394] Some commenters point to specific examples of alleged failures by a large national radio owner to provide vital public emergency programming as evidence of the harm to localism caused by consolidation.[395] In contrast, NAB argues that the record establishes that station groups are rolling out more news and talk stations and are otherwise providing substantial service to their local listeners; thus, NAB concludes that common ownership provides affirmative benefits to the public by increasing listening choices and enhancing local service.[396]

126. Based on our examination of the record, the evidence does not show that consolidation in local markets has harmed localism. Media Ownership Study 4.2 finds that the existence of economies of scope in production and distribution is supported by the findings that stations owned by parents that have more pervasive radio operations are more likely to air informational programming. The Study also provides some evidence that stations with nearby owners air more news and more local news.[397] We also note that the parties who criticize the effect of consolidation on localism often focus on the overall *national* size of the radio station group owner rather than the number of radio stations commonly owned in a local market. For example, several commenters criticize the practice of airing national music

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Tennessee (Dec. 11, 2006), *and* Remarks of Jenny Toomey, Executive Director of the Future of Music Coalition, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006), *and* Remarks of Mr. Carlson, Citizen Participant, Media Ownership Hearing in Seattle, Washington (Nov. 9, 2007), Transcript at 86-91, *and* Remarks of John Haer, Executive Director of Pittsburgh Local AFTRA, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007) Transcript at 254-55, *and* Remarks of Hannah Sassaman, Citizen Participant, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007) Transcript at 215-16 (arguing generally that the current local radio ownership rule undermines the Commission's localism goal), *with* Clear Channel Reply at 26-31, *and* NAB Reply at 53 (contending that consolidation promotes localism), *and* Remarks of Sue Sensenig, Hall Communications, Media Ownership Hearing in Harrisburg, Pennsylvania (Feb. 23, 2007) Transcript at 102-04, *and* Walters Remarks at Media Ownership Hearing in Nashville; Remarks of Art Rowbotham, President of Hall Communications, Tampa, Florida (Apr. 30, 2007) Transcript at 69-72 (noting the benefits of consolidation with respect to localism).

[393] FMC Reply at 11; FMC DiCola Study at 83-93; AFL-CIO Reply at 34 (citing FMC Study).

[394] FMC Reply at 10-11 (criticizing findings in studies commissioned by NAB and Clear Channel).

[395] *See* UCC Comments at Appendix D, Citizens Speak: The Real World Impacts of Media Consolidations at 26 (quoting testimony from FCC Commissioner Jonathan Adelstein alleging that radio stations owned by Clear Channel failed to provide citizens in Minot, North Dakota with information during an emergency in 2002). Clear Channel responded that the failure to transmit emergency information was a result of the local authorities' use of outdated EBS equipment instead of the EAS equipment that should have been implemented in 1997. Clear Channel Reply at 33-35. Clear Channel nevertheless concedes that some of its stations use voice tracking and that the decision to air that company-wide programming is made by an individual station's programming director and is primarily aired by stations in smaller markets. *Id.* at 33-34.

[396] NAB Reply at 53.

[397] "Ownership Structure, Market Characteristics and the Quantity of News and Public Affairs Programming: An Empirical Analysis of Radio Airplay," by Kenneth Lynch, FCC (2007) ("Media Ownership Study 4.2"), *available at* http://www.fcc.gov/ownership/studies.html at 1. Peer review of this study observes that the impacts of ownership characteristics are generally weak, both in terms of statistical and economic significance, and the conclusions reflect these findings. *See* Media Ownership Study 4.2 Peer Review by Scott J. Savage at 2, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. Each of these findings is subject to some caveats. For example, each additional in-market station owned by the parent decreased expected news (the effect is not statistically significant) and increased public affairs programming (the effect is statistically significant). Overall, we conclude that there are at least some economies of scope that continue to benefit the radio marketplace.

playlists by large national radio station groups.[398] As we noted in the *2002 Biennial Review Order,* however, this criticism seems to focus more on Congress's decision to eliminate the national radio ownership cap, which we are not reviewing in this proceeding.[399] In any event, these concerns do not address whether consolidation of radio stations in a *local* market harms localism.[400]

127. *Diversity.* Although media other than radio play an important role in the dissemination of local news and public affairs information, the Commission previously has concluded that its competition-based limits on local radio ownership promote diversity by ensuring a sufficient number of independent radio voices and by preserving a market structure that facilitates and encourages new entry into the local media market.[401] The Commission has declined to rely on format diversity to justify the local radio ownership rule.[402]

128. Though commenters hold various opinions on this issue,[403] our recent studies show that common ownership allowable under our tiers is not associated with reductions in format or programming diversity. Media Ownership Study 5 finds that consolidation of radio ownership does not diminish the diversity of local format offerings.[404] Similarly, the results of Media Ownership Study 10 show that the variety of radio formats available to consumers has held steady.[405] Peer review finds that Media

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398 FMC Reply at 9; AFTRA Comments at 16-17; *see also* Remarks of Big Kenny Alfend, Recording Artist, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006); Remarks of Harold Bradley, Vice President of American Federation of Musicians, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006); Remarks of Dobie Gray, Member of AFTRA, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006).

399 *2002 Biennial Review Order*, 18 FCC Rcd at 13738, ¶ 304.

400 We also address localism in a separate proceeding. *Broadcast Localism,* Report on Broadcast Localism and Notice of Proposed Rulemaking, MB Docket No. 04-233, adopted Dec. 18, 2007, Press Release (FCC 07-218).

401 *2002 Biennial Review Order,* 18 FCC Rcd at 13739, ¶¶ 305-06.

402 *Id.* at 13742, ¶ 315.

403 Some commenters contend that the consolidation allowable under the local radio rule harms diversity and creates more homogenized programming. *See* AFL-CIO Reply at 34-37; CU Reply at 21, 37; O'Donnell Informal Reply at 2-4; Remarks of Dan Navarro, Citizen Participant, Media Ownership Hearing in Los Angeles, California (Oct. 3, 2006) Transcript at 93-96; Remarks of Summer Reese, Citizen Participant, Media Ownership Hearing in Los Angeles, California (Oct. 3, 2006) Transcript at 135-38; Remarks of Craig Wiseman, Songwriter, Media Ownership Hearing in Nashville, Tennessee (Dec. 11, 2006). On the other hand, Clear Channel states that consolidation enables radio firms to offer programming that audiences want to hear. Clear Channel Reply at 24-26; *see also* Buckley Broadcasting Reply at 5-8; Salomone Remarks at Media Ownership Hearing in Seattle, Transcript at 128-32; McCollough Remarks at Media Ownership Hearing in Chicago, Transcript at 208-12. NAB also touts the benefits of consolidation, arguing that changes within local radio markets since 1996 have enabled stations to provide more varied audio programming that is specifically tailored to meet the needs and interests of minority groups. NAB Reply at 52. Critics of consolidation make the additional point that minority owners are more likely to include programming of concern to ethnic and racial minorities. *See* CU Reply at 37. We note that we have addressed this topic specifically in a separate proceeding. *See Diversity Order*, note 7, *supra.*

404 If anything, the market level analysis suggests that more concentrated markets have fewer stations with the same format categories, and therefore more format diversity. Similarly, large national radio owners offer more formats. Moreover, owners with several local stations offer longer, uninterrupted blocks of sports programming in the evening. The analysis also suggests that common ownership results in more diversity in actual programs aired. Based on an analysis of news and sports formatted stations, the study finds there is some overlap in actual programs aired across the two formats generally, but not within commonly owned station-pairs within the same market. Further, there are no significant differences in the effects of consolidation in radio on programming content, across big and small markets. Media Ownership Study 5 at 3.

405 However, in recent years the average number of formats appears to have declined slightly for some of the large markets, while increasing slightly for most of the smaller ones. Media Ownership Study 10 at 8. As noted above, (continued...)

Ownership Study 5 provides an exhaustive analysis of the data using different measures of programming and ways of treating the data (*e.g.*, looking at programming using market level averages or using observations on each station). Moreover, the review showed that the study's results were easy to replicate due to the simplicity of the study's econometric analyses and the transparency of the explanation of the specifications.[406] Peer review of Media Ownership Study 10 found that the discussion of the descriptive statistics relied on established techniques and theoretical concepts and that the interpretation of the financial indicator trends was sensible and consistent with professional standards. The review also showed that the count of formats statistic was a simple yet plausible measure of format diversity, and that the data sources used for the study were generally viewed as reliable.[407] Some commenters disagree with the results of these studies. For example, Professor Byerly and Professor Arnold contend that Media Ownership Study 5 shows a paucity of news programming compared to advertising airtime and conclude that stations are not fulfilling their public service obligation.[408] UCC asserts that the studies demonstrate that the consolidation that has occurred in the radio industry since the rule was relaxed in 1996 has significantly reduced the number of independently owned outlets, which the Commission has found to be the best proxy for measuring diversity.[409] However, based on our examination of the record, and in light of the fact that peer review confirms the validity of our studies, which show that our radio ownership limits do not decrease format diversity, we are not persuaded that common ownership allowable under our tiers is associated with reductions in format or programming diversity.

129. Based on our examination of the record, we cannot conclude that the local radio ownership rule is necessary to protect format diversity. Nevertheless, we find that retaining the current, competition-based numerical limits on local radio ownership will promote diversity indirectly for the same reasons that the Commission pointed to in the *2002 Biennial Review Order*. Thus, it is proper for us to retain the status quo, as the ownership tiers serve the public interest in light of competition.

130. *AM/FM Subcaps*. We also reaffirm the AM and FM ownership limits in the current rule. As stated above, the Third Circuit held that the Commission did not adequately support its decision to

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the conclusions of this study are based on an analysis of the commercial broadcast radio industry. Media Ownership Study 10 also notes that radio listening has continued to decline since 1998. *Id*. at 14-15.

406 *See* Media Ownership Study 5 Peer Review, by Andrew Sweeting, Duke University at 1, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. The review also points out that the study results reflect correlations in the data between ownership and programming, and that there is no direct evidence of causal effects. *Id.* at 2.

407 Media Ownership Study 10 Peer Review, by George S. Ford, Phoenix Center for Advanced Legal & Econ. Policy Studies, *available at* http://www.fcc.gov/mb/peer_review/peerreview.html. Ford found that, as a whole, the conclusions in Media Ownership Study 10 followed from the analysis. *Id*. at 3.

408 Carolyn M. Byerly, Ph.D. and John R. Arnold, Ph.D Comments to Media Ownership Studies at 2. Byerly and Arnold also argue that Media Ownership Study 5 assumes "diversity" to mean how many different program formats a station airs, rather than the ideas or other substantive content present within those formats. They claim that this assumption is contrary to current understandings of the word, both in mass communication research and in media law. *Id*. at 2-3.

409 UCC contends that format diversity is not a good proxy for diversity. Nonetheless, UCC concedes that the studies show that format diversity is not affected much one way or another by consolidation. UCC Comments to Media Ownership Studies at 39. UCC concludes that none of the findings offer compelling public interest justifications for further relaxation of the radio ownership limits. Instead, UCC contends that the studies support further tightening of the limits. *Id*. at 45-48. By contrast, Clear Channel states that the studies overwhelmingly support its contention that relaxing, if not eliminating, the local radio ownership rules has affirmative public interest benefits in terms of diversity and localism with no adverse affect on competition. Clear Channel Comments to Media Ownership Studies at 4-8.

retain the AM subcap and directed the Commission to justify its approach on remand.[410]

131. We sought comment on whether to retain the AM/FM subcaps in the *Further Notice*.[411] Five commenters addressed the issue. Clear Channel, CBS, and Multicultural Radio Broadcasting oppose retention of both the AM and FM subcaps and believe they should be eliminated.[412] Specifically, Clear Channel states that the elimination of the AM/FM subcaps will permit large broadcasters to acquire more FM stations and divest AM stations, thus fostering increased radio ownership by small businesses and minorities.[413] Multicultural Radio Broadcasting states that it owns 45 radio stations, almost all of which are AM stations, providing ethnic and foreign language programming.[414] However, in the Los Angeles and New York markets, Multicultural is prohibited from buying additional AM stations, though it could buy more FM stations under the radio ownership limits.[415] CBS argues that "no party to this proceeding has made any showing that the sub-caps serve any purpose in the promotion of competition or diversity."[416]

132. In contrast, UCC and Mt. Wilson both support retaining the caps.[417] UCC argues that "nothing has changed the need for the FM subcap," as "FM stations have tremendous technological and economic advantages."[418] In addition, UCC argues that "the digital transition does not upset, and possibly increases, these technological and economic advantages, as FM stations have rights to more spectrum and are further along in their digital transition."[419] UCC also argues that retaining the AM subcap serves the public interest because the limit on the number of AM stations one entity can own both promotes new entry and fosters diversity.[420] Mt. Wilson argues that "while generally AM stations do not command an audience size comparable to FM stations (irrespective of the reason), AM stations are in fact a contributor to the market share data for the respective broadcast entities. Moreover, the number of broadcast outlets available to a group owner can be a factor in attaining economic dominance and, further, stifling competition."[421]

133. We agree with UCC that retaining the AM subcaps serves the public interest by promoting new entry. As we have recognized, because it can reach specific demographic groups more easily than other forms of mass media, and because of its relative affordability compared to other mass media, radio remains a likely avenue for new entry into the media business, particularly by small

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410 *Prometheus*, 373 F.3d at 434-35.

411 *Further Notice*, 21 FCC Rcd at 8843, ¶ 22.

412 Clear Channel Comments at 66; Clear Channel Reply at 49; Clear Channel 12/11/2007 Comments at 5-8; CBS Reply at 13; Multicultural Radio Broadcasting Comments at 2; Multicultural Radio Broadcasting 12/11/2007 Comments at 1.

413 Clear Channel Comments at 72.

414 Multicultural Radio Broadcasting Comments at 2.

415 *Id*. at 3.

416 CBS Reply at 13.

417 UCC Comments at 84; Mt. Wilson Reply at 21.

418 UCC Comments at 84.

419 *Id*.

420 *Id*. at 84-85. In addition, UCC argues that "retaining the AM subcap will foster … diversity. Because of their inferior sound quality, AM stations are more likely to provide talk rather than music formats. Without the AM subcap, one entity in a locality could own a large number of the stations devoted to news or public affairs, considerably reducing local diversity in news and public affairs programming." *Id*.

421 Mt. Wilson Reply at 21.

businesses, women, minorities, and entrepreneurs seeking to meet market demand by providing programming to underserved communities.[422] New entry promotes outlet diversity, which in turn enhances diversity and the public interest. UCC explains in its comments that AM stations are generally far less expensive than FM stations, permitting entry with far lower capital investment.[423] We therefore find that retaining the current, competition-based subcaps will promote diversity indirectly by facilitating and encouraging entry into the local media market by new and underrepresented parties, and we thus conclude that the AM subcaps are in the public interest.

134. We also agree with Mt. Wilson that eliminating the service limits would improperly ignore the significant technical and marketplace differences between AM and FM stations and would be inconsistent with our interest in protecting competition in local radio markets.[424] Although, in many cases, these differences between AM and FM stations militate solely in favor of FM ownership limits due to factors such as AM stations' lesser bandwidth, inferior audio signal, and smaller radio audiences due to such technical differences, there is evidence in the record indicating that AM subcaps are necessary as well, as Mt. Wilson suggests. For example, Clear Channel points out that AM stations are ranked number one in 11 of the top 50 Arbitron Metro markets, and that seven additional top-50 markets had AM stations rated among the top three stations.[425] Thus, in certain local markets with top-ranked AM stations, the AM subcaps are necessary to prevent excessive market power from being concentrated in the hands of one station owner. At this time, we do not believe there is any reason to further relax, eliminate, or strengthen the AM/FM subcaps. Further loosening of the AM and FM ownership limits at this time would not be in the public interest.

135. In addition, various parties have also raised other issues in this proceeding that we decline to specifically address here.[426]

C. Petitions for Reconsideration

136. *Arbitron Markets.* We deny petitions for reconsideration of our decision to use Arbitron Metro markets to define local radio markets.[427] The Third Circuit found that the decision to adopt the

[422] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13739, ¶ 306.

[423] UCC Comments at 84-85. UCC claims that if the AM subcaps were removed, "large companies could bid up the price of AM stations and further erode th[e] abysmally low representation" of minority and female radio station owners. *Id.* at 85.

[424] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13733-34, ¶ 294.

[425] Clear Channel Comments at 66-73.

[426] *See* Stilwell Comments (urging Congress to permanently freeze the maximum number of radio stations an entity can own); *see also* Remarks by Rachel Stilwell, Media Ownership Hearing in El Segundo, California (Oct. 3, 2006), Transcript at 130-32; Amherst Alliance Supp. Comments at 1-6 (re LPFM policies); CCVM Comments at 3, 8 (contending that a connection exists between increased consolidation and increased indecency complaints); FMC Reply at 14-15 (asking that the Commission to collect more ownership-related information from licensees). These issues are outside the scope of this proceeding.

[427] We note that a number of parties challenged the Commission's decision in the *2002 Biennial Review Order* to define local radio markets using Arbitron Metro markets instead of a contour overlap methodology. Some sought Commission reconsideration. *See* Cumulus Petition at 3, 9-15; *see also* Main Street Petition at 2-6; Monterey Petition at 13-14 (also arguing the two-year hold on changes to Arbitron markets will not prevent manipulation or abuse of the definition of a radio market); Saga Petition at 2, 5-7 (also arguing, like Monterey, that the two-year hold on changes to Arbitron markets will not prevent manipulation or abuse of the definition of a radio market); WJZD Petition at 6-8, 18 (also arguing that the Commission should vacate the new radio rules, issue an NPRM on Arbitron markets and create alternative rules for case-by-case analysis of radio acquisitions); WTCM Radio Petition at 3-5. However, we note that the *Prometheus* court upheld our decision and lifted the stay with respect to using Arbitron markets. We decline to reconsider our decision or to adopt additional measures. *See Prometheus,* 373 F.3d at 425; *see also Prometheus Rehearing Order*. Furthermore, NABOB urges us to reinstitute our flagging policy. NABOB (continued...)

Arbitron Metro market definition was in the public interest and was supported by reasoned analysis.[428] We have been successfully applying the new definition for over three years and see no need to revisit its use here.

137. *JSAs and Noncommercial Stations.* We decline to reconsider our decision in the *2002 Biennial Review Order* to attribute certain JSAs.[429] We also decline to review our decision to include noncommercial radio stations in determining the size of the radio market.[430] As discussed above, both of these decisions were upheld by the Third Circuit in *Prometheus.*[431] We therefore deny petitions seeking reconsideration of these aspects of the *2002 Biennial Review Order*.

138. *Grandfathering/Transition Issues.* Several parties seek reconsideration of the Commission's grandfathering and transition procedures.[432] We address all issues regarding sales of grandfathered combinations to eligible entities in the separate Order addressing ownership diversity.[433]

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Petition at 8-9, NABOB Petition (Second) at 4-6 (Oct. 9, 2003). However, we decline to do so because the *Prometheus* court affirmed our use of Arbitron markets, and we have no evidence here to make us resume the flagging policy. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13813, ¶¶ 496-97; *see also Prometheus Rehearing Order*. ARSO asks the Commission to use a different radio market definition than the Arbitron Metro definition for the island of Puerto Rico. ARSO Petition at 1-7. We have granted ARSO's waiver request to use the interim contour-overlap methodology pending the outcome of its Petition, which will be resolved in a separate proceeding. *See* Letter from Peter Doyle, Chief, Audio Division, Media Bureau, FCC, to Luis A. Soto, President, ARSO Radio Corp., and Luis A. Mejia, President, Bestov Broadcasting, Inc., 22 FCC Rcd 2549, 2553 (Feb. 9, 2007). Therefore, we dismiss ARSO's petition in this proceeding.

[428] *Prometheus,* 373 F.3d at 423, 425.

[429] A number of parties challenged the Commission's decision to attribute certain radio JSAs. Bennco Petition at 4-5; Monterey Petition at 3-4. While some petitioned the Commission to reconsider this determination, others appealed it. However, the Prometheus court affirmed the attribution of JSAs. *Prometheus*, 373 F.3d at 429-30; *see also* Prometheus Rehearing Order. Thus, we decline to reconsider our decision and decline to adopt additional measures. *Cf*. Letter to David D. Oxenford, Esq. In re KEGK(FM), Wahpeton, North Dakota, 21 FCC Rcd 9805 (MB Sept. 1, 2006) (Triad and Monterey Licenses, its wholly owned subsidiary, granted six months to come into compliance with the local radio limit following release of FCC decision addressing their request that the Commission reconsider the decision to attribute radio JSAs.). *See also* n.432, *infra*. Mt. Wilson also asks us to extend JSA provisions to underwriting agreements with noncommercial stations and to apply our limits to noncommercial stations. Mt. Wilson Petition at 3, 6-7. We deny Mt. Wilson's petition, which we find fails to justify extending our ownership limits or our JSA provisions to noncommercial stations. In addition, Galaxy urges us to make further refinements to our method of counting stations for purposes of calculating numerical limits. Galaxy Petition at 1-6 (arguing that we should count two same-market stations that simulcast as one and three Class A FM stations in the same market as one). The *Prometheus* court upheld our decision and lifted the stay with respect to our station counting methodology. *See Prometheus,* 373 F.3d at 426, 429-30; *see also Prometheus Rehearing Order*. We decline to adopt Galaxy's proposals.

[430] Various parties sought reconsideration of the Commission's decision to include noncommercial radio stations in determining the size of a local radio market for purposes of applying the local radio ownership rule. FMC Petition at 10-12; Main Street Petition at 10; NABOB Petition at 12; UCC Petition at 28-29.

[431] *Prometheus,* 373 F.3d at 425-26.

[432] *Compare* Cumulus Petition at 19 (requesting rule to permanently grandfather existing radio station combinations that do not comply with the new rules), *and* Entercom Petition at 3-8 (proposing exception for certain community of license changes), *and* Great Scott Petition at 2 (also proposing exception for certain community of license changes), *with* NABOB Petition at 9-12 (requesting reversal of the decision to grandfather existing combinations that exceed the local radio ownership rule and require divestiture instead), *and* Treasure and Space Coast Radio Petition at 7-8 (opposing the grandfathering rule), *and* Monterey Petition (opposing decision to grandfather existing JSAs only until September 4, 2005). As noted below, the *Prometheus* court upheld our decision and lifted the stay with respect to the grandfathering/transition policy, and we decline to adopt additional measures.

[433] *See Diversity Order*, *supra* note 7.

As to all other requests that we reconsider our grandfathering and transition policies, we decline to do so.[434] The *Prometheus* court upheld our decision and lifted the stay as to the grandfathering/transition rules in 2004.[435] We decline to reconsider our decision or to adopt additional grandfathering measures.[436]

VII. DUAL NETWORK RULE

139. The Commission's dual network rule provides: "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in Section 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)."[437] Thus, the rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top four" networks. In this Order, we conclude that the dual network rule remains necessary in the public interest as a result of competition and localism, and we therefore retain the rule without modification.

140. In the *2002 Biennial Review Order*, the Commission retained the dual network rule, concluding that it was necessary in the public interest to promote competition and localism.[438] The Commission concluded that, given the level of vertical integration of each of the top four networks, as well as their continued operation as a "strategic group" in the national advertising market, a top four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming.[439] It reasoned that these competitive harms

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[434] We deny petitions seeking clarification of the grandfathering rules with respect to transfer of control due to death or departure of existing owners of closely held businesses because that issue is outside the scope of this proceeding. Mid-West Family Petition at 2-6. We also reject Cumulus's contention that application of our modified radio market definition to applications pending at the time of the *2002 Biennial Review Order* is impermissibly retroactive. *See* Cumulus Petition at 17-19; c*f. Chadmoore Comm'ns, Inc. v. FCC,* 113 F.3d 235, 240 (D.C. Cir. 1997) (denial of an application in a rulemaking proceeding based on the conclusion that grant "would be contrary to the underlying goals of this proceeding" was not impermissibly retroactive because, *inter alia,* it lacked retroactive effect; "the Commission's action did not increase CCI's liability for past conduct or impose new duties with respect to completed transactions. Nor could it have impaired a right possessed by CCI because none vested on the filing of its application.")

[435] *Prometheus,* 373 F.3d at 426-27; *see also Prometheus Rehearing Order*.

[436] We also dismiss other petitions that raise issues that are outside the scope of this proceeding. *See* Mid-West Family Broadcasters Petition at 2-6 (asking for exceptions to transfer policies for grandfathered combinations); *see also* WTCM Petition at 16-17 (urging us to adopt "satellite status" for radio stations that rebroadcast "parent radio stations"). In addition, WJZD raises concerns with respect to petitions to deny mooted by the *2002 Biennial Review Order*. WJZD Petition at 5-6. However, we note that this issue is moot because the application WJZD petitioned to deny was ultimately dismissed by staff on other grounds. *See 2002 Biennial Review Order,* 18 FCC Rcd at 13813, ¶ 498 ("Petitions … that contest pending applications solely on grounds of competition pursuant to the interim policy will be dismissed as moot."); *see also* Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, FCC, to WJZD, c/o Dennis J. Kelly, Esq. *at* 2, 5-6, DA 05-1537 (May 26, 2005) (noting that WJZD petitioned to deny WQYZ's Assignment Application on February 6, 2003, but that Commission staff dismissed WQYZ's application on Nov. 18, 2003 and, in a subsequent filing, explicitly addressed WJZD's objections to WQYZ's new filing).

[437] 47 C.F.R. § 73.658(*g*).

[438] *2002 Biennial Review Order,* 18 FCC Rcd at 13847-58, ¶¶ 592-621.

[439] *Id.* at 13850-55, ¶¶ 600-10. A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. For example, the top four networks supply their affiliated local stations with programming intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks. *Amendment of Section 73.658(g) of the Commission's Rules – The Dual Network Rule*, Report and Order, 16 FCC Rcd 11114, 11122-23 ¶ 20 (2001) ("*Dual Network Order*").

would reduce program output, choices, quality, and innovation to the detriment of viewers. The Commission also concluded that elimination of the dual network rule would harm localism by allowing a top four network merger, which would reduce the ability of affiliates to bargain with their network for favorable terms of affiliation, reducing affiliates' influence on network programming, and thereby diminishing the ability of the affiliates to serve their communities.[440]

141. No petitions were filed asking the Commission to reconsider its decision to retain the rule, and no challenges were filed in *Prometheus*.[441] We sought comment in the *Further Notice* on whether the dual network rule remains necessary in the public interest to promote the Commission's policy goals.[442] Almost all of the few parties[443] commenting on the rule in this proceeding support retaining the rule in its current form.[444] They claim that the dual network rule continues to promote competition in the television advertising and program acquisition markets[445] and helps ease market entry by new networks.[446] They also contend that the rule promotes diverse programming because it prohibits the same companies from owning numerous media outlets,[447] and promotes localism by preserving the balance of power between the networks and their affiliates.[448] Other parties argue that relaxing or eliminating the rule would increase concentration to the detriment of competition, diversity, and localism.[449] No specific changes to the dual network rule were proposed,[450] and only two parties – Fox and CBS – oppose retaining the rule in any form.[451] Neither of these parties has provided evidence

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440 *2002 Biennial Review Order,* 18 FCC Rcd at 13855, ¶ 611.

441 Media General generally opposes justifying the Commission's ownership rules, including the dual network rule, on viewpoint diversity grounds, claiming that the Commission has never demonstrated a link between its structural ownership rules and viewpoint diversity. Media General Comments at 31-32. CCC objects that the Commission wrongly concluded that it could not be justified on program diversity or viewpoint diversity grounds. CCC Petition at 9-10.

442 *Further Notice*, 21 FCC Rcd at 8848, ¶ 33.

443 Seven commenters support retaining or tightening the rule (AFL-CIO Comments at 58-62; AFTRA Comments at 24-25; Network Affiliated Stations Alliance ("NASA") Comments at 6-8; SAG Comments at 8, 31-34; Crudele Informal Comments at 1-3; Nelson Informal Comments at 1; NASA Reply Comments at 5-6). Three commenters seek to relax or eliminate the rule (CBS Reply at 19; Fox Comments at 25 n.88; Media General Comments at 31-32).

444 *See, e.g.*, AFL-CIO Comments at 58-62; NASA Comments at 6-8; SAG Comments at 8, 31-34; Smith Comments at 4; Crudele Informal Comments at 1-3; Nelson Informal Comments at 1.

445 SAG Comments at 8; Crudele Informal Comments at 1-2; Nelson Informal Comments at 1.

446 SAG Comments at 31-33. Smith asks that the rule permit the top four networks to operate new or other smaller networks, such as NBC's Telemundo. Smith Comments at 4. The Commission modified the rule in that respect in 2001. *Dual Network Order*, 16 FCC Rcd at 11114, ¶ 1. After the rule was modified, Viacom, the owner of CBS, was allowed to purchase UPN, and NBC was allowed to purchase Telemundo, the second-largest Spanish-language network in the United States.

447 Nelson Informal Comments at 3.

448 Crudele Informal Comments at 1-2.

449 AFL-CIO Comments at 58-62; SAG Comments at 34; Crudele Informal Comments at 2-3.

450 One party's suggestion that the Commission should consider restrictions on the common ownership of broadcast and cable networks by a single entity is unrelated to this proceeding. Desmond Comments at 8.

451 Fox argues that the rule is unnecessary because antitrust review can address the Commission's concerns about competition in the national advertising and program production markets. As explained above, our concerns here are with competitive harms that would reduce program output, choices, quality, and innovation to the detriment of viewers, and with reduced affiliate power and influence. We do not think that antitrust enforcement would protect (continued...)

convincing us that a departure from our 2002 decision to retain the rule in its current form is warranted. Accordingly, for the same reasons recited by the Commission in 2002, we continue to believe that the dual network rule is necessary in the public interest to promote competition and localism. Therefore, we retain the dual network rule in its current form.

VIII. UHF DISCOUNT

142. In the *2002 Biennial Review Order*, the Commission retained the 50 percent UHF discount, which is applied in calculating a UHF station's audience reach under the national television cap.[452] The Commission decided, however, that when the transition to digital television is complete, the UHF discount would be eliminated for those stations owned by the four largest networks.[453] Subsequently, in 2004, Congress set the national television ownership cap at 39 percent and excluded the national cap from the quadrennial review requirement in Section 202(h).[454] In *Prometheus*, the court mooted challenges to the Commission's decision to retain the discount, holding that the UHF discount is a rule "relating to" the national audience limitation.[455] The court then stated that the Commission may decide the scope of its authority to modify or eliminate the UHF discount. In the *Further Notice*, the Commission sought comment on whether the holding in *Prometheus* was ambiguous with respect to the UHF discount rule.[456] The Commission also asked whether it should retain, modify, or eliminate the UHF discount, and requested comment on the basis for the Commission's authority to take such action.[457]

143. We find that the Commission is foreclosed from addressing the issue of the UHF discount in this proceeding by the 2004 Consolidated Appropriations Act. Although the Act did not specifically mention the UHF discount, the *Prometheus* court observed that the statutory 39 percent national cap would be altered if the UHF discount were modified. The court observed that the Appropriations Act amended Section 202(h) to exclude "any rules relating to" the 39 percent national cap, and determined that the UHF discount was a rule "relating to" the national television cap. The Third Circuit concluded that Congress "apparently intended to insulate the UHF discount from periodic review," but left open the possibility that the Commission may consider the discount in a rulemaking "outside the context of Section

(Continued from previous page)
against these harms. CBS contends that the variety of broadcast and cable networks available to viewers makes the rule no longer necessary in the public interest. We continue to believe that the four largest broadcast networks serve a unique role in the electronic media and note that no other networks, cable or broadcast, reach nearly as large an audience as they do. Therefore, we do not believe that the advent of other networks makes this rule unnecessary.

[452] 47 C.F.R. § 73.3555(e)(2)(i); *2002 Biennial Review Order*, 18 FCC Rcd at 13845-47, ¶¶ 585-91. In applying the national television ownership limit, national audience reach means the total number of television households in the Nielsen DMA in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. Under the UHF discount, for purposes of calculating a station's national audience reach, UHF television stations are attributed with 50 percent of the television households in their DMA.

[453] *2002 Biennial Review Order*, 18 FCC Rcd at 13847, ¶ 591.

[454] *See* the 2004 Consolidated Appropriations Act. Section 629(1) amends Section 202(c) of the 1996 Act to direct the Commission to modify the national television ownership limit, contained in section 73.3555 of the Commission's rules, to specify 39 percent as the maximum aggregate national audience reach of any single television station owner. *See* 47 U.S.C. § 202(c)(1). The 2004 Consolidated Appropriations Act also provides that Section 202(h) "does not apply to any rules relating to the 39% national audience limitation." 118 Stat. at 100.

[455] *Prometheus*, 373 F.3d at 396-97. The court held that "Congress apparently intended to insulate the UHF discount from periodic review, a position that is consistent with our reading of the legislation as endorsing the almost 20-year-old regulatory definition of 'national audience reach' that provides for the UHF discount." *Id.* at 397.

[456] *Further Notice*, 18 FCC Rcd at 8849, ¶ 35.

[457] *Id.*

202(h)."[458] Accordingly, we conclude that the UHF discount is insulated from review under Section 202(h).

144. As the *Prometheus* court noted, the Commission may decide, in the first instance, the scope of its authority to modify or eliminate the UHF discount outside the context of Section 202(h). The court noted that, prior to the *Prometheus* decision, the Commission had sought comment on its authority going forward to modify or eliminate the UHF discount in light of the Appropriations Act.[459] Accordingly, we will separately address the petitions, comments, and replies that were filed concerning the extent of the Commission's authority to alter the UHF discount and the substantive petitions and comments as to whether the Commission should retain, revise, or eliminate the UHF discount.

IX. PUBLIC INTEREST OBLIGATIONS OF TELEVISION BROADCAST LICENSEES

145. We note that in the pending proceeding titled *Public Interest Obligations of TV Broadcast Licensees,*[460] commenters ask the Commission to impose additional "public interest" obligations on television broadcasters. Some of the issues raised in that proceeding have already been resolved by the Commission. For example, in January 2007, the Commission's new children's programming requirements went into effect. And, even more recently, the Commission adopted a requirement that all television broadcasters must file a standardized form on a quarterly basis providing information about their programming, including programming related to local civic affairs, local electoral affairs, public service announcements (whether sponsored or aired for free), and independently produced programming. In addition, the Commission has concurrently adopted a Localism Report and Notice of Proposed Rulemaking that addresses actions the Commission will take to ensure that broadcasters are meeting the needs of their local communities. With respect to other ideas raised in this proceeding, such as whether the agency should establish more specific minimum public interest requirements for licensees and how broadcasters could improve political candidates' access to television, the Commission declines to take any further action at this time. We find the need to impose additional obligations premature in light of the Commission's recent decision to require broadcasters to file enhanced disclosure reports about the programming they are providing to serve local communities' interests and needs. Nevertheless, to the extent that circumstances change, we will revisit this decision and initiate proceedings as appropriate.

X. DATA QUALITY ACT

146. We reject the complaints filed by Free Press, Consumer Federation of America, and Consumers Union (collectively, "Free Press")[461] claiming that the Commission violated the Data Quality Act ("DQA") and guidelines issued by the Office of Management and Budget ("OMB") implementing the DQA.[462] The complaints relate to 10 media ownership studies that the Commission posted on its website

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[458] *Prometheus*, 373 F.3d at 397.

[459] *Id.* (citing *Media Bureau Seeks Additional Comment on UHF Discount in Light of Recent Legislation Affecting National Television Ownership Cap, Public Notice,* DA 04-320 (rel. Feb. 19, 2004), 69 Fed. Reg. 9216-17 (Feb. 27, 2004)).

[460] *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633 (1999).

[461] *See* Complaint Under the Data Quality Act of Free Press, Consumer Federation of America, & Consumers Union (Sept. 11, 2007) ("First Complaint"); Second Complaint Under the Data Quality Act and Motion for Extension of Time of Free Press, Consumer Federation of America, & Consumers Union (Nov. 9, 2007) ("Second Complaint").

[462] Pub. L. No. 106-554 (2001), codified at 44 U.S.C. § 3516 note. In relevant part, the DQA required OMB to issue guidelines that would "ensur[e] and maximize[e] the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies." In furtherance of this statutory mandate, OMB thereafter issued guidelines which, in turn, required each federal agency to publish its own data quality guidelines. *See* 67 Fed. Reg. 8452 (2002). The Commission's guidelines are published in *Information Quality Guidelines*, 17 FCC Rcd 19890 (2002).

on July 31, 2007. Although Free Press concedes that the DQA creates no judicially enforceable rights,[463] it alleges that the Commission violated the DQA by failing to give interested parties sufficient time to "reproduce" the results of those studies.[464] Neither the DQA nor the OMB guidelines requires a federal agency to allot time in a rulemaking proceeding for third parties to reproduce the results of studies released by the agency. Moreover, the facts belie the allegation that Free Press had insufficient time to review the studies. The Commission made available for inspection the bulk of the non-proprietary data underlying the studies beginning on July 31, 2007, and released the proprietary data under a Protective Order by September 6, 2007. In response to a request from Free Press, the Media Bureau extended the deadline for submitting comments on the studies from October 1 to October 22, 2007, and extended the deadline for reply comments from October 16 to November 1, 2007.[465] Thus, Free Press had 46 days after September 6 to prepare comments and 10 more days to prepare reply comments. Free Press took full advantage of the extended comment period – it filed nearly 2,500 pages of comments on the studies.[466] We find that Free Press had adequate time to review the data underlying the studies and to reproduce their results.[467]

147. We also reject the complaints filed by Free Press and other commenters[468] that the Commission failed to comply with the peer review guidelines promulgated by OMB.[469] The OMB Bulletin provides for the peer review of disseminations of scientific information containing "findings or

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[463] *See* Ex Parte of Consumer Federation of America, Consumers Union, and Free Press at 38 (Nov. 14, 2007) (Nov. 14 Ex Parte); *see also Americans for Safe Access v. U.S. Dept. of Health & Human Services*, 2007 WL 2141289, slip op. at 3 (N.D. Cal. July 24, 2007) (courts "have unanimously and persuasively rejected a right of judicial review" under the DQA); *Salt Institute v. Thompson*, 345 F. Supp. 2d 589, 601 (E.D. Va. 2004), *aff'd on other grounds sub nom. Salt Institute v. Leavitt*, 440 F.3d 156 (4th Cir. 2006) ("judicial review does not exist under the [DQA] because there is no private right of action"); *see generally Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress."); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979) (availability of private right of action depends upon "statutory scheme that Congress enacted into law").

[464] *See* First Complaint at 10-12. A study is "reproducible" if "independent analysis of the original or supporting data using identical methods would generate similar analytic results, subject to an acceptable degree of imprecision or error." 67 Fed. Reg. at 8460 ¶ V.10; 17 FCC Rcd at 19897, ¶ 13.

[465] *See Media Bureau Extends Filing Deadlines for Comments on Media Ownership Studies*, Public Notice, DA 07-4097 (rel. Sept. 28, 2007).

[466] *See* CU Comments to the Media Ownership Studies; CU Reply to the Media Ownership Studies.

[467] The Center for Regulatory Effectiveness ("CRE") also filed comments concerning the DQA. Specifically, CRE suggested that the Commission should not rely on two media ownership studies because they do not meet the requirements of the DQA. *See* Comments and Data Quality Petition of the Center for Regulatory Effectiveness (Oct. 12, 2007) (regarding Media Ownership Study 8, "The Impact of the FCC's TV Duopoly Rule Relaxation on Minority and Women Owned Broadcast Stations 1999-2006"); Comments of The Center for Regulatory Effectiveness (Oct. 12, 2007) (regarding "Do Local Owners Deliver More Localism? Some Evidence From Broadcast News"). Because we are not relying on either of those studies in this Order, we need not address the merits of CRE's comments.

[468] The filings by Free Press on this subject include the First Complaint, the Second Complaint, Comments to the Media Ownership Studies, and the November 14 Ex Parte. *See also* Letter by Congresspersons Maurice D. Hinchey, Bart Stupak, Tammy Baldwin, Louise M. Slaughter and David Price to FCC Chairman Kevin J. Martin, dated September 14, 2007 ("September 14 Congressional Letter"); Motion for Issuance of a Further Notice, or in the Alternative, an Extension of Time to Comment on Studies, filed by the Office of Communication of the United Church of Christ, Inc. (Sept. 18, 2007); Comments on Media Ownership Studies 4 and 6, filed by the Center for Regulatory Effectiveness (Oct. 12, 2007).

[469] *See* OMB Final Information Quality Bulletin for Peer Review, 70 Fed. Reg. 2664 (Jan. 14, 2005) ("OMB Bulletin").

conclusions that represent the official position of one or more agencies of the Federal government."[470] It requires federal agencies to ensure that its official disseminations have met rigorous standards of quality control through a peer review mechanism or to put the public on notice that the information has not been through a rigorous quality review.[471] The Bulletin expressly provides that it is intended to improve the internal management of the executive branch and that it does not create any enforceable legal rights.[472]

148. Free Press incorrectly claims that the Commission acted contrary to the OMB Bulletin by releasing the 10 media ownership studies prior to completing peer reviews of the studies.[473] The Commission posted the media ownership studies to its website on July 31, 2007, shortly after they were completed, in order to give the public and the peer reviewers access to their contents expeditiously. The Commission issued a Public Notice that same day requesting public comment on the studies.[474] The Public Notice specifically stated that the studies had not yet been peer reviewed; accordingly, the public was accurately informed that the studies at that point did not necessarily meet rigorous quality review standards. In addition, it was clear from the disclaimers on some of the studies that those particular studies did not represent the agency's official view. In order to forestall any confusion on this point, the Commission has posted an explanatory disclaimer with regard to each of the studies on the web page that is the public's primary access point to them, making it clear that they do not represent the Commission's official views, and were not being disseminated as such.[475] Furthermore, the Media Bureau extended the comment period on the studies until November 1, 2007. The extension of time allowed a total of 58 days from the posting of the peer reviews on September 4, 2007, and more than 90 days from the posting of the studies for public review and comment on July 31, 2007. We also note that the Commission accepts *ex parte* filings from members of the public past the end of the formal comment period, which gives parties an opportunity to supplement the record with additional information.[476] Thus, the public has been

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[470] *Id*. at 70 Fed. Reg. introduction at 2666. A concern was raised in the September 14 Congressional Letter that the 10 media ownership studies should have been considered "highly influential scientific assessments" under the OMB Bulletin. The OMB Bulletin provides that a "scientific assessment" is a very specific, intensive subset of "scientific information" in the Bulletin, such as a comprehensive review or meta-analysis of the existing studies or scholarship in an entire field. OMB Bulletin at Sec. I.7. After review, the Commission concluded that none of the 10 studies was a comprehensive review of media ownership policy or a meta-analysis of previous studies, and therefore that none of the studies came within the Bulletin's definition of "highly influential scientific assessment." *See* OMB Peer Review Bulletin, Sec. III.1. The OMB Bulletin calls for additional steps in the peer review of "highly influential scientific assessments." These include sponsoring a public meeting for presentations to the peer reviewers before they complete their review. See *id.* at V.5.

[471] *See* 70 Fed. Reg. at 2667.

[472] *Id.* at Sec. XII ("This Bulletin is intended to improve the internal management of the executive branch, and is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity....").

[473] *See, e.g.,* First Complaint at 8.

[474] *See FCC Seeks Comment on Research Studies on Media Ownership*, Public Notice, DA 07-3470 (rel. July 31, 2007).

[475] The disclaimer states: "The findings and conclusions in this report are those of the author(s) and do not necessarily represent the views of the Federal Communications Commission." *See* http://www.fcc.gov/ownership/studies.html .

[476] *See* 47 C.F.R. § 1.1206. Free Press claims that the peer review reports on third-party quantitative studies were released too late for the authors of those studies to incorporate the suggestions into their comments during the formal comment period. Along similar lines, Free Press claims that because the Commission released revised versions and additional peer reviews of the 10 studies on the last day of the reply comment period the public was denied the opportunity to incorporate the revisions into their comments. *See* November 14 Ex Parte at 40. However, Free Press made a substantive and lengthy *ex parte* filing after the close of the formal comment period, illustrating the utility of the Commission's *ex parte* procedures. Although the comment period formally closed on November 1, 2007, Free Press made a filing of nearly 2,500 pages on November 14, 2007. *See id.*

afforded ample time to review and comment on the studies after completion of the peer reviews.

149. Furthermore, the record clearly indicates that the public had ample notice of our peer review plans, although Free Press attempts to make much of the fact that the peer review plans were not filed on a separate web page.[477] Beginning with the initial Public Notice announcing the commissioning of the 10 studies on November 22, 2006, the Commission continuously informed the public of its peer review process through periodic Public Notices and updates to its Media Ownership website. The Commission posted on its website the study topics (November 22, 2006); the completed studies (July 31, 2007); the peer review charge letters (August 28, 2007); and the completed peer review reports (September 4, 2007). The Commission's July 31, 2007 Public Notice established a pleading cycle for public comment on the studies. The peer review charge letters and peer review reports were made available to the public on the Commission's website well before the end of the comment period. In addition, charge letters were posted to the web site in advance of the posting of the actual peer review reports. Accordingly, the public was adequately informed of the peer review process being conducted, and has had adequate opportunity to comment on the elements of the FCC's peer review process in this proceeding.

150. Free Press's complaint does not raise concerns about the validity of the Commission's peer review process, and there is no basis for any. The OMB Bulletin expressly provides that agencies have "broad discretion" to use particular peer review mechanisms suitable to a particular information product.[478] The Commission has exercised its discretion in a reasonable manner in the course of this proceeding. All of the studies that the Commission requested to be conducted were peer reviewed by unaffiliated experts, and four of them were peer reviewed by multiple reviewers.[479] One study was revised as a result of the peer review, and the authors of another study submitted new calculations with their responses to the peer reviews.[480] Twenty-two quantitative studies submitted by third parties in the docket were peer reviewed, and the results were posted for further public comment. The Commission's peer review process has improved the quality of the studies submitted to the Commission for its information in this proceeding.[481] Although Free Press would have preferred a far more elaborate and time-consuming peer review process,[482] this process was not required under the OMB Bulletin nor would it have improved appreciably upon the Commission's robust, extended process for independent review and public comment.[483]

XI. ADMINISTRATIVE MATTERS

A. Final Regulatory Flexibility Analysis

151. As required by the Regulatory Flexibility Act of 1980 ("RFA"),[484] the Commission has

[477] *See, e.g.*, Free Press Complaint at 16-17.

[478] *Id*. at 70 Fed. Reg., introduction at 2665. *See also* Reply Comments on Media Ownership Studies at 8-9.

[479] *See* http://www.fcc.gov/ownership/studies.html.

[480] *See* http://www.fcc.gov/ownership/studies.html, Media Ownership Study 4 and Media Ownership Study 6.

[481] For these reasons, Free Press's claim that the Commission deviated from peer review and other data quality guidelines in gathering evidence for the record, including the 10 studies requested by the FCC, so that the record evidence cannot be considered "substantial" under the Administrative Procedures Act, is completely without merit. *See* Free Press Nov. 14 Ex Parte at 39.

[482] *See*, *e.g*., First Complaint at 17-19; Second Complaint at 5.

[483] *See also* NAA Reply to Media Ownership Studies at 4.

[484] *See* 5 U.S.C. § 604. The RFA, *see* 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Report and Order*. The FRFA is set forth in Appendix B.

B. Final Paperwork Reduction Act Analysis

152. This *Report and Order* contains both new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 ("PRA"), Public Law 104-13. It will be submitted to the Office of Management and Budget ("OMB") for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we have considered how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees." We find that the modified requirements must apply fully to small entities (as well as to others) to protect consumers and further other goals, as described in the Order.

C. Congressional Review Act

153. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[485]

D. Additional Information

154. For additional information on this proceeding, please contact Royce Sherlock, Industry Analysis Division, Media Bureau, at (202) 418-2330, or Mania Baghdadi, Industry Analysis Division, Media Bureau, at (202) 418-2330.

XII. ORDERING CLAUSES

155. Accordingly, IT IS ORDERED, that pursuant to the authority contained in sections 1, 2(a), 4(i,), 303, 307, 309 and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309 and 310, and Section 202(h) of the Telecommunications Act of 1996, this *Report and Order and Order on Reconsideration* and the rule modifications attached hereto as Appendix A ARE ADOPTED, effective thirty (30) days after publication of the text or summary thereof in the Federal Register, except for those rules and requirements involving Paperwork Reduction Act burdens, which shall become effective immediately upon announcement in the Federal Register of OMB approval. It is our intention in adopting these rule changes that, if any of the rules that we retain, modify or adopt today, or the application thereof to any person or circumstance, are held to be unlawful, the remaining portions of the rules not deemed unlawful, and the application of such rules to other persons or circumstances, shall remain in effect to the fullest extent permitted by law. Thus, for example, if one of the ownership rules is held to be unlawful, the other ownership rules shall remain in effect to the fullest extent permitted by law, each being severable from the others.

156. IT IS FURTHER ORDERED, that the Petition for Reconsideration filed by Office of Communication of the United Church of Christ, Inc., Black Citizens for a Fair Media, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press; and the Petition for Reconsideration filed by Minority Media and Telecommunications Council, Counsel for Diversity and Competition Supporters filed in MB Docket No. 02-277 ARE GRANTED to the extent set forth in this Order, and otherwise ARE DENIED. The Petitions for Reconsideration filed in MB Docket No. 02-277 by National Association of Black Owned Broadcasters, Inc. and The Rainbow/PUSH Coalition, Inc.; WTCM Radio, Inc.; WJZD, Inc.; Cumulus Media, Inc.; Galaxy Communications, L.P.; Mt. Wilson FM

[485] 5 U.S.C. § 801(a)(1)(A).

Broadcasters; Entercom Communications Corp.; Great Scott Broadcasting; Treasure and Space Coast Radio; Saga Communications, Inc.; Future of Music Coalition; National Organization for Women; Mid-West Family Broadcasting; Monterey Licenses, LLC; LIN Television Corporation and Raycom Media Inc.; Duff, Ackerman & Goodrich, LLC; Center for the Creative Community and Association of Independent Video and Filmmakers; Robert W. McChesney and Josh Silver of Free Press; Nexstar Broadcasting Group, LLC; Saga Communications, Inc.; Consumers Federation of America and Consumers Union; Capitol Broadcasting Company, Inc.; Bennco, Inc.; The Amherst Alliance and the Virginia Center for the Public Press are DISMISSED or DENIED as discussed in this Order.

157. IT IS FURTHER ORDERED, that as enumerated in paragraph 76 of the *Report and Order and Order on Reconsideration*, the grandfathering or waivers granted in the 1975 newspaper/broadcast cross-ownership decision, *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, 50 FCC 2d 1046 (1975), are continued, and all permanent waivers for the prior newspaper/broadcast cross-ownership rule that have previously been granted are continued.

158. IT IS FURTHER ORDERED, that as enumerated in paragraph 77 of the *Report and Order and Order on Reconsideration*, waivers are granted to Gannett Co. Inc.'s combination in Phoenix (The Arizona Republic and KPNX-TV), Media General Inc.'s combination in Myrtle Beach-Florence, South Carolina (WBTW(TV) and the Morning News), Media General, Inc.'s combination in Columbus, Georgia (WRBL(TV) and the Opelika-Auburn News), Media General, Inc.'s combination in Panama City, Florida (WMBB(TV) and the Jackson County Floridan), and Media General's combination in the Tri-Cities, Tennessee/Virginia DMA (WJHL-TV and the Bristol (Virginia Tennessee) Herald Courier.

159. IT IS FURTHER ORDERED, that as enumerated in paragraph 78 of the *Report and Order and Order on Reconsideration*, licensees with a pending waiver request that involves an existing station combination consisting of more than one newspaper and/or more than one broadcast station will have 90 days after the effective date of the *Report and Order and Order on Reconsideration* to either amend their renewal or waiver requests or file a request for a permanent waiver.

160. IT IS FURTHER ORDERED, that as enumerated in paragraph 78 of the *Report and Order and Order on Reconsideration*, entities that have been granted a temporary waiver of the newspaper/broadcast cross-ownership rule pending the completion of this rulemaking will have 90 days after the effective date of the Report and Order to either amend their renewal or waiver requests or file a request for a permanent waiver.

161. IT IS FURTHER ORDERED, that the proceedings in MB Docket No. 06-121, MB Docket No. 02-277, MM Docket No. 01-235, MM Docket No. 01-317, MM Docket No. 00-244, and MM Docket No. 99-360 ARE TERMINATED.

162. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Report and Order and Order on Reconsideration*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Rule Changes

For the reasons described in the preamble, Part 73 of Title 47 of the Code of Federal Regulations is amended as follows:

PART 73--RADIO BROADCAST SERVICES

1. The authority citations for Part 73 continue to read as follows:

Authority: 47 U.S.C. §§ 154, 303, 334, and 336.

2. Section 73.3555 is amended to read as follows:

§ 73.3555 Multiple ownership.

(a)(1) Local radio ownership rule. A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.

(b) Local television multiple ownership rule.
An entity may directly or indirectly own, operate, or control two television stations licensed in the same Designated Market Area (DMA) (as determined by Nielsen Media Research or any successor entity) only under one or more of the following conditions:

(1) The Grade B contours of the stations (as determined by § 73.684 of this part) do not overlap; or

(1)(i) At the time the application to acquire or construct the station(s) is filed, at least one of the stations is not ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a.m.-

midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating, full-power commercial and noncommercial TV stations would remain post-merger in the DMA in which the communities of license of the TV stations in question are located. Count only those stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination. In areas where there is no Nielsen DMA, count the TV stations present in an area that would be the functional equivalent of a TV market. Count only those TV stations the Grade B signal contours of which overlap with the Grade B signal contour of at least one of the stations in the proposed combination.

(c) Radio-television cross-ownership rule.

(1) This rule is triggered when:

(i) The predicted or measured 1 mV/m contour of an existing or proposed FM station (computed in accordance with § 73.313 of this part) encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompasses the entire community of license of the FM station; or

(ii) The predicted or measured 2 mV/m groundwave contour of an existing or proposed AM station (computed in accordance with § 73.183 or § 73.386), encompasses the entire community of license of an existing or proposed commonly owned TV broadcast station(s), or the Grade A contour(s) of the TV broadcast station(s) (computed in accordance with § 73.684) encompass(es) the entire community of license of the AM station.

(2) An entity may directly or indirectly own, operate, or control up to two commercial TV stations (if permitted by paragraph (b) of this section, the local television multiple ownership rule) and 1 commercial radio station situated as described above in paragraph (1) of this section. An entity may not exceed these numbers, except as follows:

(i) If at least 20 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to:

(A) Two commercial TV and six commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule); or

(B) One commercial TV and seven commercial radio stations (to the extent that an entity would be permitted to own two commercial TV and six commercial radio stations under paragraph (c)(2)(i)(A) of this section, and to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(ii) If at least 10 independently owned media voices would remain in the market post-merger, an entity can directly or indirectly own, operate, or control up to two commercial TV and four commercial radio stations (to the extent permitted by paragraph (a) of this section, the local radio multiple ownership rule).

(3) To determine how many media voices would remain in the market, count the following:

(i) TV stations: independently owned and operating full-power broadcast TV stations within the DMA of the TV station's (or stations') community (or communities) of license that have Grade B signal contours that overlap with the Grade B signal contour(s) of the TV station(s) at issue;

(ii) Radio stations:

(A)(1) Independently owned operating primary broadcast radio stations that are in the radio metro market (as defined by Arbitron or another nationally recognized audience rating service) of:

(i) The TV station's (or stations') community (or communities) of license; or

(ii) The radio station's (or stations') community (or communities) of license; and

(2) Independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron or another nationally recognized audience rating service.

(B) When a proposed combination involves stations in different radio markets, the voice requirement must be met in each market; the radio stations of different radio metro markets may not be counted together.

(C) In areas where there is no radio metro market, count the radio stations present in an area that would be the functional equivalent of a radio market.

(iii) Newspapers: Newspapers that are published at least four days a week within the TV station's DMA in the dominant language of the market and that have a circulation exceeding 5% of the households in the DMA; and

(iv) One cable system: if cable television is generally available to households in the DMA. Cable television counts as only one voice in the DMA, regardless of how many individual cable systems operate in the DMA.

(d) Daily newspaper cross-ownership rule.

(1) 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:

(i) 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

(ii) 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

(iii) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

(2) Paragraph (1) shall not apply in cases where the Commission makes a finding pursuant to Section 310(d) of the Communications Act that the public interest, convenience, and necessity would be served by permitting an entity that owns, operates or controls a daily newspaper to own, operate or control an AM, FM, or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1).

(3) In making a finding under paragraph (2), there shall be a presumption that it is not inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper in a top 20 Nielsen DMA and one commercial AM, FM or TV broadcast station whose relevant contour

encompasses the entire community in which such newspaper is published as set forth in paragraph (1), provided that, with respect to a combination including a commercial TV station,

(i) The station is not ranked among the top four TV stations in the DMA, based on the most recent all-day (9 a.m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) At least 8 independently owned and operating major media voices would remain in the DMA in which the community of license of the TV station in question is located (for purposes of this provision major media voices include full-power TV broadcast stations and major newspapers).

(4) In making a finding under paragraph (2), there shall be a presumption that it is inconsistent with the public interest, convenience, and necessity for an entity to own, operate or control a daily newspaper and an AM, FM or TV broadcast station whose relevant contour encompasses the entire community in which such newspaper is published as set forth in paragraph (1) in a DMA other than the top 20 Nielsen DMAs or in any circumstance not covered under paragraph (3).

(5) In making a finding under paragraph (2), the Commission shall consider:

(i) whether the combined entity will significantly increase the amount of local news in the market;
(ii) whether the newspaper and the broadcast outlets each will continue to employ its own staff and each will exercise its own independent news judgment;
(iii) the level of concentration in the Nielsen Designated Market Area (DMA); and
(iv) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the proposed owner's commitment to invest significantly in newsroom operations.

(6) In order to overcome the negative presumption set forth in paragraph (4) with respect to the combination of a major newspaper and a television station, the applicant must show by clear and convincing evidence that the co-owned major newspaper and station will increase the diversity of independent news outlets and increase competition among independent news sources in the market, and the factors set forth above in paragraph (5) will inform this decision.

(7) The negative presumption set forth in paragraph (4) shall be reversed under the following two circumstances:

(i) the newspaper or broadcast station is failed or failing; or
(ii) the combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours per week of local news programming after the combination.

(e) National television multiple ownership rule.

(1) No license for a commercial television 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 having a cognizable interest in television stations which have an aggregate national audience reach exceeding thirty-nine (39) percent.

(2) For purposes of this paragraph (e):

(i) National audience reach means the total number of television households in the Nielsen

Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation.

(3) Divestiture. A person or entity that exceeds the thirty-nine (39) percent national audience reach limitation for television stations in paragraph (e)(1) of this section through grant, transfer, or assignment of an additional license for a commercial television broadcast station shall have not more than 2 years after exceeding such limitation to come into compliance with such limitation. This divestiture requirement shall not apply to persons or entities that exceed the 39 percent national audience reach limitation through population growth.

(f) The ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations. However, the attribution standards set forth in the Notes to this section will be used to determine attribution for noncommercial educational FM and TV applicants, such as in evaluating mutually exclusive applications pursuant to subpart K.

* * * * *

Note 1 to § 73.3555: The words "cognizable interest" as used herein include any interest, direct or indirect, that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station.

Note 2 to § 73.3555: In applying the provisions of this section, ownership and other interests in broadcast licensees, cable television systems and daily newspapers will be attributed to their holders and deemed cognizable pursuant to the following criteria:

(a) Except as otherwise provided herein, partnership and direct ownership interests and any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper will be cognizable;

(b) Investment companies, as defined in 15 U.S.C. 80a-3, insurance companies and banks holding stock through their trust departments in trust accounts will be considered to have a cognizable interest only if they hold 20% or more of the outstanding voting stock of a corporate broadcast licensee, cable television system or daily newspaper, or if any of the officers or directors of the broadcast licensee, cable television system or daily newspaper are representatives of the investment company, insurance company or bank concerned. Holdings by a bank or insurance company will be aggregated if the bank or insurance company has any right to determine how the stock will be voted. Holdings by investment companies will be aggregated if under common management.

(c) Attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening corporations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that wherever the ownership percentage for any link in the chain exceeds 50%, it shall not be included for purposes of this multiplication. For purposes of paragraph (i) of this note, attribution of ownership interests in a broadcast licensee, cable television system or daily newspaper that are held indirectly by any party through one or more intervening organizations will be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, and the ownership percentage for any link in the chain that exceeds

50% shall be included for purposes of this multiplication. [For example, except for purposes of paragraph (i) of this note, if A owns 10% of company X, which owns 60% of company Y, which owns 25% of “Licensee,” then X’s interest in “Licensee” would be 25% (the same as Y’s interest because X’s interest in Y exceeds 50%), and A’s interest in “Licensee” would be 2.5% (0.1 x 0.25). Under the 5% attribution benchmark, X’s interest in “Licensee” would be cognizable, while A’s interest would not be cognizable. For purposes of paragraph (i) of this note, X’s interest in “Licensee” would be 15% (0.6 x 0.25) and A’s interest in “Licensee” would be 1.5% (0.1 x 0.6 x 0.25). Neither interest would be attributed under paragraph (i) of this note.]

(d) Voting stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the grantor or beneficiary, as appropriate, will be attributed with the stock interests held in trust. An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant broadcast licensee, cable television system or daily newspaper are subject to said trust.

(e) Subject to paragraph (i) of this note, holders of non-voting stock shall not be attributed an interest in the issuing entity. Subject to paragraph (i) of this note, holders of debt and instruments such as warrants, convertible debentures, options or other non-voting interests with rights of conversion to voting interests shall not be attributed unless and until conversion is effected.

(f)(1) A limited partnership interest shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies. An interest in a Limited Liability Company (“LLC”) or Registered Limited Liability Partnership (“RLLP”) shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the licensee or system so certifies.

(2) For a licensee or system that is a limited partnership to make the certification set forth in paragraph (f)(1) of this note, it must verify that the partnership agreement or certificate of limited partnership, with respect to the particular limited partner exempt from attribution, establishes that the exempt limited partner has no material involvement, directly or indirectly, in the management or operation of the media activities of the partnership. For a licensee or system that is an LLC or RLLP to make the certification set forth in paragraph (f)(1) of this note, it must verify that the organizational document, with respect to the particular interest holder exempt from attribution, establishes that the exempt interest holder has no material involvement, directly or indirectly, in the management or operation of the media activities of the LLC or RLLP. The criteria which would assume adequate insulation for purposes of this certification are described in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). Irrespective of the terms of the certificate of limited partnership or partnership agreement, or other organizational document in the case of an LLC or RLLP, however, no such certification shall be made if the individual or entity making the certification has actual knowledge of any material involvement of the limited partners, or other interest holders in the case of an LLC or RLLP, in the management or operation of the media-related businesses of the partnership or LLC or RLLP.

(3) In the case of an LLC or RLLP, the licensee or system seeking insulation shall certify, in addition, that the relevant state statute authorizing LLCs permits an LLC member to insulate itself as required by our criteria.

(g) Officers and directors of a broadcast licensee, cable television system or daily newspaper are considered to have a cognizable interest in the entity with which they are so associated. If any such entity engages in businesses in addition to its primary business of broadcasting, cable television service or newspaper publication, it may request the Commission to waive attribution for any officer or director whose duties and responsibilities are wholly unrelated to its primary business. The officers and directors of a parent company of a broadcast licensee, cable television system or daily newspaper, with an attributable interest in any such subsidiary entity, shall be deemed to have a cognizable interest in the subsidiary unless the duties and responsibilities of the officer or director involved are wholly unrelated to the broadcast licensee, cable television system or daily newspaper subsidiary, and a statement properly documenting this fact is submitted to the Commission. [This statement may be included on the appropriate Ownership Report.] The officers and directors of a sister corporation of a broadcast licensee, cable television system or daily newspaper shall not be attributed with ownership of these entities by virtue of such status.

(h) Discrete ownership interests will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if:

(1) The sum of the interests held by or through "passive investors" is equal to or exceeds 20 percent; or

(2) The sum of the interests other than those held by or through "passive investors" is equal to or exceeds 5 percent; or

(3) The sum of the interests computed under paragraph (h)(1) of this note plus the sum of the interests computed under paragraph (h)(2) of this note is equal to or exceeds 20 percent.

(i) Notwithstanding paragraphs (e) and (f) of this note, the holder of an equity or debt interest or interests in a broadcast licensee, cable television system, daily newspaper, or other media outlet subject to the broadcast multiple ownership or cross-ownership rules ("interest holder") shall have that interest attributed if:

(1) The equity (including all stockholdings, whether voting or nonvoting, common or preferred) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value, defined as the aggregate of all equity plus all debt, of that media outlet; and

(2)(i) The interest holder also holds an interest in a broadcast licensee, cable television system, newspaper, or other media outlet operating in the same market that is subject to the broadcast multiple ownership or cross-ownership rules and is attributable under paragraphs of this note other than this paragraph (i); or

(ii) The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple or cross-ownership rule that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.

(j) "Time brokerage" (also known as "local marketing") is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

(1) Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the

broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(2) Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b), (c), (d) and (e) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(3) Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b), (c), and (d) of this section if the brokering station is a television station or with paragraphs (a), (c), and (d) if the brokering station is a radio station.

(k) "Joint Sales Agreement" is an agreement with a licensee of a "brokered station" that authorizes a "broker" to sell advertising time for the "brokered station."

(1) Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a), (c), and (d) of this section.

(2) Every joint sales agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the limitations set forth in paragraphs (a), (c), and (d) of this section.

Note 3 to § 73.3555: In cases where record and beneficial ownership of voting stock is not identical (*e.g.*, bank nominees holding stock as record owners for the benefit of mutual funds, brokerage houses holding stock in street names for the benefit of customers, investment advisors holding stock in their own names for the benefit of clients, and insurance companies holding stock), the party having the right to determine how the stock will be voted will be considered to own it for purposes of these rules.

Note 4 to § 73.3555: Paragraphs (a) through (d) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (d) will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (d) of this section may not be assigned or transferred to a single person, group or entity, except as provided in this Note or in the Report and Order in Docket No. 02-277, released July 2, 2003 (FCC 02- 127).

Note 5 to § 73.3555: Paragraphs (b) through (e) of this section will not be applied to cases involving television stations that are "satellite" operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87-8, FCC 91-182 (released July 8, 1991), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating "satellite" television station, the Grade B contour of which overlaps that of a commonly owned, operated, or controlled "non-satellite" parent television broadcast station, or the Grade A contour of which completely encompasses the community of publication of a commonly owned, operated, or controlled daily newspaper, or the community of license of a commonly owned, operated, or controlled AM or FM broadcast station, or the community of license of which is completely encompassed by the 2 mV/m contour of such AM broadcast station or the 1 mV/m contour of such FM broadcast station, may subsequently become a "non-satellite" station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87-8. However, such commonly owned, operated, or controlled "non-satellite" television stations and AM or FM stations with the aforementioned community encompassment, may not be transferred or assigned to a single person, group, or entity except as provided in Note 4 of this section. Nor shall any application for assignment or transfer concerning such "non-satellite" stations be granted if the assignment or transfer would be to the same person, group or entity to which the commonly owned, operated, or controlled newspaper is proposed to be transferred, except as provided in Note 4 of this section.

Note 6 to § 73.3555: For purposes of this section a daily newspaper is one which is published four or more days per week, which is in the dominant language in the market, and which is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

Note 7 to § 73.3555: The Commission will entertain applications to waive the restrictions in paragraph (b) and (c) of this section (the local television ownership rule and the radio/television cross-ownership rule) on a case-by-case basis. In each case, we will require a showing that the in-market buyer is the only entity ready, willing, and able to operate the station, that sale to an out-of-market applicant would result in an artificially depressed price, and that the waiver applicant does not already directly or indirectly own, operate, or control interest in two television stations within the relevant DMA. One way to satisfy these criteria would be to provide an affidavit from an independent broker affirming that active and serious efforts have been made to sell the permit, and that no reasonable offer from an entity outside the market has been received. We will entertain waiver requests as follows:

(1) If one of the broadcast stations involved is a "failed" station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

(2) For paragraph (b) of this section only, if one of the television stations involved is a "failing" station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years immediately prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

(3) For paragraph (b) of this section only, if the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

Note 8 to § 73.3555: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 535-1605 kHz band where grant of such application will result in the overlap of 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled if the applicant shows that a significant reduction in interference to adjacent or co-channel stations would accompany such common ownership. Such AM overlap cases will be considered on a case-by-case basis to determine whether common ownership, operation or control of the stations in question would be in the public interest. Applicants in such cases must submit a contingent application of the major or minor facilities change needed to achieve the interference reduction along with the application which seeks to create the 5 mV/m overlap situation.

Note 9 to § 73.3555: Paragraph (a)(1) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band where grant of such application will result in the overlap of the 5 mV/m groundwave contours of the proposed station and that of another AM station in the 535-1605 kHz band that is commonly owned, operated or controlled. Paragraphs (d)(1)(i) and (d)(1)(ii) of this section will not apply to an application for an AM station license in the 1605-1705 kHz band by an entity that owns, operates, controls or has a cognizable interest in AM radio stations in the 535-1605 kHz band.

Note 10 to §73.3555: Authority for joint ownership granted pursuant to Note 9 will expire at 3 a.m. local time on the fifth anniversary for the date of issuance of a construction permit for an AM radio station in the 1605-1705 kHz band.

APPENDIX B

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[1] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking (*NPRM*) in MB Docket No. 02-277.[2] The Commission sought written public comment on the proposals in the *NPRM* including comment on the IRFA. The Commission also prepared a Supplemental Initial Regulatory Flexibility Analysis (Supplemental IRFA) of the possible significant economic impact on small entities of the proposals in the *Further Notice of Proposed Rulemaking* (*Further Notice*).[3] The Commission sought written public comment on the *Further Notice*, including comment on the Supplemental IRFA. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[4]

A. Need for, and Objectives of, the *Report and Order and Order on Reconsideration* (*Order*)

2. The *Order* concludes the Commission's 2006 Quadrennial Review of the broadcast ownership rules. This review encompasses the newspaper/broadcast cross-ownership rule, the radio-television cross-ownership rule, the local television multiple ownership rule, the local radio ownership rule, and the dual network rule.[5] The rules are reviewed under Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"),[6] which requires the Commission to review its ownership rules (except the national television ownership limit) every four years and "determine whether any of such rules are necessary in the public interest as the result of competition."[7] Under Section 202(h), the Commission "shall repeal or modify any regulation it determines to be no longer in the public interest."[8] The Commission modifies the newspaper/broadcast cross-ownership rule and retains the other broadcast ownership rules currently in effect.

3. The Commission's approach in this *Order* is a cautious approach that balances the

[1] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601– 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[2] *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Broadcast Stations in Local Markets, Definition of Radio Markets,* 17 FCC Rcd 18503, 18558 App. A (2002).

[3] *2006 Quadrennial Regulatory Review – Review Of The Commission's Broadcast Ownership Rules And Other Rules Adopted Pursuant To Section 202 Of The Telecommunications Act Of 1996*, Further Notice of Proposed Rule Making, 21 FCC Rcd 8834 (2006).

[4] *See* 5 U.S.C. § 604.

[5] The Commission's broadcast ownership rules are contained in 47 C.F.R. § 73.3555. For the local television multiple ownership rule, the radio/television cross-ownership rule, and the newspaper/broadcast cross-ownership rule that are currently in effect, *see* 47 C.F.R. § 73.3555(b)-(d) (2002); for the local radio ownership rule, *see* 47 C.F.R. § 73.3555(a) (2006). The dual network rule is contained in 47 C.F.R. § 73.658(g) (2006).

[6] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. at 111-112 *and* Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 100 (2004) (codified at 47 U.S.C. § 303 note (2006)).

[7] In 2004, Congress revised the then biennial review requirement to require such reviews quadrennially. Congress also eliminated the national television multiple ownership rule from the quadrennial review requirement. *See* Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 100 (2004) (codified at 47 U.S.C. § 303 note (2006)).

[8] Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56, 111-12 (1996).

concerns of many commenters that it not permit excessive consolidation, with concerns of other commenters that it afford some relief to assure continued diversity and investment in local news programming by a modest loosening of the 32 year-old prohibition on newspaper/broadcast cross-ownership. The Commission believes that the decisions it adopts in the *Order* serve our public interest goals, appropriately take account of the current media marketplace, and comply with our statutory responsibilities.

B. Legal Basis

4. This *Order* is adopted pursuant to Sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and Section 202(h) of the Telecommunications Act of 1996.

C. Summary of Significant Issues Raised by Public Comments in Response to the IRFA and the Supplemental IRFA

5. The Commission received no comments in direct response to the IRFA and the Supplemental IRFA. However, the Commission received comments that discuss issues of interest to small entities. These comments are discussed in the section of this FRFA discussing the steps taken to minimize significant impact on small entities, and the significant alternatives considered.

D. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

6. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[9] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[10] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[11] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[12]

7. **Television Broadcasting.** In this context, the application of the statutory definition to television stations is of concern. The Small Business Administration defines a television broadcasting station that has no more than $13 million in annual receipts as a small business. Business concerns included in this industry are those "primarily engaged in broadcasting images together with sound."[13] According to Commission staff review of the BIA Financial Network, Inc. Media Access Pro Television Database as of December 7, 2007, about 825 (66 percent) of the 1,250 commercial television stations in

[9] 5 U.S.C. § 603(b)(3).

[10] *Id*. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

[11] *Id.*

[12] 15 U.S.C. § 632.

[13] 2007 NAICS Code 515120. This category description states: "This industry comprises establishments primarily engaged in broadcasting images together with sound. These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public". U.S. Census Bureau 2007 NAICS Definitions, Television Broadcasting.

the United States have revenues of $13 million or less. However, in assessing whether a business entity qualifies as small under the above definition, business control affiliations[14] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

8. An element of the definition of "small business" is that the entity not be dominant in its field of operation. The Commission is unable at this time and in this context to define or quantify the criteria that would establish whether a specific television station is dominant in its market of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any television stations from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. It is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

9. **Radio Broadcasting.** The Small Business Administration defines a radio broadcasting entity that has $6.5 million or less in annual receipts as a small business.[15] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public."[16] According to Commission staff review of the BIA Financial Network, Inc. Media Access Radio Analyzer Database as of December 7, 2007, about 10,500 (95 percent) of 11,050 commercial radio stations in the United States have revenues of $6.5 million or less. We note, however, that in assessing whether a business entity qualifies as small under the above definition, business control affiliations[17] must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figures on which this estimate is based do not include or aggregate revenues from affiliated companies.

10. In this context, the application of the statutory definition to radio stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time and in this context to define or quantify the criteria that would establish whether a specific radio station is dominant in its field of operation. Accordingly, the foregoing estimate of small businesses to which the rules may apply does not exclude any radio station from the definition of a small business on this basis and is therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities, and our estimates of small businesses to which they apply may be over-inclusive to this extent.

11. **Daily Newspapers**. The SBA has developed a small business size standard for the census category of Newspaper Publishers; that size standard is 500 or fewer employees.[18] Census Bureau data for 2002 show that there were 5,159 firms in this category that operated for the entire year.[19] Of this

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[14] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[15] *See* 2007 NAICS code 515112.

[16] *Id.*

[17] "[Business concerns] are affiliates of each other when one business concern controls or has the power to control the other or a third party or parties controls or has the power to control both." 13 C.F.R. § 121.103(a)(1).

[18] 13 C.F.R. § 121.201; NAICS code 511110.

[19] U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 511110 (issued Nov. 2005).

total, 5,065 firms had employment of 499 or fewer employees, and an additional 42 firms had employment of 500 to 999 employees. Therefore, we estimate that the majority of Newspaper Publishers are small entities that might be affected by our action.

E. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

12. Broadcasters whose newspaper/broadcast combination is approved under the presumption that a proposed newspaper broadcast combination is consistent with the public interest when it initiates the programming of local newscasts of at least seven hours per week on a broadcast outlet that otherwise was not offering local newscasts prior to the combined operations must report to the Commission annually regarding how they have followed through on their commitment to initiate at least seven hours a week of local news. The *Order* modestly revises the newspaper/broadcast cross-ownership rule and otherwise retains the broadcast ownership rules currently in effect. With the exception of the foregoing reporting requirement, the *Order* imposes no increased reporting, recordkeeping or other compliance requirements.

F. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

13. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[20]

14. The *Order* modestly revises the newspaper/broadcast cross-ownership rule. Under the new rule, the Commission presumes a proposed newspaper/broadcast transaction is not inconsistent with the public interest if it meets the following test: (1) the market at issue is one of the 20 largest Nielsen Designated Market Areas ("DMAs"); (2) the transaction involves the combination of only one major daily newspaper and only one television or radio station; (3) if the transaction involves a television station, at least eight independently owned and operating major media voices (defined to include major newspapers and full-power TV stations) would remain in the DMA following the transaction; and (4) if the transaction involves a television station, that station is not among the top four ranked stations in the DMA. All other proposed newspaper/broadcast transactions would continue to be presumed not in the public interest.

15. Under the new rule, the negative presumption will be reversed in two circumstances. First, the newspaper or broadcast station would have to be considered "failed" or "failing." To be deemed "failed," the newspaper or broadcast station would have to have ceased publication or gone dark at least four months before the filing of an application, or be in bankruptcy proceedings. To be treated as "failing," the applicant must show that (a) the broadcast station has had an all-day audience share of 4 percent or lower, (b) the newspaper or broadcast station has had a negative cash flow for the previous three years, (c) the combination will produce public interest benefits, and (d) the in-market buyer is the only reasonably available candidate willing and able to acquire and operate the newspaper or station. Second, the negative presumption will be reversed when the combination is with a broadcast station that was not offering local newscasts prior to the combination, and the station will initiate at least seven hours

[20] 5 U.S.C. § 603 (c).

per week of local news programming after the combination. Under the new rule, the Commission would consider a negative presumption as establishing a high hurdle as it reviews the transactions on a case-by-case basis. In particular, applicants attempting to overcome a negative presumption about a newspaper television combination will need to demonstrate by clear and convincing evidence that post-merger the merged entity will increase the diversity of independent news outlets (*e.g.*, separate editorial and news coverage decisions) and increase competition among independent news sources in the relevant market. The Commission will use the following factors to inform its evaluation: (1) the extent to which cross-ownership will serve to increase the amount of local news disseminated through the affected media outlets in the combination; (2) whether each affected media outlet in the combination will exercise its own independent news judgment; (3) the level of concentration in the Nielsen DMA; and (4) the financial condition of the newspaper or broadcast station, and if the newspaper or broadcast station is in financial distress, the owner's commitment to invest significantly in newsroom operations. This approach will permit the Commission to balance the needs of the public for media and viewpoint diversity with its concerns about the financial health of traditional media outlets in the context of each particular transaction.

16. The Commission considered other alternatives, but the *Order* retains the other media ownership rules currently in effect. The Commission believes that the decisions it adopts in the *Order* serve our public interest goals, appropriately take account of the current media marketplace, and comply with our statutory responsibilities. It retains the radio/television cross-ownership rule currently in effect[21] to provide protection for diversity goals in local markets and thereby serve the public interest.

17. The *Order* finds that restrictions on common ownership of television stations in local markets continue to be necessary in the public interest to protect competition for viewers and in local television advertising markets. The Commission concludes that, in order to preserve adequate levels of competition within local television markets, the local TV ownership rule as it is currently in effect should be retained. Accordingly, an entity may own two television stations in the same DMA if: (1) the Grade B contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination. To determine the number of voices remaining after the merger, the Commission counts those broadcast television stations whose Grade B signal contours overlap with the Grade B signal contour of at least one of the stations that would be commonly owned.[22] With respect to the waiver standard for the local TV ownership rule, we will reinstate our requirement that a waiver applicant demonstrate that there is no buyer outside the market willing to purchase the station at a reasonable price. Reinstating this requirement will promote the market entry of small businesses, including minority- and women-owned businesses, because it will increase the likelihood that they will learn of purchasing opportunities.

18. The Commission does not revise its decision that DMAs are the more precise geographic markets. Nonetheless, in the instant *Order*, unlike in the *2002 Biennial Review Order*, we are not relaxing the local television ownership rule, and, accordingly, to avoid disruption to settled expectations, we retain the Grade B overlap provision. Furthermore, we believe that maintaining the Grade B provision will promote television service in rural areas by continuing to enable station owners to build or purchase an additional station in a remote corner of the DMA, beyond the reach of their Grade B signal, without regard to the top four/eight voices restriction.

19. The *Order* concludes that the current local radio ownership rule remains "necessary in

[21] 47 C.F.R. § 73.3555(c) (2002).

[22] 47 C.F.R. § 73.3555(b) (2002).

the public interest" to protect competition in local radio markets. As directed by the *Prometheus* court, the Commission also provides a reasoned justification for our decision to retain the existing numerical limits on local radio ownership and the AM subcaps. In addition, we deny or dismiss a number of pending petitions for reconsideration of the Commission's action concerning the local radio ownership rule in the *2002 Biennial Review Order*. Accordingly, an entity may own, operate, or control (1) up to eight commercial radio stations, not more than five of which are in the same service (*i.e*., AM or FM), in a radio market with 45 or more full-power, commercial and noncommercial radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market.[23] Retaining the AM subcap serves the public interest because the relative affordability of radio compared to other mass media makes it a likely avenue for new entry into the media business, particularly by small businesses.

20. For the same reasons recited by the Commission in 2002, we continue to believe that the dual network rule is necessary in the public interest to promote competition and localism. Accordingly, the *Order* retains the dual network rule in its current form. No petitions were filed asking the Commission to reconsider its decision to retain the rule, and no challenges were filed in *Prometheus*. The Commission sought comment in the *Further Notice* on whether the dual network rule remains necessary in the public interest to promote the Commission's policy goals.[24] Almost all of the few parties commenting on the rule in this proceeding support retaining the rule in its current form. Other parties argue that relaxing or eliminating the rule would increase concentration to the detriment of competition, diversity, and localism.[25] No specific changes to the dual network rule were proposed,[26] and only two parties - Fox and CBS - oppose retaining the rule in any form.[27] Neither of these parties has provided evidence convincing us that a departure from our 2002 decision to retain the rule in its current form is warranted.

21. The *Order* finds that the Commission is foreclosed from addressing the issue of the UHF discount in this proceeding by the 2004 Consolidated Appropriations Act. Although the Appropriations Act did not specifically mention the UHF discount, the *Prometheus* court observed that the statutory 39 percent national cap would be altered if the UHF discount were modified. The court observed that the

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[23] *See* 1996 Act § 202(b); 47 C.F.R. § 73.3555(a).

[24] *Further Notice*, 21 FCC Rcd at 8848 ¶ 33.

[25] AFL-CIO Comments at 58-62; SAG Comments at 34; Crudele Informal Comments at 2-3.

[26] One party's suggestion that the Commission should consider restrictions on the common ownership of broadcast and cable networks by a single entity is unrelated to the dual network rule. Desmond Comments at 8.

[27] Fox argues that the rule is unnecessary because antitrust review can address the Commission's concerns about competition in the national advertising and program production markets. As explained above, our concerns here are with competitive harms that would reduce program output, choices, quality, and innovation, to the detriment of viewers, and with reduced affiliate power and influence. We do not think that antitrust enforcement would protect against these harms. CBS contends that the variety of broadcast and cable networks available to viewers makes the rule no longer necessary in the public interest. We continue to believe that the four largest broadcast networks continue to serve a unique role in the electronic media and note that no other networks, cable or broadcast, reach nearly as large an audience as they do. Therefore, we do not believe that the advent of other networks makes this rule unnecessary.

Appropriations Act amended Section 202(h) to exclude "any rules relating to" the 39 percent national cap, and determined that the UHF discount was a rule "relating to" the national TV cap. The Third Circuit concluded that Congress "apparently intended to insulate the UHF discount from periodic review," but left open the possibility that the Commission may consider the discount in a rulemaking "outside the context of Section 202(h)."[28] Accordingly, the *Order* concludes that the UHF discount is insulated from review under Section 202(h).

22. The *Order* notes that in the pending proceeding entitled *Public Interest Obligations of TV Broadcast Licensees*[29] commenters ask the Commission to impose additional "public interest" obligations on television broadcasters. The *Order* explains that some of the issues raised in that proceeding have already been resolved by the Commission. With respect to other ideas raised in this proceeding such as whether the agency should establish more specific minimum public interest requirements for licensees and how broadcasters could improve political candidates' access to television, the Commission declines to take any further action at this time. Nevertheless, to the extent that circumstances change, the Commission agrees to revisit this decision and initiate proceedings as appropriate.

G. Report to Congress

23. The Commission will send a copy of this *Order*, including this FRFA, in a report to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.[30] In addition, the Commission will send a copy of this *Order*, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this *Order* and FRFA (or summaries thereof) will also be published in the Federal Register.[31]

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[28] *Prometheus*, 373 F.3d at 397.

[29] *Public Interest Obligations of TV Broadcast Licensees*, Notice of Inquiry, 14 FCC Rcd 21633 (1999).

[30] *See* 5 U.S.C. § 801(a)(1)(A).

[31] *See* 5 U.S.C. § 604 (b).

STATEMENT OF
CHAIRMAN KEVIN J. MARTIN

Re: *In the Matter of 2006 Quadrennial Regulatory Review*

Over the past year and a half the Commission has had to grapple with the most contentious and divisive issue to come before it: the review of the media ownership rules. Today's Order strikes a balance between preserving the values that make up the foundation of our media regulations while ensuring those regulations keep apace with the marketplace of today.

A robust marketplace of ideas is by necessity one that reflects varied perspectives and viewpoints. Indeed, the opportunity to express diverse viewpoints lies at the heart of our democracy. To that end, the FCC's media ownership rules are intended to further three core goals: competition, diversity, and localism.

Section 202(h) of the 1996 Telecommunications Act, as amended, requires the Commission to periodically review its broadcast ownership rules to determine "whether any of such rules are necessary in the public interest as a result of competition." It goes on to read, "The Commission shall repeal or modify any regulation it determines to be no longer in the public interest."

In 2003, the Commission conducted a comprehensive review of its media ownership rules, significantly reducing the restrictions on owning television stations, radio stations and newspapers in the same market and nationally. Congress and the court overturned almost all of those changes.

There was one exception. The court specifically upheld the Commission's determination that the absolute ban on newspaper/broadcast cross-ownership was no longer necessary. The court agreed that "…reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest." It has been over four years since the Third Circuit stayed the Commission's previous rules and over three years since the Third Circuit instructed the Commission to respond to the court with amended rules.

It is against this backdrop that the FCC undertook a lengthy, spirited, and careful reconsideration of our media ownership rules.

In 2003, when we last conducted a review of the media ownership rules, many expressed concern about the process. Specifically, people complained that there were not enough hearings, not enough studies, and not enough opportunity for comments and public input. When we began eighteen months ago, the Commission committed to conducting this proceeding in a manner that was more open and allowed for more public participation.

I believe that is what the Commission has done. First, we provided for a long public comment period of 120 days, which we subsequently extended. We held six hearings across the country at a cost of more than $200,000: one each in Los Angeles, California, Nashville, Tennessee, Harrisburg, Pennsylvania, Tampa Bay, Florida, Chicago, Illinois, and Seattle, Washington. And, we held two additional hearings specifically focused on localism in Portland, Maine and in Washington, DC. The goal of these hearings was to more fully and directly involve the American people in the process.

We listened to and recorded thousands of oral comments, and allowed for extensions of time to file written comments on several occasions. We've received over 166,000 written comments in this proceeding.

We spent almost $700,000 on ten independent studies. I solicited and incorporated input from all of my colleagues on the Commission about the topics and authors of those studies. We put those studies out for peer review and for public comment and made all the underlying data available to the public.

Although not required, I took the unusual step of sharing with the public the actual text of the one rule I thought we should amend. Because of the intensely controversial nature of the media ownership proceeding and my desire for an open and transparent process, I wanted to ensure that Members of Congress and the public had the opportunity to review my proposal prior to any Commission action.

We cannot ignore the fact that the media marketplace is considerably different than it was when the newspaper/broadcast cross-ownership rule was put in place more than thirty years ago. Back then, cable was a nascent service, satellite television did not exist and there was no Internet. Indeed, the newspaper/broadcast cross-ownership rule is the only rule not to have been updated in 3 decades, despite that fact that FCC Chairmen – both Democrat and Republican—have advocated doing so. In fact, Chairman Reed Hundt argued for relaxation in 1996 noting, “the newspaper/broadcast cross-ownership rule is right now impairing the future prospects of an important source of education and information: the newspaper industry.” Application of Capital Cities/ABC, Inc., Memorandum Op. & Order, 11 FCC Rcd 5841, 5906 (1996). And noted above, in 2003 the Third Circuit recognized this fact when it upheld the Commission’s elimination of the newspaper/broadcast cross-ownership ban, affirming the Commission’s determination that it was “no longer in the public interest.”

Consumers have benefited from the explosion of new sources of news and information. But according to almost every measure, newspapers are struggling. At least 300 daily papers have stopped publishing over the past thirty years. Their circulation is down, and their advertising revenue is shrinking.

Newspapers in financial difficulty oftentimes have little choice but to scale back local news gathering to cut costs. In 2007 alone, 24 newsroom staff at The Boston Globe were fired, including 2 Pulitzer Prize-winning reporters; the Minneapolis Star Tribune fired 145 employees, including 50 from their newsroom; 20 were fired by the Rocky Mountain News; the Detroit Free Press and The Detroit News announced cuts totaling 110 employees; and the San Francisco Chronicle planned to cut 25% of its newsroom staff.

Some have suggested that it is not in the business of the FCC to regulate newspapers and their condition should be of no concern to us. But if that is the case, then why do we have rules about what newspapers can or cannot own?

Without newspapers and their local news gathering efforts, we would be worse off. We would be less informed about our communities and have fewer outlets for the expression of independent thinking and a diversity of viewpoints. I believe a vibrant print press is one of the institutional pillars upon which our free society is built. In their role as watchdog and informer of the citizenry, newspapers often act as a check on the power of other institutions and are the voice of the people. Allowing cross-ownership may help to forestall the erosion in local news coverage by enabling companies to share the high fixed costs of newsgathering across multiple media platforms.

Today’s Order amends the 32-year-old absolute ban on newspaper/broadcast cross-ownership. The revised newspaper/broadcast cross-ownership rule would allow a newspaper to purchase a radio station in the largest 20 cities in the country or a television station in such cities—but not one of the top four television stations—as long as 8 independent major voices remain in the market. This relatively minor loosening of the ban on newspaper/broadcast cross-ownership in markets where there are many voices and sufficient competition will help strike a balance between ensuring the quality of local news gathering while guarding against too much concentration.

As I have previously stated, I always intended the negative presumption for all other transactions to be a very high hurdle. As I testified before Congress, I invited suggestions from my colleagues and those in the public interest community as to how we could tighten that standard so everyone would agree it was not a loophole. The edits we included in the order were made at the suggestion of the public interest and consumer advocacy groups to make more meaningful the presumption against transactions in smaller markets.

I believe we did that today by expressly stating that we will require any applicant attempting to overcome a negative presumption to demonstrate by clear and convincing evidence that post-merger, the merged entity will increase the diversity of independent news outlets and increase competition among independent news sources in the relevant market. Our analysis of the four factors will inform this determination.

In contrast to the FCC's actions 4 years ago and in response to many of the public comments we received in the proceeding, we do not loosen any other ownership rule. We do not permit companies to own any more radio or television stations either in a single market or nationally. Indeed, this rule change is notably more conservative in approach than the remanded newspaper/broadcast cross-ownership rule that the Commission adopted in 2003. That rule would have allowed transactions in the top 170 markets. The rule we adopt today would allow only a subset of transactions in only the top 20 markets, which would still be subject to an individualized determination that the transaction is in the public interest.

The new rule balances the need to support the availability and sustainability of local news while not significantly increasing local concentration or harming diversity.

As the Commission revises its media ownership rules, we must not lose sight of two critical public interest goals – localism and diversity. Indeed, I believe that it is incumbent upon the Commission to do everything it can right now to further these goals and I am pleased the Commission is acting on both today. As difficult as these issues are they are some of the most important to come before us. In fact as many have noted throughout this proceeding, promoting localism and diversity as well as responding to the Congress and the court on the media ownership rules themselves, have been pending before the Commission for far too long. These issues also are ripe for decision and should not be put off any longer.

I appreciate that some of my colleagues and I do not share the same views on the amending the newspaper broadcast cross-ownership rule. But I reject the claims that the process has been unfair or even too rushed. At every step of the process during the last 18 months, whether it came to picking dates or cities for public hearings or commissioning independent studies, I have continually sought, albeit unsuccessfully, consensus with my colleagues throughout this process. For instance, I provided my colleagues a public notice announcing dates for all the remaining hearings, including the Seattle hearing, over a month before it was held, but they did not vote to release it. When we finally announced the Seattle hearing date publicly a week prior to the hearing, they objected that we hadn't provided enough notice. They also claim I didn't listen to the comments of the people in Seattle. However, only 2 people even mentioned newspaper cross-ownership, and one in fact supported relaxation. Indeed, the majority of people expressed concern about consolidation generally, and I believe we are responding by *not* changing the local TV rule, the local radio rule, the local TV/radio rule, the national TV cap, or the national cable cap.

Unfortunately, my Democratic colleagues have been quick to say no to whatever was proposed but never getting to yes or even putting forward their own ideas on the substance of the issues before us.

They wanted public hearings. We agreed. And we provided six.

They asked for independent studies. We agreed.

Only one Commissioner, later in the process, suggested authors for a study. We agreed again, and created another study for those authors to do.

They asked for the studies to be made public. We agreed. They then complained that the studies were posted on the web too soon.

They asked for the studies to be peer reviewed. We agreed. They asked for peer reviews to be made public. We agreed. They then presented us with new individuals they wanted to do additional peer reviews. We again agreed. They then demanded an entirely separate comment cycle on just the peer reviews.

They asked me to complete the localism hearings. We agreed. They then wanted to complete the localism report. We again agreed. They wanted an NPRM on localism. We again agreed. They then wanted more time for the Commission to consider the localism issues and do a final order.

And finally, they demanded I share with the public my proposed rule. I agreed. They then criticized me for making the proposal public in *The New York Times*. They asked for time for the public to comment on my proposal. I agreed. They then demanded a new NPRM on the proposal with many months of comment.

This is a long way of stating the obvious. For a year and half, I have attempted to respond to the legitimate concerns about conducting an open and transparent process with ample opportunity for public input. At each step along the way, as I was crossing the goal line, the goal posts were moved.

While I have and will continue to seek consensus, I have come to the conclusion that it won't ever be possible to ever reach consensus on the media ownership issue. Nevertheless, it is important for the Commission and for the American people that we render a decision on this issue. We must respond to the court remand and to Congress which requires us to review the rules. And we must provide certainty to the media industry which for years has operated in a climate of uncertainty.

In sum, I believe the time has come to act. And I believe today's very modest relaxation of the one rule not relaxed since 1975 is appropriate.

ATTACHMENT
TIMELINE OF MEDIA OWNERSHIP REVIEW PROCESS

July 2, 2003	Commission releases 2002 Biennial Review Order
June 24, 2004	The Third Circuit Court of Appeals issues its decision in *Prometheus v. FCC*, affirming some Commission decisions and remanding others for further justification or modification
July 24, 2006	The Commission releases *Further Notice of Proposed Rulemaking* to call for comment on the rules and to seek arguments and factual data about their impact on competition, localism and diversity.
September 8, 2006	FCC Announces Public Hearing in Los Angeles on Media Ownership
September 26, 2006	FCC Announces Details for Public Hearing on Media Ownership in Los Angeles, CA
September 29, 2006	FCC Announces Further Details for Public Hearing on Media Ownership in Los Angeles, CA
October 6, 2006	Public Hearing on Media Ownership, Los Angeles & El Segundo, CA
October 23, 2006	Comments due in response to July 26, 2006 Further Notice of Proposed Rulemaking
November 14, 2006	FCC Announces Public Hearing in Nashville, Tennessee on Media Ownership
November 22, 2006	FCC Names Economic Studies to Be Conducted As Part of Media Ownership Rules Review
December 1, 2006	FCC Announces Details for Public Hearing on Media Ownership in Nashville, Tennessee
December 5, 2006	FCC Announces Revised Agenda for Public Hearing on Media Ownership in Nashville, Tennessee
December 11, 2006	FCC Announces Further Revised Agenda for Public Hearing on Media Ownership in Nashville, Tennessee
December 11, 2006	Public Hearing on Media Ownership, Nashville, TN
January 16, 2007	Reply Comments due in response to July 26, 2006 Further Notice of Proposed Rulemaking
February 8, 2007	FCC Announces Public Hearing in Harrisburg, PA on Media Ownership
February 16, 2007	FCC Announces Details for Public Hearing on Media Ownership in Harrisburg,

	PA
February 21, 2007	FCC Announces Further Details for Public Hearing on Media Ownership in Harrisburg, Pennsylvania
February 23, 2007	Public Hearing on Media Ownership, Harrisburg, PA
March 13, 2007	FCC Announces Public Hearing on Media Ownership in Tampa-St. Petersburg, Florida Area
April 13, 2007	FCC Announces Details for Public Hearing on Media Ownership in Tampa-St. Petersburg Florida
April 23, 2007	FCC Announces Agenda for Public Hearing on Media Ownership in Tampa-St. Petersburg Florida
April 26, 2007	FCC Announces Revised Agenda for Public Hearing on Media Ownership in Tampa-St. Petersburg Florida
April 30, 2007	Public Hearing on Media Ownership, Tampa, FL
June 8, 2007	FCC Announces Localism Hearing in Portland, Maine June 28, 2007
June 12, 2007	FCC Announces Details for Localism Hearing in Portland, Maine on June 28
June 25, 2007	FCC Announces Agenda for Public Hearing on Localism in Portland, Maine
June 28, 2007	FCC Holds Hearing on Localism Issues in Portland, Maine
July 19, 2007	FCC Announces Public Hearing on Media Ownership in Chicago, Illinois
July 31, 2007	FCC Releases and Seeks Comment on Research Studies on Media Ownership
August 1, 2007	FCC Releases Second Further Notice of Proposed Rulemaking
September 4, 2007	FCC Announces Details for Public Hearing on Media Ownership in Chicago, Illinois
September 17, 2007	FCC Announces Agenda for Public Hearing on Media Ownership in Chicago, Illinois
September 20, 2007	Public Hearing on Media Ownership, Chicago, IL
September 28, 2007	Media Bureau Extends Filing Deadlines for Comments on Media Ownership Studies
October 1, 2007	Comments due in response to August 1, 2007 Second Further Notice of Proposed Rulemaking

October 16, 2007	Reply Comments due in response to August 1, 2007 Second Further Notice of Proposed Rulemaking
October 22, 2007	Comments due in response to July 31, 2007 release of media studies
October 24, 2007	FCC to Hold Localism Hearing and Open Commission Meeting, Wednesday, October 31, 2007
October 29, 2007	FCC Announces Panelists for Public Hearing on Localism at FCC Headquarters
October 31, 2007	FCC Holds Public Hearing on Localism in Washington, DC
November 1, 2007	Reply Comments Due in response to July 31, 2007 release of media studies
November 2, 2007	FCC Announces Public Hearing on Media Ownership in Seattle, Washington
November 8, 2007	FCC Announces Agenda and Witnesses for Public Hearing on Media Ownership in Seattle, Washington
November 9, 2007	Public Hearing on Media Ownership, Seattle, WA
November 13, 2007	Chairman Martin Publishes Revision to Newspaper/Broadcast Cross-Ownership Rule
December 4, 2007	Letter sent from Secretary of Commerce, Carlos M. Gutierrez to the Honorable Harry Reid, Senate Majority Leader, expressing opposition to legislation that would delay FCC action on media ownership rules
December 11, 2007	The Commission waives the sunshine period prohibition contained in section 1.1203 of the Commission's rules, 47 C.F.R. § 1.1203, until 5:30 pm on Friday, December 14, 2007
December 14, 2007	Sunshine rules go into effect at 5:30pm; Last day to comment on Chairman's proposed rule
December 18, 2007	FCC Open Meeting

DISSENTING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re. 2006 Quadrennial Media Ownership Review

Today's decision would make George Orwell proud. We claim to be giving the news industry a shot in the arm—but the real effect is to reduce total newsgathering. We shed crocodile tears for the financial plight of newspapers—yet the truth is that newspaper profits are about double the S&P 500 average. We pat ourselves on the back for holding six field hearings across the United States—yet today's decision turns a deaf ear to the thousands of Americans who waited in long lines for an open mike to testify before us. We say we have closed loopholes—yet we have introduced new ones. We say we are guided by public comment—yet the majority's decision is overwhelmingly opposed by the public as demonstrated in our record and in public opinion surveys. We claim the mantle of scientific research—even as the experts say we've asked the wrong questions, used the wrong data, and reached the wrong conclusions.

I am not the only one disturbed by this illogical scenario. Congress and the American people have done everything but march down to Southwest DC and physically shake some sense into us. Everywhere we go, the questions are the same: Why are we rushing to encourage more media merger frenzy when we haven't addressed the demonstrated harms caused by previous media merger frenzy? Women and minorities own low single-digit percentages of America's broadcast outlets and big consolidated media continues to slam the door in their faces. It's going to take some major policy changes and a coordinated strategy to fix that. Don't look for that from this Commission.

Instead we are told to be content with baby steps to help women and minorities—but the fine print shows that the real beneficiaries will be small businesses owned by white men. So even as it becomes abundantly clear that the real cause of the disenfranchisement of women and minorities is media consolidation, we give the green light to a new round of—yes, you guessed it—media consolidation.

Local news, local music and local groups so often get shunted aside when big media comes to town. Commissioner Adelstein and I have heard the plaintive voices of thousands of citizens all across this land in dozens of town meetings and public forums. From newscasters fired by chain owners with corporate headquarters thousands of miles away to local musicians and artists denied airtime because of big media's homogenization of our music and our culture. From minorities reeling from the way big media ignores their issues and caricatures them as people to women saying the only way to redress their grievances is to give them a shot to compete for use of the people's airwaves. From public interest advocates fighting valiantly for a return of localism and diversity to small, independent broadcasters who fight an uphill battle to preserve their independence. It will require tough rules of the road to redress our localism and diversity gaps. Do you see any such rules being passed today? To the idea that license holders should give the American people high quality programming in return for free use of the public airwaves, the majority answers that we need more study of problems that have been documented and studied to death for a decade and more. Today's outcome is the same old same old: one more time, we're running the fast-break for our big media friends and the four corner stall for the public interest.

It is time for the American people to understand the game that's being played here. Big media doesn't want to tell the full story, of course, but I have heard first-hand from editorial page editors who have told me they can cover any story, save one—media consolidation, and that they have been instructed to stay away from that one. But that's another story.

Today's story is a majority decision unconnected to good policy and not even incidentally concerned with encouraging media to make our democracy stronger. We are not concerned with gathering valid data, conducting good research, or following the facts where they lead us.

Our motivations are less Olympian and our methodology far simpler—we generously ask big media to sit on Santa's knee, tell us what it wants for Christmas, and then push through whatever of these wishes are politically and practically feasible. No test to see if anyone's been naughty or nice. Just another big, shiny present for the favored few who already hold an FCC license—and a lump of coal for the rest of us. Happy holidays!

If you need convincing of just how non-expertly this expert agency has been acting lately, you couldn't have a better example than the formulation of the cross-ownership rule that the majority is adopting today. I know it's a little detailed to see how the sausage is made, but it's worth a listen.

On November 2, 2007—with just a week's notice—the FCC announced that it would hold its final media ownership hearing in Seattle. Despite the minimal warning, 1,100 citizens turned out to give intelligent and impassioned testimony on how they believed the agency should write its media ownership rules. Little did they know that the fix was already in, and that the now infamous *New York Times* op-ed was in the works announcing a highly-detailed cross-ownership proposal.

Put bluntly, those Commissioners and staff who flew out to Seattle with staff, the sixteen witnesses, the Governor, the State Attorney General and all the other public officials who came, plus the 1,100 Seattle residents who had chosen to spend their Friday night waiting in line to testify were, as Rep. Jay Inslee put it, treated like "chumps." Their comments were not going to be part of the agency's formulation of a draft rule—it was just for show, to claim that the public had been given a chance to participate. The agency had treated the public like children allowed to visit the cockpit of an airliner—not actually allowed to fly the plane, of course, but permitted for a brief, false moment to imagine that they were.

The *New York Times* op-ed appeared on November 13, the next business day after the Seattle hearing. That same day, a unilateral public notice was issued, providing just 28 days for people to comment on the specific proposal, with no opportunity for replies. The agency received over 300 comments from scholars, concerned citizens, public interest advocates, and industry associations—the overwhelming majority of which condemned the Chairman's plan. But little did these commenters know that on November 28, two weeks ***before*** their comments were even due, the draft Order on newspaper-broadcast cross ownership had already been circulated. Once again, public commenters were treated as unwitting and unwilling participants in a Kabuki theater.

Then, last night at 9:44 pm—just a little more than twelve hours before the vote was scheduled to be held and long after the Sunshine period had begun—a significantly revised version of the Order was circulated. Among other changes, the item now granted all sorts of permanent new waivers and provided a significantly-altered new justification for the 20-market limit. But the revised draft mysteriously deleted the existing discussion of the "four factors" to be considered by the FCC in examining whether a proposed combination was in the public interest. In its place, the new draft simply contained the cryptic words "[Revised discussion to come]." Although my colleagues and I were not apprised of the revisions, *USA Today* fared better because it apparently got an interview that enabled it to present the Chairman's latest thinking. Maybe we really are the Federal Newspaper Commission.

At 1:57 this morning, we received a new version of the proposed test for allowing more newspaper-broadcast combinations. I can't say that I fully appreciate the test's finer points given the lateness of the hour and the fact that there was no time afforded to parse the finer points of the new rule. But this much is clear: the new version keeps the old loopholes and includes two new one pathways to cross ownership approval. So please don't buy the line that the rule we adopt today involves fewer loopholes—it adds new ones. Finally, this morning at 11:12 a.m. as I was walking out my office door to come to this meeting, we received an e-mail containing additional changes. The gist of one of these seems to be that the Commission need not consider all of the "four factors" in all circumstances.

This is not the way to do rational, fact-based, and public interest-minded policy making. It's actually a great illustration of why administrative agencies are required to operate under the constraints of administrative process—and the problems that occur when they ignore that duty. At the end of the day, process matters. Public comment matters. Taking the time to do things right matters. A rule reached through a slipshod process, and capped by a mad rush to the finish line, will—purely on the merits—simply not pass the red face test. Not with Congress. Not with the courts. Not with the American people.

It's worth stepping back for a moment from all the detail here to look at the fundamental rationale behind today's terrible decision. Newspapers need all the help they can get, we are told. A merger with a broadcast station in the same city will give them access to a revenue stream that will let them better fulfill their newsgathering mission. At the same time, we are also assured, our rules will require "independent news judgment" (at least among consolidators outside the top 20 markets). In other words, we can have our cake and eat it too—the economic benefits of consolidation without the reduction of voices that one would ordinarily expect when two news entities combine.

But how on earth can this be? To begin with, to the extent that the two merged entities remain truly "independent," then there won't be the cost savings that were supposed to justify the merger in the first place. On the other hand, if independence merely means maintaining two organizational charts for the same newsroom, then we won't have any more reporters on the ground keeping an eye on government. Either way, we can't have our cake and eat it, too.

Also, since when do unprofitable businesses support themselves by merging with profitable ones—and then sink ***more*** resources into the money-losing division simply as a public service? Think about it this way. If any of us were employed by a struggling company, and we suddenly learned that a Wall Street financier had obtained control, would we (1) clap our hands with joy because we expect the new owner is going to throw a bunch of cash our way and tell us to keep on doing what we'd been doing, except more lavishly or (2) start to fear for our jobs and brace for a steady diet of cost cutting?

Here's my prediction on how it will really work. Mergers will be approved in both the top 20 and non-top-20 markets—towns big and small—because the set of exceptions we announce today have all the firmness of a bowl of Jell-O. Regardless of our supposed commitment to "independent news judgment" the two entities' newsrooms will be almost completely combined, with round after round of job cuts in order to cut costs. It's interesting to hear the few proponents of this rule bemoan the lost jobs that they say result from failing newspapers. Ask them this: in this era of consolidation in so many industries, isn't cutting jobs about the first thing a merged entity almost always does so it can show Wall Street it is really serious about cutting costs and polishing up the next quarterly report? These job losses are the ***result*** of consolidation. And more consolidation will mean more lost jobs. Newly-merged entities will attempt to increase their profit margins by raising advertising rates and relentless cost-cutting. Herein is the ***real*** economic justification for media consolidation within a single market.

The news isn't so good for other businesses in the consolidated market, either. Think about the other broadcast stations there. It's just like Wal-Mart coming to town—the existing news providers look around at the new reality and figure out pretty fast that they ought to head for the exit when it comes to producing news. Now, it may not be as stark as actually cancelling the evening news—it could just mean doing more sports or more weather or more ads during that half hour. But at the end of the day, the combined entity is going to have a huge advantage in producing news—and the other stations will make a reasonable calculation to substantially reduce their investment in the business. This is why, by the way, experts have been able to demonstrate—***in the record before the FCC, using the FCC's own data***—that cross ownership leads to ***less*** total newsgathering in a local market. And that has large and devastating effects on the diversity and vitality of our civic dialogue.

Let's also be careful not get too carried away with the supposed premise for all this contortionism, namely the poor state of local newspapers. The death of the traditional news business is often greatly exaggerated. The truth remains that the profit margins for the newspaper industry last year averaged around 17.8%; the figure is even higher for broadcast stations. As the head of the Newspaper Association of America put it in a Letter to the Editor of the *Washington Post* on July 2 of this year: "The reality is that newspaper companies remain solidly profitable and significant generators of free cash flow." And as Member after Member Congress has reminded us, our job is not to ensure that newspapers are profitable—which they mostly are. Our job is to protect the principles of localism, diversity and competition in our media.

Were newspapers momentarily discombobulated by the rise of the Internet? Probably so. Are they moving now to turn threat into opportunity? Yes, and with signs of success. Far from newspapers being gobbled up by the Internet, we ought to be far more concerned with the threat of big media joining forces with big broadband providers to take the wonderful Internet we know down the same road of consolidation and control by the few that has already inflicted such heavy damage on our traditional media.

In the final analysis, the real winners today are businesses that are in many cases quite healthy, and the real losers are going to be all of us who depend on the news media to learn what's happening in our communities and to keep an eye on local government. Despite all the talk you may hear today about the threat to newspapers from the Internet and new technologies, today's *Order* actually deals with something quite old-fashioned. Powerful companies are using political muscle to sneak through rule changes that let them profit at the expense of the public interest. They are seeking to improve their economic prospects by capturing a larger percentage of the news business in communities all across the United States.

Let's get beyond the weeds of corporate jockeying and inking up our rubber stamps for a new round of media consolidation to look for a moment at what we are ***not*** doing today. That's the real story, I think—that the important issues of minority and female ownership and broadcast localism and how they are being short-changed by today's rush to judgment.

Minority and Female Ownership

Racial and ethnic minorities make up 33 percent of our population. They own a scant 3 percent of all full-power commercial TV stations. And that number is plummeting. Free Press recently released a study showing that during just the past year the number of minority-owned full-power commercial television stations declined by 8.5%, and the number of African American-owned stations decreased ***by nearly 60%***. It is almost inconceivable that this shameful state of affairs could be getting worse; yet here we are.

In most places there is something approaching unanimity that this has to change. Broadcasters, citizens, Members of Congress, and every leading civil rights organization agree that the status quo is not acceptable. Each of my colleagues has recognized, I believe, that paltry levels of minority and female ownership are a reality—which makes today's decision all the more disappointing. There was a real opportunity to do something meaningful today after years of neglect, and we blew it.

It didn't have to be this way. I proposed both a process and a solution. We should have started by getting an accurate count of minority and female ownership—the one that the Congressional Research Service and the Government Accountability Office both just found that we didn't have. The fact that we don't even know how many minority and female owners there are is indicative of how low this issue is on the FCC's list of priorities. We also should have convened an independent panel proposed by Commissioner Adelstein, and endorsed by many, that would have reviewed all of the proposals before us, prioritized them, and made recommendations for implementation. We could have completed this process in ninety days or less and then would have been ready to act.

Today's item ignores the pleas of the minority community to adopt a definition of "Eligible Entity" that could actually help their plight. Instead, the majority directs their policies at general "small businesses"— a decision that groups like Rainbow/Push and the National Association of Black Owned Broadcasters assert will do little or nothing for minority owners. Similarly, MMTC and the Diversity and Competition Supporters conclude that they would rather have no package at all than one that includes this definition. Lack of a viable definition poisons the headwaters. Should we wonder why the fish are dying downstream?

So while I can certainly support the few positive changes in this item that do not depend on the definitional issue—such as the adoption of a clear non-discrimination rule—these are overshadowed by the truly wasted opportunity to give potential minority and female owners a seat at the table they have been waiting for and have deserved for far too long. My fear now is that with cross ownership done, the attentions of this Commission will turn elsewhere.

Localism

At the same time that we have shamefully ignored the need to encourage media ownership by women and minorities, we have also witnessed a dramatic deterioration of the public interest performance of all our licensees. We have witnessed the number of statehouse and city hall reporters declining decade after decade, despite an explosion in state and local lobbying. The number of channels have indeed multiplied, but there is far less local programming and reporting being produced.

Are you interested in learning about local politics from the evening news? About 8 percent of such broadcasts contain any local political coverage at all, including races for the House of Representatives, and that was during the 30 days before the last presidential election. Interested in how TV reinforces stereotypes? Consider that the local news is four times more likely to show a mug shot during a crime story if the suspect is black rather than white.

The loss of localism impacts our music and entertainment, too. Just this morning, I had an e-mail from a musician who took a trip of several hundred miles and heard the same songs played on the car radio everywhere he traveled. Local artists, independent creative artists and small businesses are paying a frightful price in lost opportunity. Big consolidated media dampens local and regional creativity, and that begins to mess around pretty seriously with the genius of our nation.

All this is a travesty. We allow the nation's broadcasters to use half a trillion dollars of spectrum—for free. In return, we require that they serve the public interest: devoting at least some airtime for worthy programs that inform viewers, support local arts and culture, and educate our children—in other words, that aspire to something beyond just minimizing costs and maximizing revenue.

Once upon a time, the FCC actually enforced this bargain by requiring a thorough review of a licensee's performance every three years before renewing the license. But during decades of market absolutism, we pared that down to "postcard renewal," a rubber stamp every eight years with no substantive review.

To begin with, the FCC needs to reinvigorate the license-renewal process. We need to look at a station's record every three or four years. I am disappointed that the majority so cavalierly dismisses this idea. And we should be actually ***looking*** at this record. Did the station show original programs on local civic affairs? Did it broadcast political conventions? In an era where too many owners live thousands of miles away from the communities they allegedly serve, do these owners meet regularly with local leaders and the public to receive feedback? Why don't we make sure that's done ***before*** we allow more consolidation?

In 2004, the Commission opened up a Notice of Inquiry to consider ways to improve localism by better enforcing the *quid pro quo* between the nation's broadcasters and the public. The Notice addressed many of the questions raised by earlier, dormant proceedings dating from years before. Today's Localism Notice asks more questions and tees up meritorious ideas—but again my question: why the rush to vote more consolidation now, consolidation that has been the bane of localism, and why put off systematic actions to redress the harms consolidation has inflicted?

Our FCC cart is ahead of our horse. Before allowing Big Media to get even bigger—and to start the predictable cycle of layoffs and downsizing that is the inevitable result of, indeed the economic rationale for, many types of mergers—we should be enforcing clear obligations for each and every FCC licensee.

<u>Conclusion</u>

Those who look for substantive action on these important issues concerning localism and minorities will look in vain, I predict, once the majority works its way on cross ownership. We are told that we cannot deal with localism and minority ownership because that would require ***delay***. But these questions have been before the Commission for almost a decade—and they have been ignored year after year. These issues could have been—should have been—teed up years ago. We begged for that in 2003 when we sailed off on the calamitous rules proposed by Chairman Powell and pushed through in another mad rush to judgment. Don't tell me it can't be done. It should have been done years ago. And we had the chance again this time around. Now, because of a situation not of Commissioner Adelstein's or my making, we are accused of delaying just because we want to make things better before the majority makes them far worse. I see.

When I think about where the FCC has been and where it is today, two conclusions:

First, the consolidation we have seen so far and the decision to treat broadcasting as just another business has ***not*** produced a media system that does a better job serving most Americans. Quite the opposite. Rather than reviving the news business, it has led to ***less*** localism, ***less*** diversity of opinion and ownership, ***less*** serious political coverage, ***fewer*** jobs for journalists, and the list goes on.

Second, I think we have learned that the purest form of commercialism and high quality news make uneasy bedfellows. As my own hero, Franklin Delano Roosevelt, put it in a letter to Joseph Pulitzer, "I have always been firmly persuaded that our newspapers cannot be edited in the interests of the general public from the counting room." So, too, for broadcast journalism. This is not to say that good journalism is incompatible with making a profit—I believe that both interests can and must be balanced. But when TV and radio stations are no longer required by law to serve their local communities, and are owned by huge national corporations dedicated to cutting costs through economies of scale, it should be no surprise that, in essence, viewers and listeners have become the products that broadcasters sell to advertisers.

We could have been—should have been—here today lauding the best efforts of government to reverse these trends and to promote a media environment that actually strengthens American democracy rather than weakens it. Instead, we are marking not just a lost opportunity but the allowance of new rules that head media democracy in exactly the wrong direction.

I take great comfort from the conclusion of another critic of the current media system, Walter Cronkite, who said, "America is a powerful and prosperous nation. We certainly should insist upon, and can afford to sustain, a media system of which we can be proud."

Now it's up to the rest of us. The situation isn't going to repair itself. Big media is not going to repair it. This Commission is not going to repair it. But the people, their elected representatives, and attentive courts ***can*** repair it. Last time the Commission went down this road, the majority heard and felt the outrage of millions of citizens and Congress and then the court. Today's decision is just as dismissive of good process as that earlier one, just as unconcerned with what the people have said, just as heedless of the advice of our oversight committees and many other Members of Congress, and just as stubborn—perhaps even more stubborn—because this time it knows, or should know, what's coming. Last time a lot of insiders were surprised by the country's reaction. This time they should be forewarned. I hope, I really hope, that today's majority decision will be consigned to the fate it deserves and that one day in the not too distant future we can look back upon it as an aberration from which we eventually recovered. We have had a dangerous, decades-long flirtation with media consolidation. I would welcome a little romance with the public interest for a change.

DISSENTING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN

Re: *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and To Build on Earlier Studies; Public Interest Obligations of TV Broadcast Licensees*

Unprecedented media consolidation in recent years has allowed giant multinational media conglomerates to dominate growing numbers of local news markets from coast to coast. These media giants have swallowed up locally owned newspapers, TV and radio stations across America. This has presented challenges to both our culture and our democracy by undercutting the American tradition of a local press, rooted in and responsive to their own communities.

Central to our American democracy is a rich and varied supply of news and information. An informed citizenry requires the "uninhibited marketplace of ideas," where there is an open exchange of communications regarding music, news, information and entertainment programming over the public airwaves. Broadcasters, along with newspapers, still produce, disseminate, and ultimately control the news, information, and entertainment programs that most inform the discourse, debate, and the free exchange of ideas. As the Supreme Court has observed, "it is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences."[1] That right is enshrined in the First Amendment to the U.S. Constitution.

By moving forward now with relaxation of the newspaper-broadcast cross-ownership rule, the majority ignores the repeated pleas of the American people and their representatives in Congress. There is no time-sensitive issue that compels us to act today. In fact, we were asked by leaders in Congress, including our oversight committees, to defer today and conduct a more inclusive process. That we are moving forward when the voices that matter are asking us to refrain defies the imagination.

The FCC has never attempted such a brazen act of defiance against Congress. Like the Titanic, we are steaming at full speed despite repeated warnings of danger ahead. We should have slowed down rather than put everything at risk.

The reasons for Congressional concern were underscored by the frantic scramble to make major policy changes at the last minute to this item. Late last night, there was a brand new proposal to provide waivers to 42 newspaper-television combinations. And not until early this morning, we learned of massive changes to the waiver standards – an issue of grave concern to me and a number of leaders in Congress. The majority argues this item is the product of long and careful deliberation. But after an odyssey through the Commission and the Courts, massive changes and new, previously unseen waivers were adopted in the dead of night on the eve of a vote. That hardly inspires confidence that this was an open, transparent and deliberative process.

The choices made by the majority are stark. The only entities asking for relief are the very media giants we are charged with overseeing. As we were reminded on Capitol Hill, the law does not say we are to serve those who seek to profit by using the public airwaves. The law says we are to serve the public

[1] *Red Lion Broadcasting Co. v. F.C.C.,* 395 U.S. 367, 390; 89 S.Ct 1794, 1807 (1969).

interest. And the public has repeatedly told us they are not interested in further media consolidation.

Traveling across the country, we have heard this message in community after community. It is a nonpartisan chorus. Americans from all walks of life and all political perspectives, whether right or left and virtually everybody in between, do not want a handful of companies dominating their primary sources of news, information and entertainment. American distrust of the concentration of power is as old as our nation itself, and is rooted in the American spirit.

The millions of Americans who have spoken up scored a solid victory in forcing the majority to back away from further changes to the Commission's remaining TV and radio ownership rules. Nevertheless, by rolling back the cross-ownership rule, today's decision will open a nationwide bazaar of consolidation that flies in the face of overwhelming public sentiment. Today's decision says to all those people who spoke to us across the country, in churches, synagogues and city halls, "you were wrong. We here inside the Beltway somehow know what is best for you -- better than you know for yourselves." It is a big mistake for big government to say big media is good for you.

Well, I for one believe in the people who pleaded for us to stop further media consolidation. They have extensive experience in the field, devouring media at an enormous rate. The statute governing media ownership is unusually broad in allowing us leeway to define the public interest. Of course, the FCC cannot make these decisions solely by popular opinion, but we walk a dangerous course when three out of five unelected bureaucrats overrule the American people, a much better judge and jury.

People understand what study after study confirms. Despite the growth of other media delivery systems, broadcasting and newspapers are still the most pervasive of all platforms. When people look for local news and information, they turn to their local newspapers and TV stations. For example, 89 percent of people say traditional media are their most important sources of news and current affairs.[2] Free over-the-air broadcasting licenses are scarce, and broadcasters still have an enormous impact on the free exchange of ideas.

This debate is fundamentally about priorities. As we solicited the views of citizens across the country, we did not hear a clamor for relaxation of the cross-ownership rules. We only hear that from media company lobbyists inside the Beltway.

The public is concerned about the lack of responsiveness of their media outlets to what is happening in their local communities, their local artists, their local civic and cultural affairs. They are concerned that people of color and women own too few outlets to have their unique voices heard over the airwaves. They are furious about the level of sexual, violent and degrading material they are seeing and believe media consolidation has something to do with it. And they want us to address the public interest obligations of broadcasters first.

That is why I have insisted that we address and implement improvements to localism and diversity of ownership <u>before</u> – not after – we address the media ownership rules.
To get it right, I called for an independent, bipartisan panel to guide us on a course to implement improvements in the level of ownership of media outlets by women and people of color. Many members

[2] *See Further Comments Of Consumers Union, Consumer Federation Of America And Free Press at 111 (Oct. 22, 2007) (noting that these findings are from an FCC-commissioned survey of media usage by Nielsen Media Research, Inc.) (also noting that while a full 46 percent of respondents use TV, radio and/or newspapers but no alternative media, a mere 1 percent of respondents use cable or the Internet, but none of the traditional media).*

of Congress and leading civil rights organizations joined that call. And I have demanded, along with many members of Congress, that we finalize the Localism Report and implement real improvements in the responsiveness of media outlets to local concerns first.

Instead, today we are offered half-measures, setbacks and draft proposals in place of real improvements to diversity and localism. While there are a few useful ideas put forth, for the most part these are half-baked gestures clearly intended as cover for the media consolidation agenda. Rather than take this in order, and address these lingering crises first, the Commission moves obsessively to allow more consolidation, notwithstanding congressional and public concern.

Most troubling, we are not dealing with the problems created by past media consolidation – loss of localism and diversity – before allowing even greater concentration. Allowing newspapers to merge with broadcast outlets only takes more opportunities out of circulation for local owners, women and people of color. And it even further raises the already exorbitant price of station ownership, the biggest barrier to new entrants and aspiring local owners.

The proposal, though portrayed as "modest," is fraught with substantive problems that should have been addressed through more thoughtful Commission consultation and negotiations. The majority's decision actually opens the door to dominant local newspapers buying up broadcast outlets in every market in America and potentially of any size.

Even if the proposal were limited to the top 20 markets, that would account for 43 percent of U.S. households, or over 120 million Americans. But the details reveal loopholes that would permit new cross-owned combinations from the largest markets down to the smallest markets, potentially affecting every American household.

There was an effort to tighten the waiver standards, but only very little progress was made, and the implications remain unclear. Unfortunately, we were not shown these changes until the last minute, with little time to respond or offer improvements. Those suggestions we offered were rejected. Despite these eleventh hour changes, the Commission historically has been so lax in granting waivers, even under the current stronger standards of a blanket prohibition on cross-ownership, there is little encouragement that the new waiver language will help. It will be open season for consolidation in markets of all sizes for those who engage in mergers that test our determination to hold the line on these waiver standards.

Exhibit A of a failed waiver process is what occurred just last night at the Commission. After all the time and debate that has occurred over this rule, we learned late last night, on the eve of this morning's vote, that the Commission would grant waivers to six new newspaper-broadcast combinations, and 36 grandfathered stations, for a total of 42 new waivers. I doubt my colleagues in the majority engaged in much deliberation on how the public interest was served in those communities, ranging from Myrtle Beach, South Carolina to Phoenix, Arizona. Yet this late-night decision will affect the people of these communities profoundly on a daily basis for years to come. Anybody who thinks our processes are open, thoughtful or deliberative should think twice in light of these nocturnal escapades.

Exhibit B is a newly devised Chinese menu of ways to create newspaper-broadcast combinations in markets outside of the Top 20. Under the draft that was circulated around dawn, there are now at least three ways to merge a newspaper with a broadcast outlet in non-top 20 markets. Now, in addition to the rebuttable presumption factors announced in the Chairman's November 13th press release, there will be a strong presumption in favor of more consolidation if a proposed combination meets our existing failing stations standard or results in a new source of local news in the market. I have serious questions about these new proposals. For example, I have real doubts about the Commission's willingness to enforce the seven-hour weekly news requirement. Also, such a requirement could have a negative impact on the total amount of news through the media. As a study from Free Press and Consumer Union has shown, while the newspaper-broadcast combinations increase its news output – in this case, seven hours per week – news production market-wide diminishes. The Commission should more closely examine this proposal to ensure that it will produce the desired effect.

These loopholes in the Order also undercut the assertion that the proposal would prevent a newspaper from buying one of the top-four rated stations in the same market. That protection does not apply in markets below the top 20, and can be dismissed with the wave of the Commission's hand in the larger markets. In reality, under this proposal a newspaper could buy any TV station in any city, no matter how large.

A main public interest justification for newspaper-broadcast cross-ownership has been the claim that relaxing the rule would create more local news. A path-breaking study by leading consumer organizations, using the FCC's own data, demonstrated that claim to be wrong. They found that the data underlying an FCC-sponsored study finding more local news by cross-owned stations actually reveals that there is less local news in those markets as a whole, taking into account all news outlets. It remains unclear exactly why the overall level of local news available diminishes. Perhaps it is because other outlets choose not to compete with the local leviathan or maybe they lose equal access to the newspaper's investigative and news resources. But the fact is the Commission's own data reveals the other outlets in those cities reduce their news coverage more than the cross-owned outlets increase it. So not only is less news produced in the market, but an independent voice is silenced when the dominant local newspaper swallows up a broadcast outlet. We should have examined the root causes of this problem and addressed it before relaxing the cross-ownership rule.

We also failed to study the relationship between inappropriate programming for children, such as excessively sexual or violent programs, and the concentration of media ownership. A 2005 report found that 96 percent of all the indecency fines levied by the FCC in radio from 2000 to 2003 (97 out of 101) were levied against four of the nation's largest radio station ownership groups. The remaining 11,000-plus stations were responsible for just four percent of all FCC radio indecency violations, a fraction of their national audience share. While the radio report did not prove a causal link between ownership concentration and broadcast indecency, I believe the Commission has an obligation to study and understand the relationship between media concentration – station ownership and program ownership – and indecency before we permit more consolidation. Further, a study last year by the Parents Television Council found that, in the midst of an unprecedented wave of media consolidation between 1998 and 2006, violence on TV during the evening hours of 8:00, 9:00 and 10:00 grew by 45, 92 and 167 percent, respectively. Commissioner Copps and I requested a full FCC field hearing to explore the relationship between media consolidation and the rising volume of material inappropriate for children in the media, but not one was held.

For many years, the underpinnings of the Commission's public interest analysis with regard to media have been to promote localism, competition, and diversity. Yet it is clear from the record that this decision undermines all of these goals. As a result of newspaper-broadcast cross-ownership, there is less local news in the market as a whole and there is less competition for stories and ideas since two competing entities become one. There is also less diversity, as a voice in the market is lost, and broadcast outlets are taken even further out of reach of women and people of color.

The ostensible reason to ignore all of these detrimental consequences was the importance of saving the newspaper industry that would otherwise wither on the vine. As many have pointed out, we are not in the business of guaranteeing newspaper profits. Perhaps if we were, we would better understand why relaxing the cross-ownership rule is not the right prescription for addressing real issues and opportunities newspapers face as the internet rapidly becomes the means of distribution for news. The record shows that news content is still largely generated by newspapers and TV stations, even though the means of distribution are changing with the emergence of broadband.

In fact, the newspaper industry is quite healthy, with profit margins of around 20 percent, exceeding the average of S&P 500 companies.[3] The problem for newspapers is that those margins and revenues are declining, and Wall Street looks askance at the trends, despite the huge continued cash generation of newspapers. The problem is that broadcasters are also seeing slow growth or revenue declines, again despite very healthy, if shrinking, margins. Wall Street analysts have recognized what the majority apparently missed. You cannot address the financial problem of shrinking margins of newspapers by combining them with broadcast outlets that also have shrinking margins. The real challenge for both outlets is to better monetize their news-gathering functions from the growing audience who views them for free on the Internet.

In the final analysis, we could have achieved a bipartisan agreement on a reasonable process to finalize the media ownership proceeding that addressed the many concerns raised by the public, leading consumer advocates and Congress. I worked to achieve that goal by offering to follow the bipartisan path laid out by Members of Congress and the Senate Committee on Commerce, Science and Transportation.

Sadly, that was a road not taken, and Members of Congress have clearly signaled there will be consequences for this breakdown of deference and cooperation. We ran so many red lights it would make Mario Andretti blush. It is now up to Congress and the courts to address the pileup that resulted. With the encouragement of the American people, who are certain to share the outrage over this decision, I certainly hope and believe that others will have the final word on this issue.

Finally, I want to recognize and thank the many groups and individuals who have provided me with important counsel during this difficult proceeding: Free Press, Media Access Project, Consumers Union, Institute for Public Representation, Consumer Federation of America, Communications Workers of America, the Writers' Guilds of America, the Media and Democracy Coalition and the tens of thousands of volunteers and members of the public who have reached out to this Commission to express their concerns.

[3] *See Further Comments of Consumers Union, Consumer Federation of America and Free Press at 48 (Dec. 11, 2007).*

STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE

RE: 2006 Quadrennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review-Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202of the Telecommunications Act of 1996; Cross Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Ways to Further Section 257 Mandate and To Build on Earlier Studies; Public Interest obligations of TV Broadcast Licensees.

As Commissioners of the Federal Communications Commission we face many serious, far-reaching, and contentious decisions affecting this nation. While I always strive to seek consensus, I know there will be some times when consensus is simply not possible, and we must agree to disagree. Today is one of those days.

I believe that the process we have engaged in over the past year and a half, has been open, transparent, and thorough—a true example of our vibrant democracy at work. Others may disagree. While I think we would all prefer to be part of a unanimous decision, I do not believe waiting would have resulted in any further agreement.

In its 2004 remand, the 3rd Circuit affirmed "the power of the Commission to regulate media ownership." In addition, Congress requires that the Commission undertake a review of our media ownership rules every four years. The 3rd Circuit also made clear that the FCC must not simply be a "revolving door" of notice and comment. We must act to fulfill our obligations: "monitor the effect of . . . competition . . . and make appropriate adjustments' to its regulations." In this Order we conclude our 2006 Quadrennial Review, and respond to the Court's remand of our 2002 Biennial Review Order.

I wish that I had time to truly capture and describe the places we visited and the thousands of individuals who lined up to speak to us – from California to Maine; Chicago to Florida; Pennsylvania to Tennessee – we traveled literally from sea to shining sea. In several cases, we stayed until after midnight in order to accommodate those citizens who took time to sit through hours of public testimony. These lengthy hearings provided an opportunity for thousands of American citizens to have unprecedented access to a governmental body about the role media plays in their lives and their opinion regarding media ownership. Over my 20-plus years of public service – at all levels of government – I cannot remember a single time that an agency expended this much institutional energy and investment on an issue, or was this open and thorough regarding a matter of public interest. We invited comment not only from the general public, but also from expert panels of economists; TV, radio, and film producers; musicians; directors; professors; students; small and large TV and radio broadcasters, and community organizations. During the roughly year and a half of on-going hearings, we arranged for ten media studies by experts – preeminent economists, academics, and researchers – and also released all of those studies for public comment as well as peer review by unaffiliated experts. Four of the studies were peer reviewed by multiple reviewers.

In addition to the FCC's formal process, I also felt it was important to seek first-hand knowledge regarding the challenges, as well as the exciting innovations, facing broadcasters and newspapers. I toured large and small media outlets, local broadcasters, network affiliates, and newspapers. In addition, I spent time hearing from consumer organizations, such as Media Access Project and the Consumer

Federation of America, as well as some of our nation's most knowledgeable professors and economists, and Members of Congress.

Throughout this process, I was struck by the ongoing, dramatic changes in how Americans use the media to receive news, information, and entertainment. Increases in broadband penetration have transformed the Internet into a viable platform for streaming full-length video programming, with more content moving online daily. And our mobile phones now provide us with stock quotes, email and news updates from sources locally and around the globe. With the multiplicity of sources now available at the click of a button, the historic concerns underlying the newspaper-broadcast cross-ownership ban would seem to be alleviated. Many academics and professionals note that developments since the Commission last reviewed its rules show that the diminishment of mainstream media power over information flow is real. This will only continue as the Internet and other communications networks develop. The diminution in the power of old media enhances the need to permit exploration of the synergies of limited cross-ownership. The Commission must ensure that our rules do not unduly stifle efficient communications that are likely to preserve or increase the amount and quality of local news available to consumers via these outlets.

As we traveled across America, one of the most prominent concerns we heard was with regard to radio consolidation. This was especially true at the hearing we held in my hometown of Nashville, TN--Music City USA. While best known as the "Home of Country Music", Nashville is the #2 video production locale in the country; second only to L.A. Nashville is the home of some of the greatest songwriters and musicians in the entire world. It provided an appropriate forum to take a look at how ownership affects artists and their art. I want to thank all the Tennessee public officials, Belmont University, and so many Nashville stars who participated: Naomi Judd, Big and Rich, George Jones, Dobie Gray and my good friend, the late Porter Wagner. We listened and heard from you, and many fans as well, who opposed further radio consolidation, and today we retain the current radio ownership limits.

For those concerned about radio consolidation, it is important to note that the industry has recently seen a number of radio giants engaging in significant divestitures. Major companies like Clear Channel, ABC, Entercom, and CBS have divested, or filed applications to divest, hundreds of stations over the last few years. This is a good example of the marketplace in action. In addition, many of the stations that were spun off were made available to new owners through capital supplied by the former ones. This will hopefully result in additional women and minority owners; a good result for them, and for America's diverse citizenry.

In addition to radio ownership, the other concern that stands out in my mind is the content provided by today's media outlets. From concerns about the pervasive impact media has on our children, to the lack of diversity of programming, to the "negativity" of news coverage in general. Some commenters took issue with a specific local station. To those citizens, I commend you to our website, www.fcc.gov, where you can file complaints regarding a broadcaster who may not be fulfilling their public interest obligations, or you believe has violated other Commission regulations. Also, we recently adopted an Enhanced Disclosure Order, requiring local broadcasters to post their public inspection files online, which will make it easier for individuals and citizens to review those files to ensure that broadcasters are meeting their regulatory responsibilities.

It was important to the process that we heard not only from passionate members of the public who shared personal stories of how media ownership has impacted their lives, but also from dispassionate academics and economists who analyzed marketplace data and derived findings that directed our inquiries. The studies examined various subjects, but several conclusions were reached. First, there is a staggeringly low rate of female and minority ownership in the broadcasting industry. Today, we adopt a separate order that takes positive steps to address that concern. Second, according to three of our media studies, cross-ownership of newspapers and broadcast stations actually results in more local news. Some point out the potential inconclusiveness as to the outcome of some of the studies, but this concern lends credence to our decision to conduct a case-by-case review of the particular characteristics of specific combinations in specific markets, rather than adopting a one-size-fits-all rule.

In conclusion, I think it is important to step back from the emotionally-charged debate that has surrounded this issue over the past few weeks, and consider the narrowness of the rule change we make today. In this Order, we retain the limits on television ownership, radio ownership, and radio-television cross-ownership. We retain the newspaper-broadcast cross-ownership ban, except in the top 20 markets, which are our most media-rich, highly-populated markets. We establish a heavy presumption against cross-ownership in markets outside the top 20. This was at the heart of the 3rd Circuit's decision which affirmed the elimination of the ban, upholding the Commission's conclusion that the ban undermined localism and was unnecessary to protect diversity.

We have traveled across the country and heard from thousands of citizens. The process has been long, but fruitful. Many wanted us to go further in repealing the ownership restrictions, but we have chosen a measured and cautious approach. We recognize the changing dynamics of the media market, but also give due consideration to the weight of the record before us. In the end, our approach is an extremely modest change, which reflects the views of citizens as well as experts gathered over the past 18 months.

Thank you to the Media Bureau for organizing the many public hearings and for drafting this item. Most of all, thank you to all of those citizens who participated in this truly monumental process. We value your insight and hope you will continue to be part of this Commission's work in the future.

STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL

Re: 2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets; Ways to Further Section 257 Mandate and To Build on Earlier Studies

Mark Twain warned us over a century ago, "If you don't read the newspaper you are uninformed. If you do read the newspaper you are misinformed." Of course, Mr. Twain had no other media than newspapers at his fingertips to glean information, opinion and, more importantly, material for his witticisms. The 21st Century's chaotic explosion of information from broadcast radio and television, cable TV, satellite radio and TV, the Internet and many other voices and outlets would have given Twain an ocean of material to use to skewer his targets with his satire. Without question, however, he would have had a blog; and I'm sure it would have been one of the most popular blogs on the Internet. If he were alive today, perhaps his cheerful disdain for newspapers would have led him and his readers to bypass the papers altogether. And that's a point at the heart of today's order: if consumers and content providers *want* to bypass the media technologies of yesteryear in favor of new media, they *can*. And *they are*. In fact, the evidence in the record tells us that if you are under 30, you are probably not reading a traditional newspaper or tuning in to your local broadcasters. You may never do so, at least not in the way the over-30 crowd does. It is precisely this type of paradigm shift that Congress and the courts have charged the Commission with weighing heavily as we revise our media ownership rules.

But before I delve into the substance of today's order, let's take a moment to examine how we got here. The current proceeding began at my very first open meeting as a Commissioner, 18 months ago. This proceeding has been unprecedented in scope and thoroughness. We gathered and reviewed over 130,000 initial and reply comments and extended the comment deadline once. We released a Second Further Notice in response to concerns that our initial notice was not specific enough about proposals to increase minority and female ownership of stations. We gathered and reviewed even more comments and replies in response to the Second Notice. We traveled across our great nation to hear directly from the American people during six field hearings on ownership in: Los Angeles and El Segundo, Nashville, Harrisburg, Tampa-St. Pete, Chicago, and Seattle. We held two additional hearings on localism, in Portland, Maine and here in our nation's capital. In those hearings, we've heard from 115 expert panelists on the state of ownership in those markets and we've stayed late into the night, or early into the next morning, to hear from concerned citizens who signed up to speak. And I want to thank all of those who turned out to express their views.

We also commissioned and released for public comment ten economic studies by respected economists from academia and elsewhere. These studies examine ownership structure and its effect on the quantity and quality of news and other programming on radio, TV and in newspapers; on minority and female ownership in media enterprises; on the effects of cross-ownership on local content and political slant; and on vertical integration and the market for broadcast programming. We received and reviewed scores more comments and replies in response. Some commenters did not like the studies and their critiques are part of the record.

So, during my entire term as a Commissioner, we have been reviewing this matter. But our review did not begin last year. The previous round began in 2002. At that time, the Commission received thousands of formal comments and millions of informal comments. The Commission held four localism hearings across the country to gather additional evidence. The FCC also produced twelve media ownership working group studies. We all know that the 2002 review ended badly for the Commission –

with both the legislative and judicial branches reacting through a Congressional override of the national ownership cap, and a reversal and remand from the Third Circuit in the *Prometheus* case. By the way, while the court threw out almost all of the Commission's order, it concluded that, "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."

But our story didn't begin in 2002 either. In 2001, the FCC issued a rulemaking focused on the newspaper-broadcast cross-ownership ban – a concept that has been around since at least 1975. Comments and replies were gathered there too. That proceeding sprouted up as the result of a June 2000 report from a Democrat-controlled FCC, which found that the ban may not be necessary to protect the public interest in certain circumstances. That report was the result of yet another proceeding, which commenced in 1998. The 1998 proceeding stemmed from a 1996 proceeding; which was sparked by legislation; which was engendered by an overwhelming and bi-partisan vote of a Republican-controlled Congress and signed into law by a Democrat President.

In my 17 years of being in and around the FCC, I can't think of any issue that has been examined more thoroughly. I can't remember any proceeding where the Commission has solicited as much comment and given the American people as much opportunity to be heard.

A point that gets lost in the emotion surrounding this debate is that the directly elected representatives of the American people, the Congress, enacted a statute that contains a presumption in favor of modifying or repealing the ownership rules as competitive circumstances change. Section 202(h) states that we must review the rules and "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 that it determines to be no longer in the public interest." This section appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule, and it is crucial for everyone involved in this debate to recognize this important presumption. It is also important to remember that Section 202(h) is the most recent set of codified instructions we have from Congress. If Congress passes legislation to the contrary, and the President signs it into law, I will work tirelessly to ensure that its intent is carried out. In the meantime, however, Section 202(h) is our legal mandate. We also have a duty to pursue the noble public policy goals of competition, diversity and localism. Today's order accomplishes all of the above.

However, while the FCC races ahead over a twelve-year period like "a runaway glacier," as one analyst put it, the private sector has been busy working around the obstacles constructed by the outdated regulations of yore. Is it any wonder that most of the energy, creativity, capital and growth have been focused on areas that are *less* regulated? That's what our record shows. The ironic truth is: in many cases, media consolidation has actually become media divestiture. Companies such as Disney, Citadel, Clear Channel and Belo actually have been shedding properties to raise capital for new ventures. They are directing new capital investment toward new media ventures. That's where America's eyeballs are looking; so that's where the ad dollars are flowing. The Hollywood writers' strike is all about the concept of following the eyeballs and ad dollars and getting fairly compensated as a result. Just to illustrate the point, over one-third of Americans go online to get their news. As the FCC's own research shows, by July 2006, 107 million Americans viewed video online and about 60 percent of U.S. Internet users download videos.[1] YouTube alone requires more bandwidth than the *entire Internet* did in 2000. Unregulated new media's numbers are growing. Heavily-regulated traditional media's numbers are shrinking.

[1] News Release, FCC, *FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for the 14th Annual Report* 4 (Nov. 27, 2007).

This new media frontier is especially promising for people of color and women. The rise of so-called "niche" markets is benefiting people who have been underserved in the past. The low barriers to entry and low capital requirements to get started have spawned a plethora of minority and women oriented new media outlets such as: NetNoir.com, a minority owned online destination that connects people interested in African American culture and lifestyle; or iVillage.com, which provides daily hot topics for women; or Women's eNews.com, an online source for news and perspectives of particular concern to women. While this new era is in its infancy, and we have a long way to go before it matures, I am optimistic that the media ownership debates of the early 21st Century will one day fade into obscurity as technology and competition advance.

Before I go further, let me offer a personal observation. Both of my parents were journalists. They met after World War II at the University of Missouri's famed School of Journalism where my mom was on the faculty. She went on to become a reporter for the *Chicago Daily News* at a time when almost no women held such jobs. She later worked for the *Washington Post* and was there when the cross ownership ban went into effect in 1975. So I found it especially remarkable, when I was sorting through her belongings after she passed away in 2005, to find a book entitled *The Fading American Newspaper*. I've read through it and I've come across some timely quotes. Here's one: "As journalism migrates into new areas of communication, its practitioners, too, are on the move. The commerce in information flourishes and quickens its tempo, new skills are developed, and the major problem for the newspaper journalist is to keep his readers from migrating, too." So when was this book written? 2005? 1975? No, it was written in 1960 by a former editor and journalism professor. But the point is that there is not a general concept before us in this proceeding that hasn't been debated for decades.

Even though the newspaper industry was already facing challenges in 1960, it has undergone dramatic change in the 32 years since the newspaper-broadcast cross ownership ban went into effect. Now we have five national networks, not the three I grew up with. Today we have hundreds of cable channels cranking out a multitude of video content produced by more, not fewer, but *more* independent voices than existed 32 years ago. Now we have two vibrant satellite TV companies, telephone companies offering video, cable overbuilders, satellite radio, the Internet and its millions of websites and bloggers, a plethora of wireless devices operating in a robustly competitive wireless market place, iPods, Wi-Fi, and much more. And that's not counting the myriad new technologies and services that are coming over the horizon such as those resulting from our Advanced Wireless Services auction of last year, or the upcoming 700 MHz auction, which starts next month. Certainly, more voices and more delivery platforms exist today than in 1975.

Consumers have more choices and more control over what they read, watch and listen to than ever. As a result of this cacophony of voices competing for consumer's attention, at least 300 daily newspapers have shut their doors forever in the last 32 years because people are looking elsewhere for their content. Newspaper circulation has declined year after year. Since just this past spring, average daily circulation has declined 2.6 percent. Newspapers' share of advertising revenue has shrunk while advertising for unregulated online entities has surged.

Some argue that newspapers are making plenty of money. For many papers, that's absolutely true, for now. As gross revenue declines year after year, publishers cut costs to retain margins. After a while, such cost-cutting slices into the heart of the news-gathering operation: the newsroom and its reporters. As a result, the ability to cover more news diminishes. Some respond by arguing that newspapers and broadcasters should therefore live under *more* regulation than what exists today. But who among them is offering to find ways to pay for the high costs of their mandates? How is such a command-and-control regulatory regime supposed to generate the funds needed to support such capital-intensive endeavors?

With all trend lines showing newspaper top-line income falling fast, the ultimate fate of this platform is obvious: newspapers, as we know them, will cease to exist sooner rather than later under existing regulations. They may disappear some day anyway, regardless of what we do today. But why should stale government industrial policy hasten their demise? While I agree with many of the critics of today's order that it is not the FCC's job to "save the newspapers," or any other industry for that matter, at the same time is it our job to leave in place an outdated regulation that results in the *elimination* of independent voices? With a regulation in place that is linked to the silencing of so many local community voices, is the cross-ownership ban still in the public interest, or is it a millstone around the neck of a drowning industry? The statute demands an answer.

Despite a strong de-regulatory statutory presumption mandated by Congress and an order from the Third Circuit essentially giving a green light to lifting the ban altogether, today's order is quite modest. The order creates a presumption in favor of lifting the ban only in the top twenty media markets where there is tremendous competition in the traditional media sector. Even then we only allow a combination outside of the top four TV stations and only when at least eight independent major media voices remain in the that market. Outside of the top twenty markets, our rule establishes a negative presumption against permitting the combination. In only two special circumstances will we reverse the negative presumption: first, if a newspaper or broadcast outlet is failed or failing; and second, when a proposed combination results in a new source of a significant amount of local news in a market.

Where neither of these circumstances exists, we establish a four-prong test to determine whether the negative presumption is rebutted. This test is not pocked with loopholes as some have suggested; quite the contrary. To determine if the presumption is overcome, we will consider: 1) whether cross-ownership will increase the amount of local news disseminated through the media outlets in the combination; 2) whether each affected media outlet in the combination will exercise its own independent news judgment; 3) the level of concentration in the Nielsen DMA; and 4) the financial condition of the newspaper and broadcast station, and if the newspaper or broadcast station is in financial distress, the putative owner's commitment to invest significantly in newsroom operations.

Lastly, we will not require divestiture of existing combinations that were grandfathered in conjunction with the 1975 rule or that were granted permanent waivers of the rule. Under both Democrat and Republican chairmen, the Commission previously determined that these combinations were in the public interest and thus warranted a waiver under the prior rule. We should not reverse course here as we modernize our rule. In addition, the Order grandfathers existing combinations operating under temporary waivers where those combinations involve one newspaper and one broadcast property in the same market. These combinations have achieved synergies that have resulted in service to their communities in the public interest. Requiring divestiture would be disruptive to the individual owners, employees and to the communities that rely on their service.

Today's order also may create new opportunities for women and people of color. Under the current rule, minority businesses may not own a newspaper and station in the same market. Now they can after appropriate Commission review. Under our narrowly-tailored rules, a modernization of the ban will create a rising tide that has the potential to float all boats.

In the meantime, all Americans, and the rest of the world, are migrating toward the boundless promise of new media for their news, information and entertainment. The best news is that all Americans will benefit from this new paradigm because new technology empowers the sovereignty of the individual, regardless of who you are. As future policymakers examine these issues in the years to come, I would urge them to continue to examine the important public policy implications of this new era in the context of these undeniable facts.

Accordingly, I support today's order.