258. Other aspects of our contour-overlap methodology also limit its usefulness in protecting and promoting competition. The method for determining which stations are in a market often does not reflect the area of true competition among radio stations. We currently count a radio station as being a competitor in a radio market if its principal community contour overlaps any one of the principal community contours that form the market boundary. Those radio stations may be too distant to serve effectively either the listeners or the advertisers in the geographic area in which concentration is occurring, but they are included in the market because of the happenstance of the size, shape, or location of one or more of the principal community contours of the radio stations involved.

259. The contour-overlap methodology also makes it difficult to measure concentration levels in local radio markets accurately. As currently implemented, the methodology does *not* examine the number of radio station owners in a market; it only considers how many radio station signals cross the market boundary created by the principal community contours of commonly owned stations with mutually overlapping contours. Those signals may be owned by only one other party; indeed, because of the numerator-denominator inconsistency, those radio stations may be owned by the same party. The current methodology simply does not take ownership into account, which makes an accurate measure of local radio concentration difficult to achieve.

260. Consistency suffers as well. Under the contour-overlap methodology, every combination operates in a radio market that is unique to that combination.[545] Thus, there is no common metric that we can use to compare the effect of two different combinations on competition.[546] In fact, we cannot even rationally evaluate the effect that adding a new radio station to an existing combination would have on competition because the relevant radio markets before and after the acquisition may be completely different, depending on the vagaries of the contour overlaps.

261. Commenters nonetheless argue that we may not alter the market definition unless we conclude that the current market definition has caused actual harm to our public interest goals.[547] We do not agree that we must demonstrate actual harm to move from an irrational market definition to a rational one. Any analysis of the potential harms of concentration should be focused on the limits on how many stations a party may own in a market, rather than on whether a distorted methodology for defining radio markets and counting radio stations should be preserved.[548]

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contour-overlap rule to be used for stations located outside of Arbitron Metro's until the completion of the rulemaking proceeding in Docket No. 03-130.

[545] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19880 ¶ 44, *Defining Moment in Radio* at 10.

[546] *See* NAB Comments in MM Docket No. 01-317 at 34 ("Utilizing a contour overlap method of market definition for competitive purposes would essentially require each applicant to submit a customized competition analysis based on the unique market created by every proposed transaction.")

[547] *See, e g*, NAB Comments in MM Docket No 00-244 at 12-13, 28.

[548] In any event, the record does provide some evidence of potential competitive harm. MOWG Study No 4 suggests that consolidation has resulted in an increase in advertising prices. *See* discussion of product market, Section VI(B)(1)(a)(i), *supra*. In addition, several smaller broadcasters have asserted that consolidation has created market power, which has resulted in significant harm to their ability to generate advertising revenue, to invest in improvements to radio service, and even to stay in business. *See* discussion of rejection of repeal and other modifications, Section VI(B)(1)(a)(iii)(b)

262. We recognize that our current view differs from what we stated in 1992 when we first adopted the contour-overlap methodology for defining radio markets and counting market participants.[549] At the time, however, the numerical limits prohibited station combinations in excess of 2 AM and 2 FM stations, and imposed on top of that an audience share cap of 25% in the largest markets. Even though the problems with the contour-overlap system were present at the beginning, the effect was less evident because of the far more restrictive ownership limits. It was only after the ownership limits were substantially raised in the 1996 Act that the scope of the market distorting effects of that system became manifest. In light of this experience, it would be irresponsible for us to leave uncorrected our market definition and counting methodology.

263. In short, our experience with the contour-overlap system leads us to believe that it is ineffective as a means to measure competition in local radio markets, and that a different method of defining the market will more effectively serve our goals. We see scant evidence in the record to lead us to a different conclusion. Some commenters correctly note that any methodology we develop may create anomalous situations in certain instances.[550] But we cannot agree that our inability to achieve perfection in every instance justifies maintaining the current system. We conclude that our methodology for defining radio markets and counting market participants must be changed.

(b) Statutory Authority

264. Before explaining our modified market definition and counting methodologies, we address arguments that we lack the statutory authority to revise those methodologies in a way that would prohibit radio station combinations that are permissible under the current framework. After reviewing the relevant statutory provisions, we find that argument to be without merit.

265. The Communications Act grants us the authority to "[m]ake such rules and regulations, . . . not inconsistent with law, as may be necessary to carry out the provisions of" the Act.[551] We also are authorized to "make such rules and regulations . . . not inconsistent with [the] Act, as may be necessary in the execution of [our] functions."[552] The Supreme Court has held that these broad grants of rulemaking power authorize us to adopt rules to ensure that broadcast station ownership is consistent with the public interest.[553] We find nothing in the 1996 Act or its legislative history that diminishes that authority.[554] To the contrary, Section 202(b) contemplated that we would exercise our rulemaking

[549] *See 1992 Radio Reconsideration Order*, 7 FCC Rcd at 6394-96 ¶¶ 37-43.

[550] *See, e g*, Cumulus Comments in MM Docket No. 01-317 at 15; Nassau Reply Comments in MM Docket No 01-317 at 5; NAB Comments in MM Docket No. 00-244 at 5, MBC Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No. 00-244 at 5, Cox Comments in MM Docket No. 01-317 at 12.

[551] 47 U.S.C. § 303(r).

[552] 47 U.S C § 154(i).

[553] *See, e g*, *Storer Broadcasting*, 351 U S. at 202-03.

[554] *See, e g*, *Keene Corp v United States*, 508 U.S 200, 209 (1993) (statutory revisions are not presumed to change the law unless "an intent to make such a change is clearly expressed") (internal punctuation omitted) *Accord United States v Wilson*, 503 U S. 329, 336 (1992); *Green v Bock Laundry Machine Co*, 490 U.S. 504, 521 (1989) *See also* 1996 Act, § 601(c)(1), 110 Stat. 143 (1996 Act "shall not be construed to modify, impair, or supersede Federal . . law unless expressly so provided").

authority to make the revisions to the rule that Congress required, and Section 202(h) contemplates that we will exercise our rulemaking authority to repeal or modify ownership rules that we determine are no longer in the public interest. We accordingly find that we have the authority to revise the local radio ownership rule in a manner that serves the public interest.

266. Some commenters nevertheless argue that the 1996 Act restricts how we may define the "public interest." They contend that Congress specifically found the levels of radio station ownership specified in Section 202(b) to be in the public interest. Because Congress has specifically spoken, the argument goes, we no longer have the discretion to interpret the public interest in a manner that, in purpose or effect, precludes a radio station combination that complies with the numerical limits of the current rule, as determined by the existing market definition and counting methodologies.[555]

267. We find that argument flawed. Even assuming *arguendo* the premise of the argument – that Congress intended Section 202(b) as a statement of the radio station ownership levels that would be conclusively consistent with the public interest – it does not follow that Congress intended that statement to remain true in perpetuity. In *Fox*, the court held, in the context of the national television ownership cap, that the numbers Congress selected "determined only the starting point" for analysis and instructed us not "to defer to the Congress's choice" of numbers in our analysis [556] Thus, even if Congress believed in 1996 that Section 202(b) set the appropriate radio station ownership levels, *Fox* holds that we retain the authority – indeed, the obligation – to determine ourselves whether a change in the rules would serve the public interest.

268. In *Fox*, of course, the court was addressing whether we were required to defer to the ownership limits established in the 1996 Act in justifying retention of the national television ownership rule But if *Fox* correctly held that we should not defer to the 1996 Act in deciding whether a rule continues to be in the public interest, we see no statutory basis to suggest that the 1996 Act in some way prevents us from changing the way we define radio markets or count radio stations.

269. Commenters arguing against our statutory authority place great weight on the *Fox* court's holding that Section 202(h) "carries with it a presumption in favor of repealing or modifying the ownership rules."[557] We recognize that the Section 202(h) presumption requires us to justify a decision to retain the rule. The purpose of the presumption is thus to shift the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it. It would be a substantial leap, however, to read this presumption as having the additional effect of limiting the types of changes that we may conclude are in the public interest [558] We see no basis for such a view. Had

[555] *See, e g*, NAB Comments in MM Docket No. 01-317 at 7-10; Radio One Comments in MM Docket No. 01-317 at 4, Clear Channel Comments in MM Docket No. 01-317 at 10; Clear Channel Comments in MM Docket No. 01-317 at 2; NAB Reply Comments in MM Docket No. 01-317 at 3.

[556] *Fox Television*, 280 F 3d at 1043.

[557] *Id* at 1048

[558] Cox argues that the Commission found that it lacked statutory authority to change the local radio ownership rule in the *1998 Biennial Review Report* Cox Comments in MM Docket No. 01-317 at 4. In that report, the Commission stated that tightening the ownership limits would be "inappropriate given that Congress directed the Commission to adopt these limits in 1996." 1998 *Biennial Review Report*, 15 FCC Rcd at 11091 ¶ 60. This statement does not speak to the Commission's authority; rather, it reflects the Commission's policy decision to "monitor . . consolidation and gather information regarding the overall impact on competition and diversity" (continued .)

Congress intended to curtail the Commission's regulatory powers so drastically, it would have done so in more express terms.[559]

270. Invocation of the ratification, or reenactment, doctrine does not alter the analysis.[560] Under that doctrine, Congress is presumed to have adopted the settled judicial interpretation of a statute when it reenacts that statute.[561] "Congress' repetition of a well-established term [also] carries the implication that Congress intended the term to be construed in accordance with pre-existing regulatory interpretations."[562] The ratification doctrine may not be invoked, however, where there is no "evidence to suggest that Congress was even aware" of an agency's position.[563] It is not enough for Congress to be presumed to know the law; Congress must make an "affirmative step" to ratify the agency's position.[564]

271. We conclude that the ratification doctrine is not applicable here. We find nothing in the 1996 Act or in its legislative history that evidences a congressional intent to adopt the market definition and counting methodologies that the Commission adopted in 1992. Contrary to certain commenters' arguments,[565] moreover, the Commission did not acquiesce to the ratification theory in 1996 by carrying forward these methodologies without notice and comment. The Commission merely noted that the revisions mandated by Section 202(b) did not directly affect the market definition and counting methodologies in the local radio ownership rule.[566]

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before considering changes to the limits established by Section 202(b). *Id* at 11088 ¶ 53. *See also Fox Television,* 280 F.3d at 1042 (noting that the Commission had adopted a "wait-and-see" approach in the *1998 Biennial Review Report*) Indeed, in the same report, the Commission concluded that it should initiate a rulemaking proceeding to consider changes to the way markets are defined and radio stations counted, finding that the current "definitions and methodologies may be undermining Congress' intent." 15 FCC Rcd at 11091 ¶ 61. The Commission would not have taken this action if it had concluded that Section 202(b) foreclosed revisions that would make the local radio ownership rule more restrictive.

[559] *American Hospital Ass'n v NLRB*, 499 U.S. 606, 613 (1991) ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted . . . , we would have expected it to do so in language expressly describing [such] an exception . . . . If [a statute] had been intended to place [such an] important limitation . . , we would expect to find some expression of that intent in the legislative history."); *cf Landgraf v USI Film Prods.*, 511 U S. 244, 259 (1994) ("we find it most unlikely that Congress intended the introductory clause to carry the critically important meaning petitioner assigns it").

[560] *See, e g*, Clear Channel Comments in MM Docket No. 00-244 at 3

[561] *See, e g*, *Keene Corp*, 508 U.S. at 208.

[562] *Bragdon v Abbott*, 524 U S. 624, 631 (1998).

[563] *Brown v Gardner*, 513 U S 115, 121 (1994) (citing *United States v Calamaro*, 354 U.S 351, 359 (1959)).

[564] *International Union, UAW v Brock*, 816 F 2d 761, 767 (D.C. Cir 1987) (citing *SEC v Sloan*, 436 U.S. 103, 121 (1978)) *Accord American Fed of Labor and Congress of Indus Orgs v Brock*, 835 F.2d 912, 915-16 (D.C. Cir. 1987)

[565] *See, e g*, Clear Channel Comments in MM Docket No. 01-317 at 9; Cox Comments in MM Docket No. 01-317 at 4, Cumulus Comments in MM Docket No. 01-317 at 4 n.2.

[566] *Implementation of Section 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368, 12370 ¶ 4 (1996)

272. Even if the ratification doctrine could be invoked, that would not "preclude [an] agency, in the exercise of its rulemaking authority, from later adopting some other reasonable and lawful interpretation of the statute."[567] The ratification doctrine "does not mean that the prior construction has become so embedded in the law that only Congress can effect a change," but permits changes "through exercise by the administrative agency of its continuing rule-making power."[568] Because Congress has left the Commission's general rulemaking powers intact, the ratification doctrine – even if properly invoked – would not bar us from exercising those powers to change the method used to define local radio markets and count radio stations for purposes of the local radio ownership rule.

(c) Geography-Based Radio Markets

273. We describe below the modified market definition and counting methodologies we will use to determine compliance with the local radio ownership rule.[569] We conclude that a local radio market that is objectively determined, *i.e.*, that is independent of the radio stations involved in a particular acquisition, presents the most rational basis for defining radio markets. We understand that geographic areas are less accurate than contours in measuring the signal reach of individual stations [570] But radio stations serve people, not land, and while radio signals may overlap over uninhabited land or even water,[571] people in the United States tend to be clustered around specific population centers. The fact that radio signals are not congruent with geographic boundaries does not undermine the logic of relying on geographic areas to define radio markets.

274. As explained below, we will rely on the Arbitron Metro Survey Area (Arbitron Metro) as the presumptive market. We also establish a methodology for counting the number of radio stations that participate in a radio market.[572] We initiate below a new rulemaking proceeding to define radio markets for areas of the country not located in an Arbitron Metro, and we adopt a modified contour-overlap approach to ensure the orderly processing of radio station applications pending completion of that rulemaking proceeding.

(i) Arbitron Metro Survey Areas

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[567] *McCoy v United States*, 802 F 2d 762, 766 (4th Cir. 1986).

[568] *Helvering v Reynolds*, 313 U.S 428, 432 (1941) (citing *Helvering v Wilshire Oil Co.*, 308 U.S. 90, 100-101 (1939)), *see also Brock*, 835 F 2d at 916.

[569] Applicants will be required to demonstrate compliance with the rule when filing applications to obtain a new construction permit or license, to assign or transfer an existing permit or license, or to make certain modifications, such as a change in the community of license of a radio station

[570] *See, e g*, Entercom Comments in MM Docket No 00-244 at 3, NAB Comments in MM Docket No. 00-244 at 11; Viacom Comments in MM Docket No 00-244 at 3.

[571] *See, e g*, Main Street Comments in MM Docket No. 01-317 at 4-6.

[572] We make clear that any radio station that is included in the radio market (*i e.*, the denominator) under our methodology will also be counted against a station owner's ownership limit in such market (*i.e.*, the numerator). We reject Viacom's argument that we should continue the numerator-denominator inconsistency in geography-based markets. *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 7, 2003) at 1 ("Viacom May 7, 2003 Ex Parte").

275. *Market definition.* Where a commercially accepted and recognized definition of a radio market exists, it seems sensible to us to rely on that market definition for purposes of applying the local radio ownership rule. Arbitron, as the principal radio rating service in the country, has defined radio markets for most of the more populated urban areas of the country. These radio markets –Arbitron Metros – are Arbitron's primary survey area, which in turn are based on Metropolitan Areas (MAs) established by the Office of Management and Budget (OMB).[573]

276. The record shows that Arbitron's market definitions are an industry standard and represent a reasonable geographic market delineation within which radio stations compete.[574] Indeed, the DOJ consistently has treated Arbitron Metros as the relevant geographic market for antitrust purposes.[575] Although NAB opposes reliance on Arbitron markets, its own study states that Arbitron's service "is the primary currency through which buyers and sellers of radio airtime negotiate prices for radio advertising in most local markets."[576] As that study states, "all aspects of the information that Arbitron includes in these reports," including "the ways in which the markets are defined," are "driven by [the] single goal" of enabling "commercial radio stations and advertisers [to] determine the relative value of radio station airtime."[577] As NABOB succinctly states, "Radio stations compete in Arbitron markets "[578] Given the long-standing industry recognition of the value of Arbitron's service,[579] we believe there is strong reason to adopt a local radio market definition that is based on this established industry standard.[580]

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[573] MOWG Study No 11 at 4. MAs are comprised of metropolitan statistical areas (MSAs), consolidated metropolitan statistical areas (CMSAs), and primary metropolitan statistical areas (PMSAs). Metropolitan Areas 1999, Statistical Policy Office, Office of Management and Budget (OMB Metropolitan Areas) CMSAs are comprised of multiple PMSAs In 2000, OMB revised its procedures for defining MAs It also adopted a more generic term, Core Based Statistical Area (CBSA), to cover both traditional Metropolitan Areas and the new Micropolitan Statistical Areas ("Micro MSAs") that OMB has defined for less populated areas of the country *See generally* Standards for Defining Metropolitan and Micropolitan Statistical Areas, 65 Fed. Reg. 82228 (2000). OMB released the updated MA and Micro MSA list, which incorporates the data from obtained the 2000 census, on June 6, 2003 *See* OMB Bulletin 03-04, http://www.whitehouse.gov/omb/bulletins/b03-04.html.

[574] NABOB Comments in MM Docket No 01-317 at 8 *See also* Eure Comments in MM Docket No. 01-317 at 4; Inner City Comments at 3-4; North American Comments in MM Docket No. 01-317 at 4; UCC Comments in MM Docket No. 01-317 at 12; NABOB *et al* Comments at 17.

[575] *See, supra* note 517.

[576] NAB Comments in MM Docket No. 00-244, Attachment B, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets* by David Gunzerath, Ph.D , Director of Survey Research, Research & Planning Dep't, National Association of Broadcasters (Feb. 26, 2001) ("NAB Comments, Gunzerath Report")

[577] NAB Comments in MM Docket No. 00-244, Gunzerath Report at 3

[578] NABOB Comments at 18.

[579] Arbitron's predecessor was founded in 1966 NAB Comments in Docket No 00-244, Gunzerath Report at 2.

[580] In approximately five areas, Arbitron Metros are embedded within or overlap another Arbitron Metro *Defining Moment in Radio* at 30 If the radio stations at issue in an application are located in such an embedded or overlap area, we will examine each Arbitron Metro separately and will not process the application unless the proposed combination complies with the local radio ownership rule in each Metro implicated by the proposed combination. We believe this approach comports with our general recognition that Arbitron's market definitions are the (continued. ..)

277. Several commenters have argued that Arbitron market definitions are not reliable enough for us to use as a radio market definition.[581] Although Arbitron Metro boundaries do occasionally change, we are not convinced that such changes occur with such frequency, or that they are so drastic, that we must reject reliance on those boundaries in defining the relevant radio markets. Indeed, as Bear Stearns states, the "self-correcting" nature of Arbitron Metros can be a useful tool for keeping up with "the reality of the marketplace."[582]

278 We believe, moreover, that we can establish safeguards to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule. Specifically, we will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. This safeguard includes both enlarging the Metro (to make a market larger) and shrinking the Metro (to split a party's non-compliant station holdings into separate markets) Similarly, a station combination that does not comply with the rule cannot rely on a change in Arbitron Metro definitions to show compliance and thereby avoid the transfer restrictions outlined in the grandfathering section below, unless that change has been in effect for two years. We also will not allow a party to receive the benefit of the inclusion of a radio station as "home" to a Metro unless such station's community of license is located within the Metro or such station has been considered home to that Metro for at least two years.[583] We believe these safeguards will ensure that changes in Arbitron Metro boundaries and home market designations will be made to reflect actual market conditions and not to circumvent the local radio ownership rule.[584]

279 *Counting Methodology*. For each Arbitron Metro, Arbitron lists the commercial radio stations that obtain a minimum audience share in the Metro. Some of these stations are designated by

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recognized industry standard We reject Bear Stearns' proposal that we apply a different test for these markets in which permissible ownership levels would be based on the size and the business plan of the particular group owner. *Id* at 31-32 We believe such a scheme would be inconsistent with our general reliance on Arbitron's market definition and cumbersome to administer

[581] *See* NAB Comments in MM Docket No. 01-317 at 35; Cumulus Comments in MM Docket No. 01-317 at 24-25; Cumulus Reply Comments in MM Docket No. 01-317 at 4; WVRC Comments in MM Docket No. 00-244 at 24; Viacom Comments in MM Docket No 00-244 at 7, NAB Comments in MM Docket No. 00-244 at 16-17; Entercom Comments in MM Docket No. 00-244 at 6; Cumulus Comments in MM Docket No. 00-244 at 5; Aurora Comments in MM Docket No. 00-244 at 8, ARD Reply Comments in MM Docket No. 00-244 at 1; Idaho Wireless Comments in MM Docket No 00-244 at 6, Brill Comments in MM Docket No. 00-244 at 2; Aurora Comments in MM Docket No 00-244 at 10

[582] *Defining Moment in Radio* at 11. Changes in Metro boundaries can occur as a result of population shifts *Id.* In addition, Arbitron may add a county to a Metro if 55% of the county's radio listening is within the proposed Metro, 15% of the county's residents commute into the proposed Metro, and 75% of Arbitron subscribers agree to the proposed change. *Id* We believe these standards will help protect against sudden, drastic changes in Arbitron Metro boundaries

[583] Similarly, a party may not receive the benefit of changing the home status of its own station if such change occurred within the two years prior to the filing of an application. For an explanation of "home" status, see the following paragraphs regarding the counting methodology for Arbitron Metros.

[584] To the extent, of course, that we determine that, despite these safeguards, an Arbitron Metro boundary has been altered to circumvent the local radio ownership rule, we can and will consider that fact in evaluating whether a radio station combination complies with the rule's numerical limits.

Arbitron as "home" to the Metro. These "home" radio stations usually are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro. These radio stations are also known as "above-the-line" stations because, in ratings reports, Arbitron uses a dotted line to separate these stations from other radio stations – known as "below-the-line" stations – that have historically received a minimum listening share in a Metro.[585]

280 The Commission traditionally has relied on BIA's Media Access Pro database to obtain information about particular Arbitron Metros.[586] The BIA database relies on Arbitron's market definitions and builds upon Arbitron's data to provide greater detail about the competitive realities in Metro markets.[587] Given our experience with the BIA database and its acceptance in the industry, we will count as being in an Arbitron Metro above-the-line radio stations (*i.e.*, stations that are listed as "home" to that Metro), as determined by BIA.[588] We also will include in the market any other licensed full power commercial or noncommercial radio station whose community of license is located within the Metro's geographic boundary [589] By including these stations in the Metro, our counting methodology will reflect more accurately the competitive reality recognized by the radio broadcasting industry.[590] It is also quite sensible. Because we require radio stations to serve their communities of license, we know that stations licensed to communities in a particular Metro represent a source of competition within that Metro.[591] In addition to serving its community of license, to the extent that a radio station competes

[585] Stations that have no reportable audience share in a Metro may remain as a below-the-line station if they historically have received a minimum audience share in the Metro

[586] *See, e g.*, *Whitehall Enterprises, Inc* , 17 FCC Rcd 17509 (2002). BIA is a communications and information technology, investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries

[587] For example, Arbitron counts only commercial stations that meet certain minimum reporting standards. *See* Letter from Anne Lucey, Viacom, to Paul Gallant, Special Advisor, Media Bureau (May 5, 2003), Attachment at 1 n 4. BIA attempts to include every commercial and noncommercial radio station licensed in each Metro. *Defining Moment in Radio* at 16 BIA also may determine on its own whether a particular station licensed to a community outside of a Metro should be listed as "home" to that Metro. *Id.*

[588] *See, e g , id* If the BIA database counts any foreign radio stations as participating in a particular Metro, we also will count those stations in the relevant market. *See id.* at 17; Jefferson-Pilot Comments in MM Docket No. 01-317 at 8-9.

[589] We will rely on the Commission's broadcast database in determining the communities of license of radio stations. In the rare case where the boundaries of a community of license cross a boundary between two radio markets, we will consider the radio stations licensed to that community to participate in both markets

[590] By counting every radio station that is located in a Metro, we resolve concerns that Arbitron does not include stations that have less than a minimum audience share. *See* WVRC Comments in MM Docket No 01-317 at 30 n 63, 31, Cumulus Comments in MM Docket No. 01-317 at 25, WVRC Comments in MM Docket No. 00-244 at 24, Cox Comments in MM Docket No. 00-244 at 10, Letter from Jack N. Goodman, NAB, to Michael K. Powell, Chairman, FCC (May 29, 2003) at 2 ("NAB May 29, 2003 Ex Parte").

[591] *See* UCC Comments in MM Docket No 01-317 at 12-13. NAB claims that a community of license test produces a different market size count than a "home" market test. NAB May 29, 2003 Ex Parte at 2. However, NAB's own data suggest that the market tier would be the same under either test in over 60% of Metros. *Id.*, Attachment. Moreover, our counting methodology appears different from the one NAB used in its analysis. For example, NAB appears to have excluded stations from markets in which their communities of license are located if (continued)

beyond that, it is likely to serve the larger out-lying metropolitan areas that also comprise Arbitron Metros.[592] Accordingly, we find it is appropriate to count these radio stations in determining the size of an Arbitron Metro [593]

281. We reject arguments that we should count below-the-line stations in determining the size of a Metro's radio market.[594] Below-the-line stations can be a considerable distance from the Metro, and in many cases serve different population centers, if not altogether different Metros, from radio stations located in the market.[595] NAB estimates that, on average, approximately 70% of radio listening within a market is "attributable to commercial stations listed as being home to that market."[596] Bear Stearns likewise estimates that local radio stations generally capture a disproportionate share of the local markets' listening share and revenue share.[597] Although we recognize that, in certain instances, certain below-the-line radio station may have a competitive impact in the market for radio listening, we believe that, on balance, counting every below-the-line radio station would produce a distorted picture of the state of competition in a particular Metro.[598]

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such stations are home to another Metro. As we explain in the following footnote, we always count a station as participating in the market in which its community of license is located

[592] It is for this reason that a radio station located outside of a Metro occasionally may be included as home to that Metro. In such cases, we will count that station as participating in the radio market in which its community of license is located in addition to the Metro. We believe this simple rule will help prevent odd results in cases where a station requests "home" status in order to be viewed as a participant in another (usually larger) Metro. *See, e g*, *Great Scott Broadcasting*, 17 FCC Rcd 5397, 5406 ¶ 25 (2002) (noting that a radio station that was licensed to Trenton, New Jersey and was the second highest rated station in the Trenton Metro was listed as home to the Middlesex-Somerset-Union Metro); *see also* Viacom May 7, 2003 Ex Parte at 3, NAB May 29, 2003 Ex Parte at 3

[593] We disagree with commenters that contend that the "home" status designation is unreliable. *See, e g*, Nassau Comments in MM Docket No 01-317 at 8-9. Because a station will always be considered to participate in the radio market in which its city of license is located, the "home" status designation only affects radio stations licensed outside of the Metro to which it is home. It makes sense to us, moreover, to count those stations in the market in which they are commercially recognized as competitors

[594] *See, e g*, Aurora Comments in MM Docket No. 00-244 at 12; Viacom May 7, 2003 Ex Parte.

[595] *See, e g*, UCC Comments in MM Docket No. 01-317 at 12-13

[596] NAB Comments in MM Docket No. 01-317 at 4 We expect that listening to in-market stations is even higher when noncommercial stations are taken into account

[597] *Defining Moment in Radio* at 12. Bear Stearns states that the mean of audience share and revenue share that the top 3 in-market radio station groups receive is 58.9% and 82.9%, respectively. Bear Stearns concludes that "'out-of-market' players are probably not as significant in competing for local dollars as are 'in-market' players." *Id* Bear Stearns also notes that "the radio business, more than any other measured media, is a local medium" and that "78% of the radio industry's revenues are derived from local advertisers." *Id* We have previously observed that local businesses may not find out-of-market radio stations to be adequate substitutes for in-market stations. *See, e g*, *Youngstown Radio License, L L C*, 17 FCC Rcd 13896, 13903 ¶ 20 (2002)

[598] This distortion generally can occur in two ways. First, counting every below-the-line station as numerically equal to every in-market station would artificially inflate the size of radio markets. Second, it could unnecessarily restrict consolidation *across* markets because a party's ownership interest in a radio station in one market could (continued)

(ii) Areas Not Located in an Arbitron Metro

282. Arbitron Metros do not cover the entire country; the 287 Arbitron Metros cover approximately 60% of the commercial radio stations, 30% of the counties, and 78% of the population above the age of 12 in the United States, including Puerto Rico.[599] Several commenters have raised concerns concerning the appropriate method of defining radio markets in areas of the country not covered by Arbitron Metros.[600]

283. One possibility, in the absence of a pre-defined radio market, is to determine the relevant radio market on a case-by-case basis, in the context of an individual application. Such a process, however, would create significant regulatory uncertainty and impose substantial burdens on small-market radio broadcasters.[601] The better course is to develop radio market definitions for non-Metro areas through the rulemaking process.[602] We believe that would provide the most expeditious way to delineate appropriate radio market boundaries for the entire country and give all interested parties clear guidance about how we will analyze a proposed radio station combination under the local radio ownership rule. Because the rulemaking record in this proceeding provides little information about the appropriate boundaries of specific non-Metro radio markets,[603] we initiate below a new rulemaking proceeding to seek comment on that issue.

284. While that rulemaking proceeding is pending, we will need to process applications proposing radio station combinations in non-Metro areas and determine whether such combinations comply with the local radio ownership rule. Although we find the contour-overlap methodology problematic for the reasons stated above, we conclude that its temporary use during the pendency of the rulemaking proceeding cannot be avoided. Conducting a case-by-case analysis would create significant regulatory uncertainty, and adopting an ill-considered "proxy" geographic market could produce unforeseeable distortions The contour-overlap methodology is, at a minimum, well understood, and continuing its use for a few additional months would allow for the orderly processing of radio station applications

285. Although we find it necessary to maintain the contour-overlap market definition for an additional period of time, we will make certain adjustments to minimize the more problematic aspects of

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also count against that party in an adjacent market solely by virtue of such station obtaining a minimal audience share in the adjacent market. *See Defining Moment in Radio* at 13-14

[599] MOWG Study No 11 at 4-5 & nn 6 & 7

[600] *See, e g*, NAB Comments in MM Docket No. 01-317 at 35, WVRC Comments in MM Docket No. 01-317 at 29; Cumulus Reply Comments in MM Docket No 01-317 at 5; WVRC Comments in MM Docket No 00-244 at 23; Disney Comments in MM Docket No. 00-244 at 3, Viacom Comments in MM Docket No. 00-244 at 7, NextMedia Comments in MM Docket No. 00-244 at 4; NAB Comments in MM Docket No. 00-244 at 15, Entercom Comments in MM Docket No. 00-244 at 5; Cumulus Comments in MM Docket No. 00-244 at 6, Cox Comments in MM Docket No. 00-244 at 9; Brill Comments in MM Docket No 00-244 at 2.

[601] *See, e g*, Letter from Lewis W. Dickey, President, Cumulus Media, to Michael K. Powell, Chairman, FCC (May 19, 2003) at 2.

[602] NAB May 23, 2003 Ex Parte at 2-3.

[603] *Id*

that system Specifically, we adopt NAB's proposal to exclude from the market (*i.e.*, the denominator) radio stations that are commonly owned with the stations in the numerator.[604] This will prevent a party from "piggy-backing" on its own stations to bump into a higher ownership tier. We also will adopt NAB's suggestion that we exclude from the market any radio station whose transmitter site is more than 92 kilometers (58 miles) from the perimeter of the mutual overlap area.[605] This will alleviate some of the gross distortions in market size that can occur when a large signal contour that is part of a proposed combination overlaps the contours of distant radio stations and thereby brings them into the market.

286. We will require parties proposing a radio station combination involving one or more stations whose communities of license are not located within an Arbitron Metro boundary to show compliance with the local radio ownership rule using the interim contour-overlap methodology.[606] In making that showing, parties should include in the numerator and denominator radio stations that meet the criteria for inclusion under that methodology (as modified by the preceding paragraph) regardless of whether they are included in Arbitron Metros. We emphasize, however, that the interim contour-overlap methodology may not be used to justify radio station combinations in Arbitron Metros that exceed the numerical limits of the local radio ownership rule; in all cases, parties must demonstrate – using the standards for Arbitron Metros described above – that they comply with those limits in each Metro implicated by the proposed combination.

(iii) Modification to The Local Radio Ownership Rule

(a) Analysis of the Current Numerical Limits

287. 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.[607] With respect to the ownership tiers, we conclude that the current rule meets that standard. We find, however, that the rule improperly fails to consider the effect that noncommercial stations can have on competition in the local radio market We accordingly modify the rule to count noncommercial radio stations in determining the size of the radio market

288. We conclude that the ownership tiers in the current rule represent a reasonable means for promoting the public interest as it relates to competition. In radio markets, barriers to entry are high because virtually all available radio spectrum has been licensed. Radio broadcasting is thus a closed entry market, *i.e.*, new entry generally can occur only through the acquisition of spectrum inputs from existing radio broadcasters.[608] The closed entry nature of radio suggests that the extent of capacity that is

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[604] *Id*

[605] *Id*

[606] The interim methodology will be triggered even if a radio station is "home" to an Arbitron Metro, as long as its community of license is located outside of the Metro.

[607] Although the numerical limits in the local radio ownership rule traditionally have been focused on ensuring "Local Radio Diversity," *see* 1996 Act, § 202(b), we rely primarily on our competition goal to justify the rule. *See Fox Television*, 280 F.3d at 1042

[608] The need for governmental approval also imposes costs on new entry into the market.

available for new entry plays a significant role in determining whether market power can develop in radio broadcasting. Numerical limits on radio station ownership help to keep the available capacity from becoming "locked-up" in the hands of one or a few owners, and thus help prevent the formation of market power in local radio markets.

289. Although competition theory does not provide a hard-and-fast rule on the number of equally sized competitors that are necessary to ensure that the full benefits of competition are realized, both economic theory and empirical studies suggest that a market that has five or more relatively equally sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market.[609] The current tiers ensure that, in markets with between 27 and 51 radio stations, there will be approximately five or six radio station firms of roughly equal size.[610] An analysis of the top 100 Metro markets indicates that many of them fall within this range [611]

290. We find that the concentration levels permitted by the current rule represent a reasonable and necessary balance for radio broadcasting that comports with general competition theory, and we decline to relax the rule to permit greater consolidation in local radio markets We acknowledge that many radio markets currently have more than 6 radio station firms. According to MOWG Study No. 11, the top 50 Metros have an average of 19.9 radio station owners, the next 50 Metros have an average of 11.4 owners, and the remaining Metros have an average of 6.7 owners.[612] We also consider, however, that radio stations are not all equal in terms of their technical capabilities (*i.e.*, each radio station covers a population with varying levels of signal quality), and that the technical differences among stations can cause radio stations groups with similar numbers of radio stations to have vastly different levels of market power. Thus, although the top 50 Metros have an average of 19.9 owners, the top station group in each of those Metros has, on average, 35.2% of the revenue share, and the top four groups receive, on average, 86 1% of the revenue share.[613] The top four firms also dominate audience share.[614] According to the Future of Music Coalition, the top four firms receive 77.1% of the audience share in the top 10

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[609] A game-theoretic analysis of the number of independent firms that are required to produce competitive market performance is provided by R. Selter, *A Simple Model of Imperfect Competition Where Four are Few and Six are Many*, INT'L J GAME THEORY 2 (1973) This model is presented more intuitively in Louis Phillips, COMPETITION POLICY· A GAME THEORY PERSPECTIVE Ch 2 (Cambridge, UK: Cambridge Univ. Press 1995). An empirical study which finds that additional market entry has little effect on market conduct once a market has between three and five firms is provided by Timothy F. Bresnahan and Peter C. Reiss, *Entry and Competition in Concentrated Markets*, 99 J OF POL ECON 997-1009 (1991). These limits roughly comport with the limit in the DOJ/FTC Merger Guidelines between moderately- and highly-concentrated markets *DOJ/FTC Guidelines* § 1.51.

[610] Markets with 27 radio stations must have at least 4.5 owners (27 stations divided by the 6 station limit). Markets with 51 radio stations must have at least 6.375 owners (51 stations divided by 8 station limit).

[611] *Defining Moment in Radio* at 21. Our own analysis of BIA data confirms this conclusion.

[612] MOWG Study No 11, App. D.

[613] *Id* In Metros 51 to 100, the average revenue shares for the top firm and the four top firms are 42.8% and 93 5%, respectively. In Metros 101-287, the figures are 50.9% and 95%, respectively.

[614] The radio stations that receive the highest audience shares tend to receive a disproportionate portion of the revenue shares *See Defining Moment for Radio* at 12; *see also* Arbitron, Radio's Leading Indicator. Audience ratings and the impact on revenue, available at http.//www arbitron.com/downloads/leadindicator2002.pdf.

Metros, 84.7% in Metros 11 to 25, and 85.8% in Metros 26-50.[615] Bear Stearns' analysis also shows that, in the top 100 radio markets, the top three radio groups receive a median of 82.9% of the revenue share and 58.9% of the audience share.[616] And MOWG Study No. 4 indicates that the increase in concentration in radio markets has resulted in an appreciable, albeit small, increase in advertising rates.[617] This data suggests that the current numerical limits are not unduly restrictive.[618]

291. For markets with more than 51 radio stations, the number of radio station firms ensured by the rule increases as the size of the market increases. Because of this, some parties argue that we should raise the numerical limits to permit common ownership of more than eight radio stations in larger markets.[619] We reject that argument. There is no evidence in the record that indicates that the efficiencies of consolidating radio stations increase appreciably for combinations involving more than eight radio stations.[620] On the other hand, extremely large radio markets tend to cover a large area geographically and also tend to be more "crowded" in terms of radio signals. As a result, large markets may include a greater number of extremely small radio stations, as well as radio stations that are a significant distance from each other.[621] Both of these phenomena may make a large market appear more competitive than it actually is.[622] For example, there are approximately 84 radio stations (52 FM and 27 AM) licensed to the Los Angeles Metro. Of the FM stations, twenty-three are Class A or Class D stations, the weakest classes of FM stations. Of the 27 AM stations in Los Angeles, only five are 50 kilowatts and three are 20 kilowatts. The remaining 19 AM stations include one 10 kilowatt station and 18 stations with a power of 5 kilowatts or less. Some of these technically weaker stations may, of course, be strong competitors in their markets, depending on a variety of factors such as format choice, population coverage, and quality of programming.[623] But even in Los Angeles, the second largest radio

[615] FMC Comments at 33. The audience share of the top four firms in markets 51-100 and 101-289 is 92.5% and 93 9%, respectively *Id*

[616] *Defining Moment in Radio* at 12.

[617] MOWG Study No 4 at 18

[618] We see no significant benefit in tinkering with the basic structure of the tiers *See, e g*, Hodson Comments in MM Docket No. 01-317 at 7 (proposing six-tier framework). Bear Stearns argues that we should adjust the tiers because, in its view, Arbitron Metro markets contain on average fewer stations than the current contour-overlap markets. *Defining Moment in Radio* at 21-25. We reject that argument. The purpose of developing a sound market definition methodology is to enable us to measure concentration levels more accurately. We do not see why that should affect the level of concentration we permit in a (properly defined) market.

[619] *See Defining Moment in Radio* at 21-22; Viacom May 5, 2003 Ex Parte at 11

[620] No party contends that radio broadcasting is a natural monopoly, *i e*, that one firm can always provide service more efficiently than two or more firms.

[621] *See, e g*, NextMedia Comments in MM Docket No. 00-244 at 5; *accord* Letter from Jeffrey H. Smulyan, Chairman and CEO, Emmis Communications to Michael K. Powell, Chairman, FCC (May 30, 2003); Letter from Lee J Peltzman, Shainis and Peltzman, to Marlene H Dortch, Secretary, FCC (May 7, 2003) (Peltzman May 7, 2003 Ex Parte Letter)

[622] In addition to our decision to cap radio station ownership at 8 stations, we take the technical differences of radio stations into account by maintaining separate AM and FM limits.

market in the nation, the top one, two, and four radio station firms receive 31.2%, 60.2%, and 76.1%, respectively, of the revenue share.[624] By capping the numerical limit at eight stations, we seek to guard against 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.[625]

292. We also decline to make the numerical limits more restrictive. In the smallest radio markets, the current rule provides that one entity may own up to half of the commercial radio stations in a market. Although this would be considered highly concentrated from a competitive point of view, the Commission has recognized that greater levels of concentration may be needed to ensure the potential for viability of radio stations in smaller markets.[626] Given these concerns, we find it reasonable to allow greater levels of concentration in smaller radio markets, but to require more independent radio station owners as the size of the market increases and viability concerns become less acute.

293. In analyzing the level of concentration in radio markets that would be consistent with the public interest, we seek both to ensure a healthy, competitive radio market and enable radio owners to achieve significant efficiencies through consolidation of broadcast facilities. Prior to 1992, the local radio ownership rule did a poor job of recognizing 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; we seek to ensure that such consolidation does not reach the point of stifling competitive incentives. Because we believe that the current numerical limits by and large strike the appropriate balance,[627] we reaffirm those limits

294. We also reaffirm the AM and FM ownership limits in the current rule. Eliminating the service limits would improperly ignore the significant technical and marketplace differences between AM and FM stations AM stations have significantly less bandwidth than FM stations, and the fidelity of

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[623] It is for this reason that we cannot agree with certain commenters' arguments that we should allow greater consolidation of less powerful radio facilities in a local market. *See, e.g.*, Letter from John S Logan, Dow, Lohnes & Albertson, to Marlene H. Dortch, Secretary, FCC (May 15, 2003); Letter from Linda G. Morrison, Leventhal, Senter & Lerman, to Marlene H. Dortch, Secretary, FCC (May 28, 2003); NextMedia Comments in MM Docket No. 00-244 at 4-5. The local radio ownership rule takes into account differences in power and class of radio stations where appropriate We see no feasible way to account for unique market conditions or individual company holdings without frustrating our goal of providing regulatory certainty through relatively simple, bright-line rules.

[624] MOWG Study No 11, App. F.

[625] *See infra* ¶¶ 296-301

[626] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2777 (competitive realities are substantially different in markets of different sizes). *See also* Cumulus Comments in MM Docket No. 01-317 at 18-20.

[627] *See Sinclair*, 284 F.3d at 162, *AT&T Corp v FCC*, 220 F 3d 607, 627 (D C Cir. 2000) (the Commission "has wide discretion to determine where to draw administrative lines"); *Cassell v FCC*, 154 F.3d 478, 485 (D.C Cir. 1998) (the Commission's line-drawing is entitled deference so long as it is not "patently unreasonable"), *Health and Medicine Policy Research Group v FCC*, 807 F.2d 1038, 1043 (D.C. Cir. 1987) ("the scope of review is particularly limited when the FCC engages in 'the process of drawing lines'"); *Hercules Inc v EPA*, 598 F.2d 91, 107-108 (D.C. Cir. 1978) (agency's numbers must only be within a "zone of reasonableness").

their audio signal is inferior to that of FM stations.[628] Unlike FM stations, moreover, AM signal propagation also varies with time of day. During the day, AM signals travel through ground currents for between 50 to 200 miles; at night, AM signals travel further because they are reflected from the upper atmosphere. As a result, "many AM stations are required to cease operation at sunset."[629] These and other technical differences[630] have an effect on radio listenership patterns. As of 2002, 82% of radio audience comes from the FM service, while 18% of radio audience comes from the AM service.[631] Radio formats also can be affected. In Los Angeles, for example, our analysis indicates that many of the AM stations have a news/talk/sports or ethnic format, while music formats are more likely on commercial FM stations. We cannot agree, therefore, that eliminating the service caps and treating AM and FM radio stations equally for purposes of the overall station limit is consistent with our interest in protecting competition in local radio markets.

295. Although we reaffirm the ownership tiers in the local radio ownership rule, we conclude that it is not necessary in the public interest to exclude noncommercial radio stations in determining the size of the radio market. Although noncommercial stations do not compete in the radio advertising market, they compete with other radio stations in the radio listening and program production markets.[632] Indeed, noncommercial stations can receive a significant listening share in their respective markets.[633] Their presence in the market therefore exerts competitive pressure on all other radio stations in the market seeking to attract the attention of the same body of potential listeners. In television, we have recognized the contribution that noncommercial stations can make to competition by counting noncommercial stations in determining the size of the television market. We see no reason to treat noncommercial radio stations differently.

(b) Rejection of Repeal and Other Modifications

296. We reject arguments that we should repeal the local radio ownership rule. We see nothing in the record that persuades us that the acquisition of market power in radio broadcasting serves

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[628] *See Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service*, 17 FCC Rcd 19990, 19997 ¶ 19 (2002). The development of in-band, on-channel technology may help AM stations overcome this limitation *See id.*

[629] *Id*

[630] *See generally Review of Technical Assignment Criteria for the AM Broadcast Service*, 2 FCC Rcd 5014 (1987); *Review of Technical Assignment Criteria for the AM Broadcast Service*, 5 FCC Rcd 4381 (1990), *Review of the Methods for Calculating Nighttime Protection for Stations in the AM Broadcast Service*, 3 FCC Rcd 6448 (1988).

[631] *See* Arbitron National Radio Services, Tracking Trends at http://www.Arbitron.com/national_radio/home.htm (visited May 11, 2003); *see also* Peltzman May 7, 2003 Ex Parte at 1. Viacom argues that "four of the ten highest billing stations in the country are AM stations." *See* Letter from Meredith Senter, Levanthal, Senter & Lerman, to Marlene H. Dortch, Secretary, FCC (May 15, 2003) at 3. We fail to see how looking at only the top ten billing stations provides much information about the relative strength of AM and FM stations across the country. To the contrary, the fact that a few high-power AM stations are comparable to FM stations in terms of billing capability weighs against Viacom's alternative argument that we should disregard AM ownership entirely. *Id*

[632] *See, e g*, Viacom May 5, 2003 Ex Parte at 4.

[633] *See, e g*, Viacom May 7, 2003 Ex Parte at 2.

the public interest.[634] As we explain in the Policy Goals section, we are committed to establishing a regulatory framework that promotes competition in the field of broadcasting. Competition breeds innovation in programming and creates incentives to continually improve program quality.[635] Because competition – and the benefits that flow from it – is lessened when the market is dominated by one or a few players, we seek through our rules to prevent that type of market structure from developing.

297. Without some check, a party could acquire all or a significant portion of the limited number of broadcast radio channels in a local community, leaving listeners, advertisers, and program producers with fewer substitutes. That situation also would raise the cost of entry into the market by new entrants because there would be fewer radio stations available from which a party could construct a competing station group.[636] Because the most potent sources of innovation often arise from new entrants,[637] a market structure that significantly raises the costs of entry leads to less-than-optimal results in terms of innovation and program quality and thereby harms the public interest.[638] It is therefore necessary for us to impose limits on the number of radio stations a party may own in a local market to preserve competition in the relevant markets in which radio stations compete.[639]

298. Several commenters argue that the local radio ownership rule is unjustified because consolidation has resulted in efficiencies and has produced significant public interest benefits.[640] In the *Local Radio Ownership NPRM*, we asked for information on three specific markets – Syracuse, New York; Rockford, Illinois; and Florence, South Carolina. Clear Channel is the largest group owner in Syracuse;[641] Cumulus is a large group owner in Rockford and Florence.[642] Clear Channel and Cumulus have provided detailed information highlighting the public interest benefits that they contend they have produced by consolidating radio stations in those markets, such as greater investment in facilities and

[634] Most of the debate centers around whether radio broadcasting constitutes a separate relevant product market (we have concluded that it does) and the means we should use to protect competition in the relevant market (we have just answered that question) Although some parties have suggested that monopoly in broadcasting would promote program diversity, we find the evidence supporting that theory inconclusive. *See infra* ¶¶ 307-315.

[635] *See, e g*, *EchoStar/DirecTV HDO*, 17 FCC Rcd at 20626 ¶ 176. *See also* Policy Goals, Section III, *supra.*

[636] *See* Dick Comments in MM Docket No. 01-317 at 6; Hodson Comments in MM Docket No. 01-317 at 6.

[637] *See, e g*, *1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd at 6077 ¶ 28; *see also* MMTC Comments in MM Docket No 01-317 at 107

[638] *See* Policy Goals, Section III, *supra.*

[639] *Id* The Policy Goals Section contains an explanation of why we decide to rely on prescriptive rules rather than case-by-case analyses to promote our public interest objectives in media.

[640] *See, e g*, Viacom Comments in MM Docket No. 01-317 at 51, 60-63; Clear Channel Comments in MM Docket No. 01-317 at 23-24.

[641] Clear Channel Comments in MM Docket No 01-317 at 24.

[642] Cumulus Comments in MM Docket No. 01-317 at 7.

programming, including local news and public affairs [643]

299. We do not dispute that a certain level of consolidation of radio stations can improve the ability of a group owner to make investments that benefit the public.[644] Our responsibility under the statute, however, is to determine the level at which the harms of consolidation outweigh its benefits, and to establish rules to prevent that situation from developing. And while Clear Channel, Cumulus, and others highlight the public interest benefits that they were able to achieve through consolidation, we also seek to ensure that radio stations outside of the dominant groups can remain viable and, beyond that, can prosper. Several commenters express concern that, in markets with a high level of concentration, small radio firms may be forced to "sell out" to group owners.[645] Specifically, the concern is that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner.[646] As a result, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups.[647] Although we decline to pass on the competitive situation in any particular radio market in the context of this rulemaking proceeding,[648] the concerns raised by these commenters comport with the competition analysis that underlies this order and supports our decision not to repeal the local radio ownership rule.

300. We also reject arguments that we incorporate a market share analysis into the local radio ownership rule or that we continue to "flag" applications that propose radio station combinations above a certain market share.[649] Several parties have suggested that we consider audience share or revenue share

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[643] Clear Channel Comments in MM Docket No. 01-317, Exh. 4; Cumulus Comments in MM Docket No. 01-317 at 6-14; Cumulus Comments at 7-12. Clear Channel also filed similar information about other radio markets in which it operates Clear Channel Comments in MM Docket No 01-317, Exh 5.

[644] *See, e g*, NAB Comments in MM Docket No 01-317 at 44-45, Radio One Comments in MM Docket No. 01-317 at 11-12, Viacom Comments in MM Docket No. 01-317 at 60-62; Clear Channel Comments in MM Docket No 01-317 at 23-24; Cumulus Comments in MM Docket No. 01-317 at 5-6, 19; Zimmer Comments in MM Docket No 00-244 at 6; Weigle Comments in MM Docket No. 00-244 at 6; Viacom Comments in MM Docket No 00-244 at 6, HBC Comments in MM Docket No. 01-317 at 11-12; NAB Reply Comments in MM Docket No. 01-317 at 11, Zimmer Comments in MM Docket No. 00-244 at 7.

[645] *See* AFTRA Comments in MM Docket No. 01-317 at 2; North American Comments in MM Docket No. 01-317 at 12, Blakeney Comments in MM Docket No. 01-317 at 2; MMTC Comments in MM Docket No. 01-317 at 23-24, 45

[646] *See* North American Comments in MM Docket No. 01-317 at 11, Idaho Comments in MM Docket No 01-317 at 3; Dick Comments in MM Docket No. 01-317 at 3; MMTC Comments in MM Docket No. 01-317 at 21.

[647] *See* AFTRA Comments in MM Docket No. 01-317 at 9; Daugherty Comments in MM Docket No. 01-317 at 3; Kennelwood Comments at 1-3.

[648] *See, e g*, Kennelwood Comments at 8.

[649] In August 1998 the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market. *See Applications of Shareholders of AMFM, Inc, (Transferor)* (continued ..)

in determining the level at which common ownership of local radio stations becomes contrary the public interest.[650] We recognize that competition analysis generally looks to market share as the primary indicator of market power Market share, however, must be considered in conjunction with the overall structure of the industry in determining whether market power is present.[651] In radio, the availability of a sufficient number of radio channels is of particular importance in ensuring that competition can flourish in local radio markets. The numerical caps and the AM/FM service limits are designed to address that interest, and in our judgment, establishing a inflexible market share limit in our bright-line rule would add little, if any, benefit. We do not seek to discourage radio firms from earning market share through investment in quality programming that listeners prefer, our objective is to prevent firms from gaining market dominance through the consolidation of a significant number of key broadcast facilities. We do not believe that developing a market share limit would significantly advance that objective.

301. We recognize that our conclusion differs from the Commission's view in 1992 that an audience share cap was necessary "to prevent consolidation of the top stations in a particular local market."[652] But the audience share cap was never intended to be more than a "backstop" to the new numerical limits the Commission had established, which for the first time allowed a party to own multiple radio stations in a local market[653] The audience share cap was eliminated as a result of the revisions to the local radio ownership rule that Congress mandated in the 1996 Act, which left only the numerical caps in place But because of the problems associated with the contour-overlap market definition and counting methodologies, we could not rely with confidence on those numerical limits to protect against undue concentration in local markets. As a result, we began looking at revenue share in our "flagging" process and the interim policy that we established in the *Local Radio Ownership NPRM.* Now that we have established a rational system for defining radio markets and counting market participants, we believe that the numerical limits will be better able to protect against harmful concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary *prima facie* showing that a proposed combination is contrary to the public interest.[654]

b. Localism

302. Our localism goal stems from our interest in ensuring that licensed broadcast facilities

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and Clear Channel Communication, Inc (Transferee), 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000) ("*AMFM, Inc* "). Flagged transactions were subject to a further competitive analysis, the scope of which is embodied in the interim policy set forth in the *Local Radio Ownership NPRM*, 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[650] *See, e g*, Hodson Comments in MM Docket No 01-317 at 6-7; UCC Comments in MM Docket No. 01-317 at 27; NABOB Comments in MM Docket No 01-317 at 5, Radio One Reply Comments in MM Docket No. 01-317 at 3; Cumulus Comments at 14.

[651] *See, e g*, *United States v Microsoft Corp*, 235 F.3d 34, 51, 54 (D.C Cir 2001); *TV FNPRM*, 10 FCC Rcd at 3535 ¶ 21

[652] *1992 Radio Ownership Order*, 7 FCC Rcd at 2781 ¶ 53.

[653] *Id*

[654] 47 U.S C § 309(d)

serve and are responsive to the needs and interests of the communities to which they are licensed.[655] Our localism policy influences many of our broadcast policy decisions, including decisions relating to how radio spectrum is allocated and to the public interest obligations that are imposed on radio broadcasters.[656]

303. Some commenters argue that the local radio ownership rule harms localism by preventing efficient consolidation that promotes improved local service. As explained in the Competition Section above, we agree that consolidation of radio stations can result in efficiencies. This does not mean, however, that all consolidation serves the public interest.[657] We recognize only those efficiencies that inure to the benefit of the public.[658] In a competitive market, the efficiencies arising out of consolidation will be passed on to listeners through greater innovation and improved service quality, which in this context contemplates programming that is responsive to the needs and interests of the local community. In a concentrated market, radio station firms have diminished incentive to compete vigorously. Smaller firms, moreover, may have insufficient resources to compete aggressively with the dominant firms in the market, which makes smaller firms less effective in meeting the needs and interests of their local communities. Thus, by preserving a healthy, competitive local radio market, the local radio ownership rule also helps promote our interest in localism.

304 Aside from the positive effect on localism that ensues from a competitive radio market, we see little to indicate that the local radio ownership rule significantly advances our interest in localism. In prior rulemaking proceedings, the Commission has not emphasized localism as one of the justifications for the local radio ownership rule,[659] and the record suggests no reason for adopting a different view here. Although some parties suggest that localism has suffered as a result of consolidation, the source of the alleged harm appears to be the overall *national* size of the radio station group owner rather than the number of radio stations commonly owned in a local market. Thus, Idaho Wireless contends that large group owners downsize local staff so that "they can run stations all over the country more cheaply,"[660] and UCC asserts that consolidation has resulted in "nearly identical programming" in *different* local markets.[661] These concerns do not address whether consolidation of radio stations in a *local* market would harm localism. National radio ownership limits are outside the scope of this proceeding.

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[655] *Notice*, 17 FCC Rcd at 18526 ¶ 70.

[656] *Id*

[657] *See 2000 CMRS Review*, 16 FCC Rcd at 22696 ¶ 55

[658] *See, e g , Whitehall Enterprises, Inc* , 17 FCC Rcd at 17525 ¶ 49. *Accord EchoStar/DirecTV HDO*, 17 FCC Rcd at 20604 ¶ 98.

[659] *See, e g , 1992 Radio Ownership Order*, 7 FCC Rcd 2755; *1989 Multiple Ownership First Report and Order*, 4 FCC Rcd 1723

[660] Idaho Wireless Comments in MM Docket No. 01-317 at 3, 9-10; *see also* North American Comments in MM Docket No 01-317 at 11.

[661] UCC Reply Comments in MM Docket No 01-317 at 17

c. Diversity

305. *Viewpoint Diversity.* Viewpoint diversity "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public "[662] Many outlets contribute to the dissemination of diverse viewpoints, and provide news and public affairs programming to the public. Elsewhere in this *Order*, we discuss in exacting detail the various sources of local news and information that are available to the public. Here, it is sufficient to say that media other than radio play an important role in the dissemination of local news and public affairs information.

306. That, of course, does not mean that radio broadcasting is irrelevant to viewpoint diversity. We recognize that radio can reach specific demographic groups more easily than other forms of mass media.[663] Because of this, 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 businesses, women, minorities, and other entrepreneurs seeking to meet a market demand or provide programming to underserved communities. New entry promotes outlet diversity, which in turn enhances viewpoint diversity and the public interest. Our competition-based limits on local radio ownership thus promote viewpoint diversity, not only by ensuring a sufficient number of independent radio voices, but also by preserving a market structure that facilitates and encourages entry into the local media market by new and underrepresented parties.

307. *Programming Diversity.* Some commenters argue that program diversity should be the paramount diversity concern in radio broadcasting.[664] The record is divided on the effect of consolidation on program diversity. Some argue that the local radio ownership rule harms program diversity because greater concentration leads to more homogenized, less innovative programming.[665] Others argue that the rule encourages program diversity because greater concentration encourages the common owner to program in a manner that appeals to different audiences.[666]

308. In theory, program diversity promotes the public interest by affording consumers access to a greater array of programming choices. We have long recognized that the most extreme example of zero program diversity – duplication of programming – generally results in an inefficient use of the scarce radio spectrum and a lost opportunity to use that spectrum to serve a community. For that reason, our rules restrict the ability of radio broadcasters to duplicate programming in the same community.[667] The

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

[663] *See* MMTC Comments in MM Docket No. 01-317 at 47.

[664] *See, e g*, NAB Comments in MM Docket No. 01-317 at 16, Clear Channel Comments in MM Docket No. 01-317 at 14.

[665] AFTRA Comments in MM Docket No. 01-317 at 11; Hodson Feb 28, 2002, Comments at 5-6; Amherst Comments in MM Docket No. 01-317 at 3

[666] NAB Comments in MM Docket No 01-317 at 18-20; Radio South Comments in MM Docket No 01-317 at 2; Clear Channel Reply Comments in MM Docket No 01-317 at 3; NAB Reply Comments in MM Docket No. 01-317 at 12, Zimmer Comments In MM Docket No 00-244 at 6, Citadel Comments in MM Docket No. 00-244 at 8

[667] 47 C.F.R. § 73 3556

corollary is that greater variety of differentiated programming advances the public interest by giving consumers in a local community more selection from which they can obtain programming to meet their varied interests.

309. No party seriously disputes that greater program diversity promotes the public interest. The difficulty is in finding a way to measure program diversity in a coherent and consistent manner so that we can determine how it is affected by concentration.[668] The record indicates that different measures of format diversity produce strikingly different results.

310. A number of commenters cite a recent study by Berry and Waldfogel that found that reductions in the numbers of owners in radio markets led to an increase in radio format labels.[669] This confirms, they argue, Steiner's claim that a monopoly broadcaster will provide more diverse programming than a number of competitive stations.[670] The evidence presented in MOWG Study No. 11, however, suggests that the number of formats across radio markets has remained flat since the passage of the 1996 Act.[671]. The discrepancy between these two studies is due to the different classification of format used in each study. MOWG Study No. 11 uses the most general type of classification available in the BIA database, while Berry and Waldfogel uses the finer classification formats available in Duncan. An example will illustrate the difference. One radio format Adult Contemporary taken from the BIA can be broken down into five different subformats under Duncan's system: Adult Contemporary, Adult Contemporary/Album Oriented Rock, Adult Contemporary/Contemporary Hit Radio, Adult Contemporary/ New Rock, and Adult Contemporary Oldies. While we agree that the Duncan formats allow a somewhat richer portrayal of the variety of music than the more general format categories, we are not certain how substantial the difference between many of these minor subcategories within the major categories of format are. We therefore question how well the increases in radio formats reported by Berry and Waldfogel imply increases in radio program diversity.

311. The relationship between radio formats and radio programming is investigated in a study by Peter DiCola and Kristin Thomson.[672] By searching through playlist data in *Radio and Records*, they found substantial overlap between the major radio formats. For example, they found that in August 2002, that Contemporary Hit Rock (CHR) Rhythmic and Urban shared 76% of the songs on their top 50 charts.[673] Further, they found that the overlap had increased for some music format pairs and decreased

[668] The relationship between concentration and program diversity is not necessarily linear. One study examining the relationship between industry structure and variety in the music recording industry found that high and low levels of concentration result in less variety, while maximum variety is promoted at a moderately concentrated structure. In this study, that moderate concentration level corresponded with the top four firms capturing approximately half the market revenue. *See* Peter J. Alexander, Product Variety and Market Structure, 32 J. ECON. BEHAVIOR & ORG 207 (1997)

[669] Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116(3) Q. J ECON 1009-25.

[670] Steiner, *supra* note 400. *See infra* ¶¶ 313-14.

[671] MOWG Study No 11

[672] Future of Music Coalition Comments, *Radio Deregulation Has It Served Citizens and Musicians?* by Peter DiCola and Kristin Thomson.

[673] Future of Music Coalition Comments at Table 4-1, at 56.

for others.[674] The considerable overlap between major format categories reported by DiCola and Thomson suggest far greater overlap between the Duncan formats which Berry and Waldfogel use. The presence of substantial overlap between music formats that do not remain stable through time suggests that the number of formats is not a good measure of program diversity.

312. MOWG Study No. 9 addresses the issue of diversity in radio by examining top 10 playlists across a sample of radio stations published by *Radio and Records*.[675] Overall, the results suggest that song diversity remained approximately flat from 1996 to 2001. MOWG Study No. 9 compared the total number of unique songs in top 10 playlists between 1996 and 2001 and found the number of songs changed from 1241 to 1228, a 1 percent decline.[676] MOWG Study No. 9 also constructed a measure to compare the difference of the top 10 songs played between radio stations.[677] The authors found that comparing stations within the same format led to an overall decline of 2.4% in top 10 playlist diversity.[678] A similar exercise, however, comparing radio stations in similar but different formats found a slight increase in diversity of 0.74%.[679] The study also attempted to establish the direct link of songlist diversity and consolidation in the radio industry. Overall, the results suggest that consolidation in the radio industry neither helped nor hindered playlist diversity between radio stations.[680]

313. The studies on program diversity also do not draw a sufficiently reliable causal link between ownership concentration and the purported increase in format diversity. To establish that link, some commenters rely on the theory proposed by Peter Steiner in 1952 that a monopoly broadcaster will diversify programming to attract different groups with distinct listening preferences and thereby secure the largest total audience for advertisers, whereas broadcasters operating in a competitive environment would be more likely to duplicate formats if a majority of listeners prefer a particular format. According to these commenters, the Steiner theory supports the causal link between the increase in radio ownership

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[674] For example, overlap in Top 50 charts for CHR Pop and CHR Rhythmic has increased by 14% from 1994 and 2002 *Id* at Table 4-2, at 60.

[675] MOWG Study No. 9, Radio Market Structure and Music Diversity by George Williams, Keith Brown, and Peter Alexander (Sept. 2002) ("MOWG Study No. 9")

[676] *Id.* at 9

[677] The technical details of this difference measure are described in the paper, but essentially the measure counts the number of times two different playlists do not share a song. Thus if the top 10 songs of two stations share 4 songs, the distance measure would equal 6.

[678] MOWG Study No. 9 at 11

[679] *Id* at 13

[680] MOWG Study No. 9 also attempted to establish the direct relationship between consolidation of radio stations in a market and the songlist diversity in that market through linear regression. The results reported suggest that common ownership of radio stations in a market can increase playlist diversity. Unfortunately, inspection of the data suggest that this result may not be very robust. The number of common radio stations in issues of *Radio and Records* examined between 1996 and 2001 is so few that that the result is driven by only a handful of radio station pairs This remains to be an important question for further research.

concentration over the last few years and the asserted increase in format diversity [681]

314. Steiner's theory has produced much discussion and research in the economic literature,[682] and the Commission has itself recognized the theory that greater consolidation could lead to greater format diversity.[683] After a careful review of the economic literature, however, we cannot confidently adopt the view that we should encourage more consolidation in order to achieve greater format diversity. Like many economic theories, the Steiner theory and its progeny rests on a number of assumptions. The ability of the theory to predict actual market results reliably therefore depends in large part on the accuracy of those assumptions. For example, Steiner assumes that viewers prefer only one type of programming; when viewers have lesser preferred substitutes, different results are produced. Moreover, competitive models perform better than monopoly in terms of diversity and consumer welfare when channel space increases.[684] Changes in various other assumptions also may affect the results reached by the original Steiner model.[685] We need not review all of these assumptions here; it is sufficient that they exist and that their accuracy is open to debate. Although further research on the Steiner model may be fruitful, we cannot at this time rely on that model to accept the argument that greater consolidation leads to more format diversity in radio broadcasting.[686]

315. In light of this record, we cannot conclude that radio ownership concentration has any effect on format diversity, either harmful or beneficial. Accordingly, we do not rely on it to justify the local radio ownership rule.[687]

2. Attribution of Joint Sales Agreements

316 In the *Local Radio Ownership NPRM*, we sought comment on the appropriate regulatory

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[681] *See, e g*, Clear Channel Comments, Hausman Statement at 12.

[682] Jack H Beebe, in particular, has used the Steiner model to create a significantly more sophisticated model of program choice in broadcasting. Jack H. Beebe, *Institutional Structure and Program Choices in Television Markets*, 91(1) Q. J. ECON. 15 (1977).

[683] *Notice*, 17 FCC Rcd at 18530 ¶ 82 n 159.

[684] Beebe, *supra* note 682 at 15

[685] For example, taking advertising into account may change the results of the Steiner model. *See* Simon Anderson and Steve Coate, *Market Provision of Public Goods The Case for Broadcasting*, Working Paper (UVA and Cornell 2001).

[686] Even if the Steiner model is an accurate model of program choice in broadcasting, we would not necessarily conclude that greater consolidation in radio broadcasting would serve the public interest. As explained above, consolidation may have certain negative effects on innovation and program quality that outweigh any asserted increase in program diversity. Because we do not rely on the Steiner model here, we do not attempt to undertake a balancing of those competing interests at this time.

[687] We leave open the possibility that, after further research, additional evidence may be adduced to establish the link between ownership concentration and format diversity. If such a link can be shown, we will consider the implications of that link on the local radio ownership rule at that time.

treatment for radio Joint Sales Agreements (JSAs).[688] A typical radio JSA authorizes the broker to sell advertising time for the brokered station in return for a fee paid to the licensee. Because the broker normally assumes much of the market risk with respect to the station it brokers, JSAs generally give the broker authority to hire a sales force for the brokered station, set advertising prices, and make other decisions regarding the sale of advertising time, subject to the licensee's preemptive right to reject the advertising. Currently, JSAs are not attributable under the Commission's attribution rules. Therefore, radio stations subject to JSAs do not count toward the number of stations the brokering licensee may own in a local market.

317. Based on the record in this proceeding, and on our experience with JSAs and our local radio ownership rules, we will now count the brokered station toward the brokering licensee's permissible ownership totals under the revised local ownership rules. Where an entity owns or has an attributable interest in one or more stations in a local radio market, joint advertising sales of another station in that market for more than 15 percent of the brokered station's advertising time per week will result in counting the brokered station toward the brokering licensee's ownership caps. Specifically, we have concerns regarding the impact of in-market JSAs on competition in local radio markets. We do not believe that out-of-market JSAs pose the same economic concerns. Therefore, JSAs will not be attributable when a party does not own any stations or have an attributable interest in stations in the local market in which the brokered station is located.[689]

318. In considering revisions to our attribution rules, we have always sought to identify and include those positional and ownership interests that convey a degree of influence or control to their holder sufficient to warrant limitation under our ownership rules.[690] As with LMAs, JSAs are not precluded by any Commission rule or policy as long as the Commission's ownership rules are not violated and the participating licensees maintain ultimate control over their facilities. Nothing in the record indicates that licensees abdicate control over stations that are subject to JSAs. However, we find that the use of in-market JSAs may undermine our continuing interest in broadcast competition sufficiently to warrant limitation under the multiple ownership rules.[691] Where we have referred to

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[688] As we stated in the *Notice*, as a general matter, we are not reviewing our attribution rules as part of the biennial review process. *Notice*, 17 FCC Rcd at 18506 ¶ 7 n 13. However, we specifically sought comment in the *Local Radio Ownership NPRM* on whether to attribute radio JSAs Therefore, we will consider changes to our attribution rules only in this one context Because we did not raise the issue of whether to change our current policy regarding non-attribution of television JSAs, we will not consider any changes in this *Order*. We will issue a future Notice of Proposed Rulemaking to seek comment on whether or not to attribute television JSAs.

[689] For instance, consider a licensee that owns a radio station in the Cleveland, Ohio, radio metro, and has a JSA for a radio station in the Akron, Ohio, radio metro. The broker owns no stations in the Akron, Ohio, market. The JSA in the Akron, Ohio, market therefore would not be attributable. However, in-market JSAs will be attributable regardless of whether the advertising time for the station is sold in conjunction with commonly owned stations in the same market, or with stations in distant markets The potential for influence over the brokered station would exist under both scenarios

[690] *Attribution of Ownership Interests*, 97 F C.C.2d 997, 999, 1005 (1984), ("*1984 Attribution Order*") *on recon*, 58 RR 2d 604 (1985), *on further recon*, 1 FCC Rcd 802 (1986), *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121.

[691] *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2788 ¶ 64; *Attribution NPRM*, 10 FCC Rcd 3606, 3609 ¶ 4 (1995) (*quoting 1984 Attribution Order*, 97 F C C 2d at 999).

influence, we have viewed it as an interest that is less than controlling, but through which the holder is likely to induce a licensee to take actions to protect the interests of the holder. Our judgment as to what level of influence should be subject to restriction by the multiple ownership rules has, in turn, been based on our judgment regarding what interests in a licensee convey a realistic potential to affect its programming and other core operational decisions.[692]

319. We find that where one station owner controls a large percentage of the advertising time in a particular market, it has the ability potentially to exercise market power. Many times, the broker will sell advertising packages for the group of stations, offer substantial discounts and create incentives not available to other broadcasters in the market. In any given radio market, a broker may own or have an ownership interest in stations, operate stations pursuant to an LMA,[693] or sell advertising time for stations pursuant to a JSA. "Control over spot sales by one station affords significant power over the other."[694] Thus, JSAs raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally. JSAs put pricing and output decisions in the hands of a single firm. Instead of stations competing against one another, a single firm sells packages of time for all stations, eliminating competition in the market.

320 We have not previously attributed JSAs based on our earlier conclusion that JSAs do not convey sufficient influence or control over a station's core operations to be considered attributable.[695] While we have recognized the DOJ's concerns as to the impact of same-market radio JSAs on competition, we noted that the DOJ and the Commission's concerns may differ in certain respects.[696] We have previously distinguished JSAs and LMAs, finding that only LMAs have the ability to affect programming, personnel, advertising, physical facilities, and other core operations of stations.[697] There are several reasons for our policy change. Upon reexamination of the attribution issue, we find that, because the broker controls the advertising revenue of the brokered station, JSAs have the same potential as LMAs to convey sufficient influence over core operations of a station to raise significant competition concerns warranting attribution.[698] As with LMAs, licensees of stations subject to JSAs typically receive

[692] *Attribution NPRM*, 10 FCC Rcd at 3610 ¶ 4

[693] LMAs typically provide that the broker may sell advertising time and retain the advertising revenue for the programming it provides to the brokered station.

[694] *1999 Attribution Report and Order*, 14 FCC Rcd at 12612 ¶ 121

[695] *Id* at 12612 ¶ 122 However, we left open the possibility that JSAs could threaten competition, and retained discretion to review cases involving radio or television JSAs on a case-by-case basis if it appeared that such JSAs pose competition or other concerns. *Id* at 12613 ¶ 123. *See, e.g*, *Shareholders of the Ackerly Group, Inc. (Transferor) and Clear Channel Corp. (Transferee)*, 17 FCC Rcd 10828 (2002).

[696] *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122.

[697] *Id*

[698] In 1996, we revisited the issue of whether to attribute JSAs *See Review of the Commission's Regulations Governing Attribution of Broadcast Interests,* 11 FCC Rcd 19895, 19911 (1996) ("*1996 Attribution FNPRM*"). We considered whether JSAs present diversity and competition concerns, and whether a company could potentially exert market power by controlling a certain amount of the advertising revenue share in the market In declining to attribute JSAs, we concluded that they do not convey the degree of influence or control over station programming or core operations such that they should be attributed *1999 Attribution Order*, 14 FCC Rcd at 12612 ¶ 122.

a monthly fee regardless of the advertising sales or audience share of the station. Therefore, licensees of stations subject to JSAs have less incentive to maintain or attain significant competitive standing in the market.

321. Although we continue to believe that JSAs may have some positive effects on the local radio industry, we find that the threat to competition and the potential impact on the influence over the brokered station outweighs any potential benefits and requires attribution. As with our decision in 1992 to attribute radio LMAs, we find that modification of our regulation also is warranted given the need for our attribution rules to reflect accurately competitive conditions of today's local radio markets.[699] We noted then, and it still holds true today, that it would be inconsistent with our rules to allow a local station owner to substantially broker a station, whether pursuant to an LMA or JSA, that it could not own under the local radio ownership limits [700]

322. Some commenters argue that we should continue to exempt JSAs from attribution because they produce a public interest benefit.[701] Others believe that we either should treat JSAs the same as LMAs in our competition analysis,[702] or that we should require prior approval for both JSAs and LMAs.[703] Clear Channel argues that "[n]othing has transpired over the succeeding two years [since we decided not to attribute JSAs] that would justify reconsideration of these positions."[704] We disagree with Clear Channel. Our experience administering the local radio ownership rule convinces us that we need to modify our attribution policy with regard to JSAs for the above reasons. Although, like LMAs, JSAs might produce public interest benefits, we find that JSAs may convey sufficient influence or control over advertising to be considered attributable.[705]

323. We believe that a 15 percent advertising time threshold will identify the level of control or influence that would realistically allow holders of such influence to affect core operating functions of a station, and give them an incentive to do so. At the same time, a 15 percent threshold will allow a station the flexibility to broker a small amount of advertising time through a JSA with another station in

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[699] In 1992, based on concerns about competition and diversity, we attributed radio LMAs where an entity owns a station in a local radio market and brokers another station in the market for more than 15 percent of the brokered station's broadcast hours per week *1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2788. In 1999, we attributed television LMAs. *See 1999 Attribution Report and Order*, 14 FCC Rcd at 12597 ¶ 83.

[700] *1992 Radio Ownership Report and Order*, 7 FCC Rcd at 2788- 89 ¶ 65.

[701] Clear Channel Comments in MM Docket No. 01-317 at 27; Cox Comments in MM Docket No. 01-317 at 17-18, Cumulus Comments in MM Docket No. 01-317 at 15 n.10; Clear Channel Reply Comments in MM Docket No. 01-317 at 5 n 7

[702] Dick Broadcasting Comments in MM Docket No. 01-317 at 8; Eure Comments in MM Docket No. 01-317 at 2, Idaho Wireless Comments in MM Docket No 01-317 at 9; Hodson Comments in MM Docket No. 01-317 at 9.

[703] North American Comments in MM Docket No 01-317 at 17-18; Dick Broadcasting Comments in MM Docket No 01-317 at 8, Idaho Wireless Comments in MM Docket No. 01-317 at 9.

[704] Clear Channel Comments in MM Docket No 01-317 at 27.

[705] As evidence of potential adverse competitive effects pursuant to the interim policy adopted in the *Local Radio Ownership NPRM*, we considered the presence of both LMAs and JSAs in the relevant radio market. *Local Radio Ownership NPRM*, 16 FCC Rcd at 19896 ¶ 86.

the same market without that brokerage rising to an attributable level of influence. We believe that the 15 percent threshold (which is the same threshold used for determining attribution of radio and television LMAs) balances these interests.[706]

324. Under our modified rules, JSAs currently in existence will be attributable. Parties with existing, attributable JSAs in Arbitron Metros under our new rules will be required to file a copy of the JSA with the Commission within 60 days of the effective date of this *Order*.[707] For JSAs involving stations located outside of Arbitron Metros, we will require such JSAs to be filed within 60 days of the effective date of our decision in Docket No. 03-130, unless a different date is announced in that decision. In addition, we are modifying FCC Application Forms 314 and 315 to require applicants to file attributable JSAs at the time an application is filed, regardless of whether the markets implicated by the application are located in Arbitron Metros.

325. *Existing JSAs.* We are aware that attribution of in-market radio JSAs may affect licensees' compliance with the modified local radio ownership rules. In addition, we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers. Therefore, we will give licensees sufficient time to make alternative business arrangements where they have in-market JSAs entered into prior to the adoption date of this *Order* that would cause them to exceed relevant ownership limits. In such situations, parties will have 2 years from the effective date of this *Order* to terminate agreements, or otherwise come into compliance with the local radio ownership rules adopted herein.[708] However, if a party sells an existing combination of stations within the 2-year grace period, it may not sell or assign the JSA to the new owner if the JSA causes the new owner to exceed any of our ownership limits; the JSA must be terminated at the time of the sale of the stations. JSAs that do not cause a party to exceed the modified local radio rules may continue in full force and effect and may be transferred or assigned to third parties. Finally, parties are prohibited from entering a new JSA or renewing an existing JSA that would cause the broker of the station to exceed our media ownership limits.

3. Waiver Standards

326. In the *Local Radio Ownership NPRM*, we requested comment on how we should analyze proposed radio station transactions involving failed, failing, unbuilt, or silent stations.[709] We presented this question in terms of our consideration of a case-by-case competition analysis of radio station transactions (as opposed to requesting specific comment on potential waiver standards), and we in fact received very few comments addressing this issue.[710] In light of our rejection of a case-by-case analysis for radio transactions, the other changes we are making to the local radio ownership rule, and the dearth

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[706] *See 1999 Attribution Report and Order*, 14 FCC Rcd at 12598 ¶ 85 n.183.

[707] Both the licensee and the broker should submit copies of their JSAs as supplements to their Ownership Reports on file at the Commission

[708] This includes JSAs involving radio stations in non-Metro markets We believe the two-year time grace period will give sufficient time for us to conclude the proceeding in MB Docket No. 03-130 and give parties sufficient time thereafter to take any necessary action to come into compliance with our media ownership rules.

[709] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19891-92 ¶¶ 74-77.

[710] *See* MMTC Comments in MM Docket No 01-317 at 53

of comments on this issue, we decline at this time to adopt any specific waiver criteria relating to radio station ownership. Parties who believe that the particular facts of their case warrant a waiver of the local radio ownership rule may seek a waiver under the general "good cause" waiver standard in our rules.[711]

C. Cross Ownership

327 In this section we address (1) the newspaper/broadcast cross-ownership rule[712] and (2) the radio-television cross-ownership rule[713] to determine whether they are necessary in the public interest pursuant to Section 202(h). Based on the record in this proceeding, we find that neither our current nation-wide prohibition on common ownership of daily newspapers and broadcast outlets in the same market nor our cross-service restriction on commonly owned radio and television outlets in the same market, is necessary in the public interest. With respect to both rules, we conclude that the ends sought can be achieved with more precision and with greater deference to First Amendment interests by modifying the rules into a single set of cross-media limits described below.

1. Newspaper/Broadcast Cross-Ownership Rule

328. Adopted in 1975, the newspaper/broadcast cross-ownership rule prohibits in absolute terms common ownership of a full-service broadcast station and a daily newspaper when the broadcast station's service contour encompasses the newspaper's city of publication.[714] The rule was intended to promote media competition and diversity,[715] yet the rule makes no allowance for the size of the market at issue, the number of broadcast outlets or newspapers in the market, or the variety of other media interests that serve the market. When it adopted the rule, the Commission grandfathered combinations in many markets (so long as the ownership of the combination remained the same), but it required divestiture of properties in highly concentrated markets. These so-called highly concentrated markets were those in which a combination of newspaper and broadcast outlets would be expected to be the most harmful to media diversity.

329. The Commission examined the newspaper/broadcast cross-ownership rule and several other broadcast ownership rules in its first biennial review in 1998.[716] The Commission concluded in its 1998 Biennial Review Report that the newspaper/broadcast cross-ownership rule continued to serve the public interest because it furthered diversity, and therefore should be retained.[717] However, the

[711] 47 C.F.R. § 1.3.

[712] 47 C.F R. § 73.3555(d).

[713] 47 C F.R § 73.3555(c).

[714] For AM radio stations, the service contour is the 2mV/m contour, 47 C.F.R § 73.3555(d)(1); for FM radio stations, the service contour is the 1mV/m contour, *id* § 73 3555(d)(2), for TV stations, the service contour is the Grade A contour, *id.* § 73.3555(d)(3). A daily newspaper is one that is published in the English language four or more times per week. *Id.* § 73.3555 n.6.

[715] *1975 Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1074.

[716] *1998 Biennial Regulatory Review, Notice of Inquiry*, 13 FCC Rcd 11276 (1998) (*"Biennial NOI"*). The Commission incorporated the record from the *Newspaper/Radio NOI* into the record of the *Biennial NOI* *See id* at 11286 ¶ 30.

[717] *1998 Biennial Review Report*, 15 FCC Rcd at 11105-08 ¶¶ 89-93

Commission noted that the rule might not be necessary to achieve its intended public interest benefits under all circumstances. More specifically, the Commission stated that "[t]here may be instances, for example, in which, given the size of the market and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed."[718] Thus, the Commission committed to undertaking a rulemaking proceeding to tailor the rule accordingly.[719] That proceeding was commenced in 2001,[720] and later was made part of this biennial review proceeding.[721]

330. Upon review, we now conclude that (1) the rule cannot be sustained on competitive grounds, (2) the rule is not necessary to promote localism (and may in fact harm localism), and (3) most media markets are diverse, obviating a blanket prophylactic ban on newspaper-broadcast combinations in all markets.[722] Instead, we will review proposed license transfers and renewals involving the combination of daily newspapers and broadcast properties only to the extent that they would implicate the cross-media limits discussed below.

a. Competition

331 We first define the relevant product and geographic markets in which broadcasters and newspapers compete, and then assess whether the rule is necessary to promote competition in these markets. As we noted in the newspaper/broadcast proceeding, our focus is on the primary economic market in which broadcast stations and newspapers compete: advertising.[723] Our concern is not related to competition in advertising markets themselves, but is instead directed at the ability of broadcasters to compete for advertising dollars. If free over-the-air broadcasting is to remain vibrant, broadcasters must be able to organize efficiently and compete for advertising dollars. We look, therefore, to the sole source

[718] *Id* at 11105 ¶ 88. The Newspaper Association of America ("NAA") challenged the Commission's decision not to repeal the rule. *Newspaper Ass'n of America v FCC*, Case No 00-1375 (D.C. Cir filed Aug. 16, 2000). By order dated August 30, 2000, the court held the case in abeyance.

[719] *Id* In its 2000 biennial regulatory review proceeding, the Commission did not alter the recommendations it had made with respect to the newspaper/broadcast cross-ownership rules in the 1998 biennial review proceeding. *See 2000 Biennial Regulatory Review*, 16 FCC Rcd 1207 (2001)

[720] *Newspaper/Broadcast Cross-Ownership NPRM, supra*

[721] *Notice,* 17 FCC Rcd at 18506 ¶ 7.

[722] A number of parties raise Constitutional objections to the rule *See, e g*, NAA Comments at 102-14. To the extent that our local broadcast ownership regulatory framework may prohibit some newspaper/broadcast combinations, we addressed this argument in the Legal Framework section, above. We address the comments of those parties who have argued that we should change the way we apply the rule in primarily Spanish language markets (*e g*, Arso Comments and Caribbean Comments in MM Docket No 01-235) in the section on Cross-Media Limits, *infra*.

[723] *Newspaper/Broadcast Cross-Ownership NPRM*, 16 FCC Rcd at 17292 ¶ 19

of revenue for these stations – advertising – to define the product market.[724]

332. We conclude, based on the record in this proceeding, that most advertisers do not view newspapers, television stations, and radio stations as close substitutes. To begin with, the Department of Justice and several federal courts have concluded that the local newspaper market is distinct from the local broadcast market.[725] This conclusion is supported by a number of commenters and MOWG Study No. 10, by Anthony Bush, which found "weak substitutability" between various local media outlets for purposes of local advertising sales.[726] Cox argues, for instance, that advertisers place ads in television, radio, and newspapers for different reasons.[727] CWA asserts that newspapers and television are separate local media markets, with weak substitution by consumers and advertisers.[728] Gannett and Hearst argue that very little advertising substitution exists between daily newspapers and broadcast outlets. They claim that newspapers, radio, and TV attract different portions of local advertising dollars, which refutes the notion that common ownership has any adverse impact on advertising rates or any other competition concerns.[729] Thus, at least for purchasers of advertising time, we find that newspapers, television, and radio are not good substitutes and therefore make up distinct product markets. A newspaper/broadcast combination therefore is not a horizontal merger and cannot adversely affect competition in any product market Neither is the combination a vertical merger, because neither type of entity sells inputs to the other in the production chain, as in a supplier-customer relationship.[730]

333 Some commenters criticize MOWG Study No. 10 and argue that radio, TV, and newspapers, compete vigorously for advertising dollars.[731] Both Economists Incorporated ("EI") and

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[724] A product market includes identical products, products with such negligible differences that buyers regard them as substitutes, and other products that buyers regard as such close substitutes that a slight price increase in one will induce shifts of demand to the other *See DOJ/FTC Merger Guidelines.*

[725] *See, e g , United States v Jacor Communications Inc.*, 1996 WL 784589 at *10 (S.D. Ohio 1996), *Community Pub Inc v Donrey Corp* , 892 F. Supp. 1146, 1155-57 (W D Ark. 1995).

[726] MOWG Study No. 10 Bush develops a model of business behavior in purchasing advertising for use in sales activities. He estimates elasticities of substitution and finds weak substitutability for advertising between newspaper, broadcast TV, and radio.

[727] Cox argues, for example, that while television is used to build and maintain a brand, newspapers are used to move volumes of products *See* Cox Comments at 17-18.

[728] *See* CWA Comments at 9-1, AFL-CIO Comments, Baker Study, at 5-7.

[729] *See* Gannett Comments at 15-17, Hearst Comments at 8-10, Hearst Comments in MM Docket No 01-235 at 14.

[730] *See* Hearst-Argyle Reply Comments at 4 n.8 (citing *Missouri Portland Cement Co v Cargill, Inc* , 498 F.2d 851 (2d Cir 1974), *Emhart Corp v USM Corp.*, 527 F 2d 177 (1st Cir. 1975)). Although the merging of newspapers and television stations may result in sharing of inputs, sharing of inputs is distinct from vertical integration, which involves merging of firms where the output of one becomes the input of the other.

[731] Many of the commenters who assert that there is vigorous competition and strong substitution among media advocate elimination of the cross-ownership rules. They argue that consolidation of owners between any two media will not result in a significant increase in advertising prices because advertisers substitute across virtually all media. Hearst-Argyle, for example, asserts that its own analysis of prior studies show that local advertisers view newspaper and broadcast advertising as substitutes for one another, and national advertisers may view newspaper and broadcast advertising similarly It concludes that all these results, combined with the increase in the number of (continued....)

Jerry Hausman argue that MOWG Study No. 10 contains measurement errors.[732] These commenters argue that there are two sources of measurement error: (1) the SQAD radio and television advertising rate data measures national and regional, but not local advertisers;[733] and (2) the study, rather than measuring actual local newspaper ad prices, constructs them. Both critiques suggest that these measurement errors lead to bias. EI does not explain whether it believes the bias is in the direction toward too little or too much substitution among media, but Hausman argues that MOWG Study No. 10 is biased in the direction of too little substitution.[734] We recognize the measurement errors associated with the use of SQAD data. Bush used this data because there is no source of data available to the public on actual local advertising prices. As the best public data available, we believe the SQAD data is a reasonable proxy for actual local advertising prices.[735] As for Hausman's claim that use of SQAD prices biases the results in the direction of too little substitution, we believe that Hausman's arguments apply to a simple linear regression, not the model or estimation technique used by Bush. We believe that the effects of these measurement errors may cancel out such that the estimates of Bush are unbiased. Accurate data are required in order to examine this possibility. Bush used, however, available and public data in his study. Therefore, we recognize the limitations of the data in the Bush study and assign the study an appropriate weight while considering other evidence on the record.

334 Hausman offers as evidence regressions that show significant correlation between the prices of advertising on various media.[736] Hausman's analysis consists of regressing the price of advertising on radio on a set of variables that include the price of advertising on two other media (broadcast TV and newspapers) and various measures of ownership concentration in a market. He reports no significant positive relationship between radio ad pricing and concentration, but does find significant correlation between the prices of radio advertising on the price of advertising on other media. We are reluctant, however, to conclude that this correlation implies strong substitution in the advertising market. First, Hausman's regressions omit important variables that may result in bias.[737] Second, the data

(Continued from previous page)
media outlets, support repeal of the rule Hearst-Argyle at 1-8 (referencing Barry J. Seldon, R. Todd Jewell, & Daniel M O'Brien, *Media Substitution and Economies of Scale in Advertising,* 18 INT'L J OF INDUS ORG 1153 (2000); Barry J Seldon & Chulho Jung, *Derived Demand for Advertising Messages and Substitutability Among the Media,* 33 Q REV OF ECON AND FIN 71 (1993)).

[732] *See* Fox Comments, Appendix C, Economist Incorporated; Clear Channel Comments, Hausman Statement at 11-18. *See* Appendix E for a more complete summary of the criticisms by Professor Hausman and Dr. Owen and our response

[733] SQAD, Inc. is an independent media research company that produces measures of the costs of purchasing advertising spots on radio and TV.

[734] Clear Channel Comments, Hausman Statement at 17 (Professor Hausman's statement is part of Clear Channel's filing, which advocates relaxation or elimination of radio ownership rules in local markets.)

[735] Measurement errors due to use of SQAD data are discussed more fully in Appendix E.

[736] *See* Clear Channel October 15, 2002, Ex Parte, Hausman Statement, Table 3 at 17.

[737] *See* Clear Channel Comments, Hausman Statement at Table 3 Usually, when econometricians estimate equations with the price of a good as a dependant variable, such as a demand or supply equation, the quantity or income generated by that good is included as an independent variable Hausman includes neither the quantity nor income in his regressions. Omission of such a key variable often leads to bias in the coefficients of the included independent variables *See* Peter A. Kennedy, A GUIDE TO ECONOMETRICS, (3rd ed 1992) at 91.

used for Professor Hausman's study were not made available in the record of this proceeding. As a result, neither the Commission nor other interested parties have had an opportunity to perform independent analysis of the data to either confirm or refute Professor Hausman's conclusions. Third, Hausman studies the substitution between radio and other forms of media using a simple linear regression model, rather than a simultaneous equation model.[738]

335. Further, other empirical studies confirm our conclusion that advertisers do not view ads in newspapers and broadcast TV as substitutes. Silk, Klein, and Berndt examine advertising substitution among eight media in the national markets.[739] They report only weak substitution between newspapers and spot TV; they also report that advertising on network TV and newspapers are complements, not substitutes. Busterna estimates demand functions in five media (including network and spot television) and concludes that "cross-elasticity of demand between newspapers and other media is consistently nil across all media."[740] Reid and King conduct a study based on interviewing and surveying advertising managers in national markets and conclude that these managers did not view television and newspapers to be good substitutes for advertising.[741] Finally, the Department of Justice and several federal courts have concluded that the local newspaper market is distinct from the local broadcast market[742]

336. Although the studies discussed in the paragraph above focus on national advertising markets, not local ones, the results likely extend to local markets. We see no evidence that local advertisers would more easily substitute between TV and newspapers than national advertisers. Indeed, evidence suggests that local advertisers are less likely to substitute among media than national advertisers For example, classified ads, an important component of local advertising, comprising 40% of newspaper advertising revenues, offer affordable local advertising that is not available on broadcast TV.[743] In addition, newspapers provide unique features (*e g*, coupons to be redeemed with local retailers) that are not available through broadcast TV or radio.[744] We believe, therefore, that findings of weak substitution between newspapers and broadcast TV for national advertisers likely apply to local buyers as well.

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[738] Systems of equations, such as a group of demand equations, allow more efficient estimation than regressing one equation, especially when economic theory is employed to constrain estimates across equations. By efficient, we mean here that the uncertainty of the parameter estimates, given the underlying data, is reduced. *See*, e.g., Silk, Klein, and Berndt, *supra* note 522, and MOWG Study No. 10. For more discussion on estimating systems of equations, *see* William Greene, ECONOMETRIC ANALYSIS (1990) at 509-542.

[739] Silk, Klein, and Berndt, *supra*.

[740] John C Busterna, *The Cross-Elasticity of Demand for National Newspaper Advertising*, 64 J Q 349 (Summer/ Autumn 1987)

[741] Reid and King, *supra* note 520 at 292-307.

[742] *Supra* note 725.

[743] Newspaper Association of America website (*http //www naa.org*). The NAA estimates that 48% of local newspaper advertising dollars are allocated to classified ads, which have no good substitutes on television or radio media NAA Comments at 55-65

[744] Cox asserts that advertisers place ads in television, radio and newspapers for different reasons. *See* Cox Comments at 16-21.

337. Indeed, Cox states that aggregate advertising prices in markets with grandfathered media combinations are consistent with prices in other markets after adjusting for market size.[745] Gannett states that the combined local measurable advertising market revenue share of a newspaper and television station it now owns in Phoenix, Arizona, was nearly the same prior to 1999, when the properties came under common ownership, as it is now.[746] Further, the synergies and cost reductions of joint-ownership may translate into increased, rather than decreased competition within each service. Media General provides a number of case studies that suggest increased services and reduced costs through newspaper and broadcast TV partnerships.[747] By precluding the efficiencies inherent in combinations, the rule likely harms consumers by limiting the development of new, innovative media services that would flow from a more efficient, combined entity.[748]

338 A number of commenters believe the rule is necessary to protect advertisers that substitute between newspapers and broadcast TV. UCC argues that cross-media consolidation will likely harm advertisers in local markets. It concludes that consumers will have to pay more for products in a market with commonly owned newspapers and broadcast stations because advertisers will have to pay more to advertise and these increased costs will be passed on to consumers.[749] Others, such as Caribbean International News Corp., assert that in markets where there are newspaper/broadcast combinations, the commonly owned firms aggressively market multimedia advertising packages, creating a competitive imbalance [750] CFA contends that a review of the literature on vertical and conglomerate mergers identifies major concerns about such mergers in concentrated markets where dominant players can employ a range of anticompetitive tactics (e.g., raising entry barriers, cross-subsidization, price squeezing, price discrimination, market foreclosure and exclusive deals) to thwart competition.[751]

339. Although the overall evidence appears to suggest little substitution between newspapers, broadcast TV, and radio, we agree that there may be a small group of advertisers that benefit from using various media to advertise their products. These advertisers could be harmed if owners of newspaper/broadcast combinations can identify this group and price discriminate -- charge higher prices

[745] *Id* at 16-21 (citing the Media Market Guide published by SQAD, Inc.).

[746] Gannett Comments at 14-16 and Exhibit B. Schurz Communications, Inc. similarly argues that two grandfathered combinations in South Bend, Indiana, have not caused the percentage of local advertising dollars spent with newspapers, television and/or radio stations to differ from that spent by national advertisers. Schurz Comments at 8-10.

[747] Media General Comments, Appendix 3, Statement of James K Gentry.

[748] NAB Comments at 63-65, 101. *See also* Belo Comments at 1-8 (claiming its Dallas-Fort Worth combination has increased synergies and economies of scale that benefit the public); Cox Comments at 70 (claiming co- ownership benefits the operation of local media markets)

[749] *See* UCC Comments at 11-13.

[750] Caribbean Comments at 27-35 Caribbean reports that such cross-ownership has created a situation where one owner (with two daily newspapers) garners 43% of the advertising revenues for traditional media outlets in Puerto Rico

[751] CFA Comments at 96-121, *see also* Mid-West Comments at 5-6; UCC Comments at 13.

to this group than they charge to other advertisers for the same product.[752] As explained above, however, the Commission is not charged with protecting competition in the advertising markets. These advertisers, however, are not without remedy The Department of Justice, the Federal Trade Commission, as well as state attorney generals, review mergers generally and are concerned about the effects in the advertising market. Further, both federal and state antitrust laws allow private suits to be brought. The Commission's interest in advertising markets extends only so far as issues relating to advertisers might affect the ability of FCC licensees to serve the public interest, convenience, and necessity. Since we see no potential harm to broadcasters, television viewers or radio listeners, the concern raised regarding harm to an ill-defined subset of advertisers does not justify retaining the rule.[753]

340 In any event, even if we were to focus exclusively on the advertising markets alone, the potential for harm to advertisers who substitute between various media outlets would be greatest if one entity owned all the newspapers and all the broadcast facilities. Through the constraining effect of our local radio and TV ownership rules, we expect that the majority of the potential newspaper/broadcast combinations would continue to face competition from separately owned media outlets in the local market.

341. Finally, consumers experience print and electronic media in very different ways.[754] Electronic media can provide real-time information concerning current events, sporting contests, or other time sensitive matters. Electronic media also can be experienced more passively, as users may engage in other activities simultaneously while enjoying television or radio programming. Print media, on the other hand, require a higher degree of engagement by the consumer, but they also are capable of delivering greater depth of coverage. 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. Advertisers will view newspapers and TV broadcast as imperfect substitutes. A newspaper-broadcast combination, therefore, cannot adversely affect competition in any relevant product market. Accordingly, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition

b. Localism

342 The record indicates that the newspaper/broadcast cross-ownership prohibition is not necessary to promote broadcasters' provision of local news and information programming. Indeed, evidence suggests that the rule actually works to inhibit such programming. One of the strengths of daily

[752] *DOJ/FTC Merger Guidelines* § 1.12 explains. "Existing buyers sometimes will differ significantly in their likelihood of switching to other products in response to a small but significant and non-transitory price increase. If a hypothetical monopolist can identify and price differently to those buyers ("targeted buyers") who would not defeat the targeted price increase by substituting to other products in response to a 'small but significant and nontransitory' price increase for the relevant product, ... then a hypothetical monopolist would profitably impose a discriminatory price increase on sales to targeted buyers. This is true regardless of whether a general increase in price would cause such significant substitution that the price increase would not be profitable."

[753] There is nothing in the record regarding the number of advertisers that may be targeted for such price discrimination, nor the magnitude of the potential price increases. We believe, however, that the number of advertisers that may be potential targets of price discrimination would be very small for most newspaper/broadcast combinations.

[754] For a summary table that compares the characteristics of print with electronic media, see David W. Stewart and Scott Ward, *Media Effects on Advertising,* MEDIA EFFECTS: ADVANCES IN THEORY AND RESEARCH (1994) at 328

newspapers is their ability to provide in-depth coverage of local news and events.[755] Many newspapers provide local content that far exceeds that provided by local broadcast outlets. Newspapers and broadcast stations – particularly television stations -- continue to be the dominant sources, in terms of consumer use, for news and information to local communities.[756] Our rules should promote the ability of newspapers, television stations, and all other sources of local news and information to serve their communities

343. Although the Commission does not regulate quality of programming, and, indeed, such regulation of content would raise significant First Amendment concerns, we have historically sought to promote the ability of local stations to serve their communities through news and public affairs programming. Our MOWG studies suggest a direct correlation between the association of a broadcast outlet with a published daily newspaper and the quality of the local broadcast news. In MOWG Study No. 7, "The Measurement of Local Television News and Public Affairs Programs," the authors found that television broadcast stations affiliated with a major broadcast television network that are "co-owned with newspapers experience noticeably greater success [in terms of] quality and quantity of local news programming than other network affiliates."[757] Co-ownership, the authors explain, refers to a company that owns at least one television station and one daily newspaper; the two need not necessarily serve the same market.[758] Accordingly, while eliminating the rule may not be essential to achieve the efficiencies of common ownership -- because the rule prohibits only ownership of newspapers and broadcast stations serving the same market -- the breadth and depth of news coverage can be enhanced by collocation and the rule's elimination will increase the opportunities to realize these benefits by permitting combinations in areas where the rule currently prohibits them.

344. Specifically, MOWG Study No. 7 found that while non-network owned but network-affiliated stations provide, on average, 14.9 hours per week of local news and public affairs programming, newspaper-owned affiliated stations provide almost 50% more such programming, averaging 21.9 hours per week [759] In addition, the study found that the average number of hours of local news and public affairs programming provided by the same-market cross-owned television-newspaper combinations was 25.6 hours per week, compared to 16.3 hours per week for the sample of television stations owned by a newspaper that is not in the same market as the station.[760] Not only do newspaper-owned stations provide more news and public affairs programming, they also appear to provide higher-

[755] *E g*, Tribune Comments in MM Docket No. 01-235 at 43-52 (core mission of daily newspapers is to provide local news).

[756] MOWG Studies No. 8; MOWG Study No. 3, *Consumer Substitution Among Media* by Joel Waldfogel (Sept. 2002)("MOWG Study No. 3"), *see also* AFL-CIO Comments at 34-36; AFTRA Comments at 26-28, Comments of CWA at 5-9

[757] MOWG Study No 7, *The Measurement of Local Television News and Public Affairs Programs,* by Thomas C. Spavins, Loretta Denison, Jane Frenette and Scott Roberts (Sept. 2002) at 1 ("MOWG Study No. 7")

[758] *Id.* at 3, note 1.

[759] *Id* at 3

[760] This information was derived from an examination of the data included in the appendices of MOWG Study No. 7, as well as information in the record of this proceeding regarding the same market television/newspaper combinations *See* NAA Comments at 14-15

quality programming, on average, at least as measured by ratings and industry awards. The ratings for newspaper-owned stations' 5:30 and 6:00 pm newscasts during the November 2000 sweeps period averaged 8 compared to an average rating of 6.2 for non-newspaper-affiliated stations.[761] More dramatically, newspaper-owned stations received 319 percent of the national average per station Radio and Television News Directors Association ("RTNDA") awards, and 200 percent of the national average A. I. DuPont Awards (in association with the School of Journalism of Columbia University) in 2000-2001.[762] During that same period, non-newspaper-owned stations received RTNDA Awards at a rate of only 22 percent of the national average.[763] They received DuPont Awards at a rate of 39 percent of the national average per station.[764] The authors conclude that, "within the overall category of network affiliates, there appears to be a systematic divergence between stations that are co-owned with a newspaper publisher relative to all other affiliates. For each quality and quantity measure in our analysis, the newspaper network-affiliated stations exceed the performance of other, non-newspaper-owned network affiliates."[765]

345. These conclusions are supported by a study done by the Project for Excellence in Journalism ("PEJ") in which PEJ analyzed five years of data on ownership and news quality. PEJ concluded that cross-owned stations in the same Nielsen Designated Market Area were more than twice as likely to receive an "A" grade as were other stations.[766] On the whole, cross-owned stations were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human-interest features.[767]

346. The benefits of combined ownership are not likely to be achieved through joint ventures as opposed to combined ownership. Besen and O'Brien present a persuasive theoretical argument that the efficiencies of joint ownership of newspaper and television will likely exceed the efficiencies of joint ventures between the two.[768] The authors argue that joint ventures confront three classes of issues that hinder their ability to achieve efficient joint production: (1) the costs of reaching the agreement; (2) incentives to withhold private information; and (3) incentives to take actions that are not in the best

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[761] *Id*

[762] *Id.* at 4

[763] *Id*

[764] *Id* While there is controversy in the record about some aspects of this study, no commenter has critiqued the newspaper-related evidence

[765] *Id*

[766] Project for Excellence in Journalism, *Does Ownership Matter in Local Television News A Five-Year Study of Ownership and Quality* (Feb 17, 2003) at 10 ("PEJ Study"). Elsewhere in this *Report and Order*, we determine that the results of the PEJ study are statistically insignificant and cannot be considered reliable or convincing evidence *See* National TV Ownership Rule Section VII(A), *infra* We use PEJ's filing here solely as a source of anecdotal evidence, not as a statistical study, and do not base our conclusions regarding the newspaper/broadcast cross-ownership rule upon it.

[767] *Id*

[768] Gannett Comments in MM Docket No. 01-235, Exhibit C, Besen and O'Brien, *An Economic Analysis of the Efficiency Benefits from Newspaper/Broadcast Station Cross-Ownership.*

interests of the joint venture. Besen and O'Brien maintain that joint ownership mitigates these possible hindrances. The prospective benefit of some media consolidation in the form of non-trivial efficiencies – and, conversely, the opportunity cost from the loss of such benefits through a rule prohibiting certain combinations – weigh against retention of our newspaper/broadcast cross-ownership rule. The authors provide no estimate of the value of these benefits.

347. Many commenters illustrate how combining a newspaper's local news-gathering resources with a broadcast platform contributes to, rather than detracts from, the production of local news programming that serves the community. These results follow from the particular journalistic experience associated with local daily newspapers, as well as the tangible economic efficiencies, such as sharing of technical support staff, which can be realized through common ownership of two media outlets. Such efficiencies may increase the amount of diverse, competitive news and local information available to the public, and allow the combined entities to compete more effectively in an increasingly fragmented and competitive market.[769]

348. There are several anecdotes in the record that illustrate how efficiencies resulting from cross-ownership translate into better local service. These efficiencies are particularly important as consumers demand almost instantaneous delivery of news – both locally and nationally – and even more in-depth coverage of complex issues.[770] Gannett, which owns a newspaper/television combination in Phoenix, Arizona,[771] reports that the quantity and diversity of area news coverage it provides has increased as a result of its ability to leverage the combined resources of the two outlets. According to Gannett, media integration has improved efficiency, particularly in situations characterized by fast-breaking news such as the massive wildfires near Phoenix last year, while the journalists at each outlet retain discretion and exercise independent judgment.[772] Similarly, in Dallas, Texas, where Belo owns a newspaper/television combination,[773] both outlets have been able to cover a wider range of stories through information sharing between the separate newspaper and television news staffs.[774] Belo also

[769] *See* The Times Comments in MM Docket No. 01-235 at 7-10, Ex. 3 (efficiencies in the Times' grandfathered combination reduce costs for, *e g*, training and employee benefits, which reduces pressure on advertising rates and frees up resources for programming efforts), *see also* ALTV Comments in MM Docket No 01-235 at 7-8; Hearst Comments in MM Docket No 01-235 at 16-18.

[770] *Compare* Edwin Emery & Michael Emery, THE PRESS AND AM (5th ed 1984) at 82 (reporting that it took six weeks for the news of the fighting at Lexington and Concord to reach Savannah, Georgia). Coverage of news events in the early press also tended to be brief, sometimes painfully so One cannot but feel for the citizens of Philadelphia, for example, who were afforded only 43 words by the *Freeman's Journal* conveying the entire account of the final battle of the revolutionary war: "Be it remembered that on the 17th day of October, 1781, Lieut. Gen. Charles Earl Cornwallis, with about 5,000 British troops, surrendered themselves prisoners of war to His Excellency, Gen George Washington, Commander-in-Chief of the allied forces of France and America." *See* Emery & Emery, THE PRESS AND AM. at 83 (citing Laurence Greene, AM. GOES TO PRESS (1936)).

[771] Gannett holds this combination pursuant to the retention period formula we instituted when we originally adopted the rule *See 1975 Multiple Ownership Second Report and Order,* 50 F C.C.2d at 1076 n. 25.

[772] Gannett Comments at 8-11, Ex. A, Gannett Comments at 4-8, 18 (citing MOWG Study No. 7) and Exh. A (an affidavit from two local managers explaining the working relationships between commonly owned newspapers and broadcast stations in Phoenix, Arizona).

[773] This combination was "grandfathered" at the time of the rule's adoption.

[774] Belo Comments in MM Docket No 01-235 at 4-7

operates TXCN, a 24-hour local cable news network, which uses its own news-gathering sources as well as those of Belo's other media properties in the market. This aggregation of news gathering and production resources, Belo asserts, has allowed it to provide more content, to innovate more in its reporting, and to provide more in-depth coverage of locally important issues than it otherwise could.[775]

349. Efficiencies not involving the sharing of news staffs may also be realized through cross-ownership. For example, Gannett explains that, if the restriction on newspaper/broadcast cross-ownership were removed, combinations could share back office expenses, such as accounting, marketing, and human resource functions.[776] Further, once a story has been assembled, the cost of distribution for another use is minimal, but the gains from incremental additional distribution can be large. This differential increases, rather than reduces, the incentives to create and expand the product sold -- in this case information.[777] As Cox argues, combinations at the local level result in efficiencies that allow media companies to serve their localities better and increase investment in local programming.[778]

350. Although our conclusions pertain to markets of all sizes, newspaper-broadcast combinations may produce tangible public benefits in smaller markets in particular. In this regard, West Virginia Media contends that the cross-ownership restriction impairs coverage of local news and public affairs in small markets by prohibiting combinations that would produce efficiencies and synergies particularly necessary in smaller markets.[779] It argues that the rule may have the unintended effect of stifling local news by prohibiting efficient combinations that would produce better output.[780] We assume that the efficiencies cited by West Virginia Media can benefit small businesses with respect to the production of news and public affairs programming.[781]

351. We disagree with those who argue that the relaxation or elimination of the newspaper/broadcast cross-ownership rule will create additional pressures on local news editors and

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[775] *Id. See also* NAA Comments in MM Docket No 01-235 at 23-24, 29-30, 34 (co-owned broadcast stations and newspapers have won multiple awards for their reporting); Bonneville Comments in MM Docket No 01-235 at 5-6 (joint operation will result in better content and greater public service); Morris Comments in MM Docket No. 01-235 at 6-12 (co-owned outlets provide superior service), NAB Comments in MM Docket No. 01-235 at 34-43 (combinations are beneficial because, as operations in both entities are strengthened, they can provide better and more innovative media services).

[776] Gannett Comments in MM Docket No 01-235 at 13-14.

[777] *Id* at 16-19, Exhibit C, *see also* NAA Comments in MM Docket No. 01-235 at 16-22.

[778] Cox Comments at 73-74 (citing, *e g*, Schurz Comments in MM Docket No 01-235 at 8, Gannett Comments in MM Docket No. 01-235 at 7).

[779] West Virginia Media Comments in MM Docket No. 01-235 at 7 (*citing* Bond & Pecaro, Inc, *A Study to Determine Certain Economic Implications of Broadcasting/Newspaper Cross-Ownership* (July 21, 1998) at 1); Bonneville Comments at 7-8.

[780] West Virginia Media Comments at 1-14 (citing Bond & Pecaro, Inc., *supra*), NAB Comments in MM Dkt. No 98-35 at Appendix B ; *see also* Media General Comments at 71-75

[781] In the Grandfathering and Transition Procedures Section VI(D), below, we adopt special provisions with respect to small businesses to further assist them.

directors to curtail coverage of public interest news.[782] For example, according to AFL-CIO, CanWest, whose daily newspapers comprise 30% of Canada's daily newspaper circulation, requires its big city newspapers to publish weekly editorials that are written by, and issued from, headquarters, and does not permit unsigned local editorials to contradict the headquarters editorials.[783]

352. As an initial matter, the issue raised by AFL-CIO regarding CanWest does not address cross-ownership within a market but, instead, addresses the perceived problems of national ownership and corporate centralization. Since our cross-ownership rule is not intended to address such problems, we need not address this argument. Moreover, it is hardly surprising, nor do we find it troubling, that newspaper owners use their media properties to express or advocate a viewpoint. To the contrary, since the beginning of the Republic, media outlets have been used by their owners to give voice to, among others, opinions unpopular or revolutionary,[784] to advocate particular positions,[785] or to defend, sometimes stridently, social or governmental institutions.[786] Our broadcast ownership rules may not and

[782] AFL-CIO Comments in MM Docket No. 01-235 at 8-14 (citing Kunkel and Roberts, *Leaving Readers Behind: The Age of Corporate Newspapering*, 23(4) AM. J. R. (May 1, 2001)); Consumers Union Comments in MM Docket No. 01-235 at 52-58, Mid-West Comments in MM Docket No. 01-235 at 3; AFL-CIO Comments at 44-46; NAHJ Comments at 16-17

[783] AFL-CIO Comments at 44-46

[784] Concerning the role of spokespersons in the media in the American Revolution, *see* Philip Davidson, PROPAGANDA & THE AMERICAN REVOLUTION (UNC Press, 1941), in the abolitionist movement, *see* Edwin & Michael Emery, THE PRESS & AMERICA: AN INTERPRETIVE HISTORY OF THE MASS MEDIA (Prentice Hall 1992) at 121-27 ("Emery & Emery"); in the "muck-raking" movement, *see* Ron Chernow, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR (Random House 1998) at 116-17, 435-53; in the rural populist movement, *see* Howard Zinn, A PEOPLE'S HISTORY OF THE UNITED STATES. 1492 – PRESENT (Harper Collins 2003) at 292 ("Zinn"); in the labor movement, *see The Labor Press Project*, http://faculty washington.edu/gregoryj/laborpress/ (visited May 21, 2003); in the prohibition movement, *see* John Kobler, ARDENT SPIRITS: THE RISE AND FALL OF PROHIBITION (G P. Putnam's Sons, 1973) at 42-47, 55-57, 98-101, 138-40, 153, 155, 158, 183; in the post-World War II conservative movement, *see* George H Nash, THE CONSERVATIVE INTELLECTUAL MOVEMENT IN AMERICA SINCE 1945 (Basic Books 1976) at 148-60, and Rick Perlstein, BEFORE THE STORM: BARRY GOLDWATER & THE UNMAKING OF THE AMERICAN CONSENSUS (Hill & Wang 2001) at 114, in the counterculture and anti-Vietnam War movements of the 1960s and 1970s, *see* Ellen Frankfort, THE VOICE: LIFE AT THE VILLAGE VOICE (Morrow 1976), Kevin McAuliffe, THE GREAT AMERICAN NEWSPAPER. THE RISE & FALL OF THE VILLAGE VOICE (Charles Scribner's Sons, 1978); and Zinn, at 494; and in contemporary protest movements, *see* Greg Ruggiero & Stuart Sahulka (Eds.), THE PROGRESSIVE GUIDE TO ALTERNATIVE MEDIA & ACTIVISM (Seven Stories Press 1999); *see also* Ward L. Miner, WILLIAM GODDARD, NEWSPAPER-MAN (Duke U. Press 1962); Arthur Schlesinger, PRELUDE TO INDEPENDENCE, THE NEWSPAPER WAR ON BRITAIN, 1764-1776 (Knopf 1958); Walett, MASSACHUSETTS NEWSPAPERS AND THE REVOLUTIONARY CRISIS, *1763-1776* (Boston, MA Bicentennial Comm., 1974).

[785] Catherine D. Bowen, JOHN ADAMS AND THE AMERICAN REVOLUTION (Little Brown 1950), Milton Flower, John Dickinson, CONSERVATIVE REVOLUTIONARY (UVA Press, 1983); Robert Middlekauff, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 (Oxford U Press, 1982), Clinton Rossiter, POLITICAL THOUGHT OF THE AMERICAN REVOLUTION (Harcourt Brace Jovanovich 1963); Maurice R. Cullen, Jr., *Benjamin Edes· Scourge of Tories*, J. Q (Summer 1974) at 214.

[786] Edwin & Emery, *supra* at 42-44 (concerning Tory newspaper publisher James Rivington). Other newspaper editors who championed causes passionately include William Randolph Hearst concerning many causes (*see* David Nasaw, THE CHIEF: THE LIFE OF WILLIAM RANDOLPH HEARST (Houghton Mifflin 2001)) and the late Katherine (continued. .)

should not discourage such activity. Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do so,[787] nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing. The media are not common carriers of speech.[788] It is hardly an indictment of the media to point out that an outlet may be a proponent of an identifiable editorial viewpoint. And the fact that such viewpoints may reflect popular opinion or have widespread appeal is not a ground for government intervention in the marketplace of ideas. Indeed, the very notion of a marketplace of ideas presupposes that some ideas will attract a following and achieve wide currency, while others quietly recede having failed to conquer the hearts and minds of the citizenry. Our Constitution forbids government action to pre-select the winners in this competition or to guarantee the circulation of any particular set of ideas.

353. Nor is it troubling that media properties may allow their news and editorial decisions to be driven by "the bottom line."[789] Again, the need and desire to produce revenue, to control costs, to survive and thrive in the marketplace is a time honored tradition in the American media. Indeed, it was not until newspaper publishers learned to market their papers as tools of commerce that the press became a force in the public debate that lead to the framing of our Constitution.[790] Impair the ability of media outlets to profit and you choke off the capital to which their tap roots reach; strangle the press and the balance of our familiar rights and privileges wither and fall.

354. In short, to assert that cross-owned properties will be engaged in profit maximizing behavior or that they will provide an outlet for viewpoints reflective of their owner's interests is merely to state truisms, neither of which warrants government intrusion into precious territory bounded off by the First Amendment. To the contrary, we are engaged in this exercise precisely because we seek to encourage the airing of diverse and antagonistic viewpoints. It would be odd indeed if our rules were structured to inhibit the expression of viewpoints or to promote only an accepted set of ideas. In light of the overwhelming evidence that combinations can promote the public interest by producing more and better overall local news coverage, we conclude that the current rule is not necessary to promote our

(Continued from previous page)
Graham of the Washington Post concerning the Watergate scandal (*see* Carl Bernstein & Bob Woodward, ALL THE PRESIDENT'S MEN (Touchstone/Simon & Schuster, New York, 1974))

[787] *See Miami Herald Publishing Co v Tornillo*, 418 U.S. 241 (1974). Broadcasters, however, are subject to certain statutory political broadcasting requirements. *See* 47 U.S C. § 312(a)(7) (broadcast and DBS licensees must make available "reasonable access" to all legally qualified candidates for federal elective office); 47 U.S.C. § 315 ("equal opportunities" to competing legally qualified candidates) The Bipartisan Campaign Reform Act of 2002 contains several content-related provisions applicable to certain FCC regulatees. This Act is now being challenged before a special three Judge panel of the United States District Court for the District of Columbia *McConnell v FEC*, Civ No. 02-0582 (D D C. 2003).

[788] *See, e g*, 47 U S C. § 153(10) ("a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier").

[789] *See* CFA Comments at 255 (citing Cranberg, Gilbert, Randal Bezanson, John Soloski, TAKING STOCK: JOURNALISM AND THE PUBLICLY TRADED NEWSPAPER COMPANY, (Ames: Iowa State, 2001) at 89; and *The Business of News, the News About Business,* Neiman Reports, Summer 1999) It appears that by "[feeling] pressure from the bottom line," CFA means that editors are spending less time on the news and more of their time is being taken up with business concerns such as "plotting marketing strategies or cost-cutting campaigns." *Id*

[790] Edwin and Michael Emery, THE PRESS AND AMERICA (5th Ed 1984) 51-72.

localism goal and that it, in fact, is likely to hinder its attainment.

c. Diversity

355. The Commission adopted the newspaper/broadcast cross-ownership rule because it believed that diversification of ownership would promote diversification of viewpoint.[791] This proposition has been both defended and called into question. The Supreme Court found that the newspaper/broadcast cross-ownership rule could be sustained "so long as the regulations are not an unreasonable means for seeking to achieve these [public interest] goals."[792] Against the backdrop of the last 27 years' growth in the number, breadth, and scope of informational and entertainment media available and the benefits that may accrue from common ownership, we conclude that a blanket prohibition on the common ownership of broadcast stations and daily newspapers in all communities and in all circumstances can no longer be justified as necessary to achieve and protect diversity. Although we continue to believe that diversity of ownership can advance our goal of diversity of viewpoint, the local rules that we are adopting herein will sufficiently protect diversity of viewpoint while permitting efficiencies that can ultimately improve the quality and quantity of news and informational programming. Accordingly, we will eliminate the newspaper/broadcast cross-ownership prohibition and consider any such proposed merger in light of our new rules.

356. *Benefits of Common-Ownership.* As discussed above in connection with localism, the record indicates that cross-ownership of newspapers and broadcast outlets creates efficiencies and synergies that enhance the quality and viability of media outlets, thus enhancing the flow of news and information to the public.[793] Cox argues that co-ownership increases source diversity because it enables broadcasters to enhance their delivery of local programming, news, and information.[794] Others assert that the various synergies and profitable ventures between TV broadcasts and newspapers suggest that relaxing the newspaper cross-ownership rule could conceivably help struggling newspapers in some markets and perhaps provide economic justification for creation of newspapers.[795] Thus, relaxing the cross-ownership rule could lead to an increase in the number of newspapers in some markets and foster

[791] *1975 Multiple Ownership Second Report and Order*, *supra* note 33

[792] *NCCB*, 436 U S. at 796

[793] *See, e g*, News Corp Comments in MM Docket No. 01-235 at 35-37 (since waiver of the rule in 1993, News Corp. has sustained the continued publication and expansion of the *New York Post*); BIC Comments in MM Docket No. 01-235 at 5-6 (broadcasters must grow and consolidate in order to survive and effectively serve the public); Norwell Comments in MM Docket No. 01-235 at 5-6 (economies of scale of combining a broadcast station and a daily newspaper are driven by marketplace realities of competing for limited advertising dollars); Can West Comments at 6 (print journalists can reach a wider audience over TV); Cox Comments at 71-72; of NAA Comments at 11-20 (co-owned affiliates offer superior news and informational content over non-co-owned affiliates).

[794] Cox does not address program diversity because it believes that program diversity is irrelevant to newspapers since they do not offer programming. Cox Comments at 71-72.

[795] Bear Stearns Comments at 40.

the development of important new sources of local news and information.[796]

357. Evidence that common ownership can enhance the flow of news and information to the public can be found in grandfathered newspaper-television combinations of which there are 21. Our review of the record indicates that such combinations often serve the public interest by adding information outlets and creating high quality news product. A recent study, for example, determined that, on average "grandfathered" newspaper-owned television stations, during earlier news day parts, led the market and delivered 43% more audience share than the second ranked station in the market and 193% more audience than the third ranked station in the market. These "grandfathered" structures also have created new information outlets in their market, such as Internet sites and local news-oriented cable networks.[797]

358. Moreover, empirical research confirms that newspaper/television combinations frequently do a superior job of providing news and informational programming. MOWG Study No. 7 found that network affiliated TV stations that are co-owned with a newspaper "experience noticeably greater success under our measures of quality and quantity of local news programming than other network affiliates."[798] Similarly, as described above, the Project for Excellence in Journalism's five-year study on local television news found "[s]tations with [newspaper] cross-ownership . . . were more than twice as likely as stations overall to generate "A" quality newscasts."[799] None of the cross-owned stations in the sample received an "F" grade in quality, as compared with 8% of all other stations.[800] It appears that the synergies and efficiencies that can be achieved by commonly located newspaper/broadcast combinations can and do lead to the production of more and qualitatively better news programming and the presentation of diverse viewpoints, as measured by third-parties.[801]

359 *Harm to Diversity Caused by the Rule* The newspaper/broadcast cross-ownership rule, as

[796] Media General Comments at 13-21 (arguing that its convergence model has enabled it to deliver better, faster, and deeper local news in Tampa, Florida; Roanoke/TriCities, Virginia; Florence, South Carolina; Columbus, Ohio; and Panama City, Florida).

[797] Miller Comments in MM Docket No 01-235 at 24-28, Ex. 8. The Miller study looked at only a few of the cross-owned newspaper/broadcast combinations, not all of them Some commenters discount the importance of these new voices claiming that commonly-owned outlets do not contribute to viewpoint diversity. We address these arguments in the *Common Ownership/Common Viewpoint* section, *infra*

[798] MOWG Study No. 7 at 2.

[799] PEJ Study, *supra* note 766 at 4, 10.

[800] *Id.* at 10

[801] We recognize that quality can be subjective. However, both MOWG Study No. 7 and the PEJ Study attempted to use objective measurements of quality. In the case of the former, the number of Radio and Television News Directors Awards and A I. DuPont Awards was measured. In the latter, a Design Team of 14 respected local television news professionals from a diverse cross-section of companies and regions around the country was assembled. This panel, through the use of survey questionnaires and long-form open-ended discussions developed 6 criteria for assessing the quality of newscasts including story balance via multiple sources and story balance via multiple viewpoints Project for Excellence in Journalism, *"Does Ownership Matter in Local Television News· A Five-Year Study of Ownership and Quality"* (Feb. 17, 2003) at 2, 21 (Appendix III). *See also* PEJ's March 20, 2003, reply to Network's response.

noted above, may be preventing efficient combinations that would allow for the production of high quality news coverage and broadcast programming, including coverage of local issues, thereby harming diversity.[802] Newspapers and local over-the-air television broadcasters alike have suffered audience declines in recent years.[803] In the broadcast area, commenters have reported declines in the ratings of existing outlets as more media enter the marketplace. For example, the number of television stations in the Miami-Ft. Lauderdale and the adjacent West Palm Beach markets has increased from 10 to 25 from 1975 to 2001.[804] As more stations have begun to program local news, however, the ratings for individual stations have dropped.[805] Broadcast groups owned by GE, Disney, Gannett, Hearst-Argyle and Belo have lost 10 to 15% of their aggregate audience in the past five years.[806] Local over-the-air broadcast TV's share of total television advertising dollars, which includes the new broadcast networks, new cable networks and syndication providers, has fallen from 56% in 1975 to 44% in 2000.[807] E.W. Scripps Company argues that consolidation among established media outlets and the proliferation of new media outlets since 1975 requires broadcasters and newspapers to grow, consolidate, and achieve critical scale in their local markets to survive and effectively serve the public.[808]

360 Given the decline in newspaper readership and broadcast viewership/listenership, both newspaper and broadcast outlets may find that the efficiencies to be realized from common ownership will have a positive impact on their ability to provide news and coverage of local issues.[809] We must consider the impact of our rules on the strength of media outlets, particularly those that are primary sources of local news and information, as well as on the number of independently owned outlets. As West Virginia Media, states, for example, maximizing the number of independent voices does not further diversity if those voices lack the resources to create and publish news and public information.[810]

361 *Common Ownership/Common Viewpoint.* As suggested by MOWG Study No. 2,[811] authored by David Pritchard, commonly-owned newspapers and broadcast stations do not necessarily

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[802] FOEF Comments in MM Docket No. 01-235 at 22, Table 1, and 29-31; Herald Reply Comments in MM Docket No 01-235 at 4-5.

[803] *Id* at 1-2; *see also* NAB Comments in MM Docket No. 01-235 at 9-16, Att. 1 (audience share of traditional media has declined as the share of new outlets, particularly cable systems, DBS and MVPDs has increased).

[804] Tribune Comments in MM Docket No. 01-235 at 25-26. Tribune publishes the *South Florida Sun-Sentinel*

[805] *Id* at 26-27.

[806] Miller Comments in MM Docket No. 01-235 at 19-21, Exhibits 5, 6.

[807] *Id.* at 21-22, Exhibit 7.

[808] Scripps Comments in MM Docket No 01-235 at 2.

[809] *See* West Virginia Media Comments at 14-23; Bonneville Comments at 7, Cox Comments at 71-72; Dispatch Comments at 7-9; Stapleton Comments at 14-15.

[810] West Virginia Media Comments in MM Docket No. 01-235 at 13-15.

[811] MOWG Study No. 2.

speak with a single, monolithic voice.[812] Although limited in scope, the Pritchard study found that in half of the 10 newspaper-television combinations studied, the overall slant of the coverage of a company's television station was noticeably different from the overall slant[813] of the coverage provided by the same company's newspaper in the same market. While this does not permit us to conclude that common ownership never results in common slant, it does suggest that common ownership "does not result in a predictable pattern of news coverage and commentary about important political events in ... commonly owned outlets."[814] The results of the Prichard study are consistent with other anecdotal information supplied by commenters.[815]

362. Several parties assert that ownership affects editorial decisions and, ultimately, viewpoints expressed by media outlets.[816] As evidence, CFA points to Kim Fridkin Kahn and Patrick J. Kenny's paper, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens' View of Candidates*,[817] which concludes that information on news pages is slanted in favor of the candidate endorsed on the newspaper's editorial page. CFA argues that combined entities are more likely to engage in biased reporting that goes unchecked by a disinterested rival. Issues affecting TV stations but not newspapers, it claims, might be discussed differently by independent newspapers and newspaper/TV combinations. It argues that, due to excessive influence and conflicts of interest, cross-owned media fail repeatedly to exercise their "watchdog" function, as documented by experiences in a variety of communities.[818] Some opponents of elimination of the rule, arguing that common ownership will result in the common expression of viewpoint, attack the motives and objectivity of Dr. David Pritchard, author of MOWG Study No. 2.[819] Dr. Dean Baker asserts that MOWG Study No. 2 has serious methodological flaws and that when the results are properly analyzed seven of the ten combinations had a

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[812] Fox Comments at 54-55, NAB Comments at 62-63. *See also* Fox Comments in MM Docket No 01-235 at 20-23; Gannett Comments at 9-14, Morris Comments at 8-9; NAA Comments at 11-20; Tribune Comments in MM Docket No. 01-235 at 42-47. Indeed, few broadcast stations overtly editorialize.

[813] In MOWG Study No. 2, Pritchard defines the "slant" of a published or broadcast item about the presidential campaign from the point of view of a hypothetical interested but undecided voter. If the coders judged an item to be likely to make such a voter more inclined to vote for a candidate, the item was coded as "favorable" to that candidate "Slant" was not a judgment about whether a candidate or his staff would have been happy with publication or broadcast of the item, about whether an item was somehow biased, or about a journalist's intent. It was simply an assessment of whether an item would have made a typical undecided voter more likely to vote for a candidate

[814] MOWG Study No 2

[815] *See* Tribune Comments in MM Docket No. 01-235 at 43, *see also* Gannett Comments in MM Docket No 01-235 at 11-13, Gannett Comments at 9-14, NAB Comments at 62-63 (*citing e g*, Hicks and Featherston, Duplication of Newspaper Content at 551-53).

[816] *See* AFL-CIO Reply Comments in MM Docket No. 01-235 at 13-20; UCC Comments in MM Docket No 01-235 at 11

[817] 96(2) AMERICAN POLITICAL SCIENCE REVIEW (June 2002).

[818] CFA Comments at 225-34.

[819] *See, e g*, AFL-CIO Comments at 36-43; AFTRA Comments at 28-32; CFA Comments at 221-24; CWA Comments at 29-34.

common slant.[820] CFA argues that "this is a remarkably high bias and underscores the problem of common ownership across the media."[821] Other critics of MOWG Study No. 2 claim that its results cannot be generalized to all broadcast/newspaper combinations because the study examined only a small sample of cases and the author failed to include a "control" group of independently-owned broadcast stations and newspapers for comparison.[822]

363. Various parties submit anecdotal evidence purporting to show that ownership either does or does not influence viewpoint. For example, in an effort to show that ownership does influence viewpoint, AFL-CIO reports that Pulitzer winner Sydney Schanberg's column in *The New York Times* was canceled when he criticized the press for ignoring a major real estate scandal in New York;[823] the publisher of Hearst's *San Francisco Examiner* allegedly promised to stem his paper's criticism of Mayor Willie Brown if the mayor did not oppose Hearst's takeover of its rival, the *Chronicle*;[824] and the *Los Angeles Times* failed to report a controversial real estate and recreational project that benefited the *Times'* parent, *Times-Mirror*, although the story was reported by other papers, including *The New York Times* and *The Bakersfield Californian*.[825] CWA argues that ownership influences viewpoint, and even reduces viewpoint diversity.[826] The record also includes anecdotes to the contrary, and those supplying these anecdotes are equally adamant that ownership does not influence viewpoint. For example, Tribune states that all of its newspapers did not endorse the same candidate in the 2000 presidential election.[827]

364. Suffice to say, although there is evidence to suggest that ownership influences viewpoint, the degree to which it does so cannot be established with any certitude. In order to sustain a blanket prohibition on cross-ownership, we would need, among other things, a high degree of confidence that cross-owned properties were likely to demonstrate uniform bias. The record does not support such a conclusion. Indeed, as the market becomes more fragmented and competitive, media owners face increasing pressure to differentiate their products, including by means of differing viewpoints. While such differentiation may occur, however, our analysis does not turn on that premise, and it is not determinative of our decision with respect to our current newspaper/broadcast cross-ownership rule. Our analysis turns, rather, on the availability of other news and informational outlets. Thus, while we do not

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[820] AFL-CIO Comments, *Democracy Unhinged* at 5-7.

[821] CFA Comments at 47-48 n.68.

[822] *See, e g, Democracy Unhinged*

[823] AFL-CIO Comments at 22 (citing Northwest Passage Productions in association with KTEH, *Fear and Favor in the Newsroom*).

[824] *Id.* (citing Thomas Kunkel and Gene Roberts, *Leaving Readers Behind The Age of Corporate Newspapering*, 23(4) AM J R 36 (May 1, 2001).

[825] *Id* (citing Ben Bagdikian, THE MEDIA MONOPOLY (6th ed.) (Boston: Beacon Press 2000) at 39-41).

[826] CWA Comments at 29-40 (citing Marion Just and Rosalind Levine, *"News for Sale" Special Report Local TV News*, COL J REV /PEJ (Nov /Dec. 2001) at 2-3; DeNeen L. Brown, *Canadian Publisher Raises Hackles Family is Accused of Trying to Restrict Local Newspapers' Autonomy*, WASHINGTON POST (Jan. 27, 2002) at A25); *see also* CFA Comments at 34-40, 225-34.

[827] Tribune Comments in MM Docket No. 01-235 at 43 *See also* Gannett Comments in MM Docket No. 01-235 at 11-13; Gannett Comments at 9-14.

dispute that a particular outlet may betray some bias, particularly in matters that may affect the private or pecuniary interest of its corporate parent (*e.g.*, such as when an outlet has an interest in a real estate transaction or is being criticized in an op-ed), such anecdotes do not show a pattern of bias in the vast majority of news comment and coverage where such self-interest is not implicated. Nor, moreover, do such incidents mean that the public was left uninformed about the situation by other available media. Therefore, it would seem that the remedy for any such "bias" is the provision of antagonistic viewpoint we seek to advance.

365. *Available Media.* The record in this proceeding provides ample evidence that competing media outlets abound in markets of all sizes – each providing a platform for civic discourse.[828] Television and radio stations, both commercial and noncommercial, are important media for news, information, entertainment, and political speech [829] Cable television systems, which originated as passive conduits of broadcast programming, have expanded to carry national satellite-delivered networks. Many also carry local public, educational, and governmental channels. Cable systems in larger markets are now evolving into platforms for original local news and public affairs programming.[830] Daily newspapers, while declining in number, continue to provide an important outlet for local and national news and expression.[831] The Internet, too, is becoming a commonly-used source for news, commentary, community affairs, and national/international information.[832] Seventy-two percent of Americans are now online and spend an average of nine hours weekly on the Internet.[833] MOWG Study No. 3 suggests that consumers generally view Internet news sources as a substitute for daily newspapers and broadcast news.[834] We cannot but conclude that, notwithstanding the claims of supporters of retention of the

[828] *See* Media Marketplace Section IV, *supra, see also* MOWG Study No. 1; MOWG Study No. 3 at 3, 18; MOWG Study No 8 at Table 1; Appendix D; Gannett Comments at 9-14 (consumers use a variety of media to obtain news and information).

[829] Gannett Comments at 10-11. *See also* Andrea M.L. Perrella, THE POLITICAL INFLUENCE OF TALK RADIO (Université de Montréal, 1995) ("Talk radio has grown . . from a fringe radio format to a lucrative industry and a noticeable actor in recent American politics. Talk radio has played a vocal role during the 1992 presidential election and the 1994 mid-term elections, with many people both in and out of politics attributing the Republican Party's 1994 election sweep to buoyant conservative talk-radio hosts."); Amy Ridenour, *President of The National Center for Public Policy Research*, Press Release (Nov. 20, 2002) ("Talk radio is America's town hall"). *But see* Consumers Union/MAP Reply Comments at 21-23 (claiming that radio stations are no longer a major voice in civic discourse)

[830] The first local/regional cable news channels began in the mid-1980s; today there are 32 cable news channels. *See* NCTA, *Regional Cable Networks*, Cable Developments (2002) at 171-94

[831] CFA Comments at 159-62

[832] *See, e g*, Media General Reply Comments in MM Docket No. 01-235 at 8-11 (Internet a surrogate for local newspapers with over half of the nation having access to the Internet) (citing, NTIA, *A Nation Online· How Americans are Expanding Their Use of the Internet* (Feb. 2002)); *see also* NAB Reply Comments in MM Docket No 01-235 at 8-10; Hearst Comments in MM Docket No. 01-235 at 10-11.

[833] *See, e g*, Hearst Comments in MM Docket No 01-235 at 10-11.

[834] *See* MOWG Study No. 3. We recognize, however, that many television stations and newspapers also distribute their content via the Internet.

newspaper/broadcast rule,[835] the Internet does play an important role in the available media mix.[836]

366. We disagree with parties that assert that there is little diversity in media markets.[837] The average American has a far richer and more varied range of media voices from which to choose today than at any time in history. Given the growth in available media outlets, the influence of any single viewpoint source is sharply attenuated. AFL-CIO argues to the contrary, asserting that the growth rate of media outlets is slowing.[838] The slowing of the growth rate is attributable, at least in part however, to the lack of available spectrum to maintain the tremendous growth in broadcast outlets recently experienced. CFA argues that only a large number of independent owners – "diverse and antagonistic sources" – will provide sufficiently diverse viewpoints for effective public discourse.[839] It estimates that elimination of the rule would result in approximately 200 newspapers merging with broadcasters, reducing the number of independent outlets available.[840] This, some commenters allege, will cause a reduction in viewpoint diversity.[841] We agree that diversity of ownership can promote a diversity of viewpoints and recognize that absent the current rule there will be some consolidation. We conclude, however, that our new local rules will protect the diversity of voices essential to achieving our policy objectives. A blanket prohibition on newspaper-broadcast combinations, however, can no longer be sustained.

367. In short, the magnitude of the growth in local media voices shows that there will be a plethora of voices in most or all markets absent the rule. Indeed, the question confronting media companies today is not whether they will be able to dominate the distribution of news and information in any market, but whether they will be able to be heard at all among the cacophony of voices vying for the attention of Americans.[842] Our rules should account for these changes and promote, rather than inhibit,

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[835] UCC Comments in MM Docket No. 01-235 at 17-19, Att. 10 (Internet not effective news or advertising substitute for broadcast stations or daily newspapers), CU Comments in MM Docket No. 01-235 at 65-96 (diversity not assured by competition across media products); AFL-CIO Comments at 34-36 (arguing that more than 60% of Americans watch broadcast news, and about 62 percent of Americans read a daily newspaper, while other media do not have comparable reach, and half of all Americans do not have Internet connections at home); CWA Comments at 5-9, *citing* MOWG Studies Nos. 3 and 8 (Internet not a mass medium and most people use Internet news sites for non-local news).

[836] Major media providers need no convincing, as virtually all of them have rushed to create webpages in an effort to capture a segment of this incipient market. For example, MSNBC, Fox News, CNN, the major broadcast television networks and many newspapers all now maintain websites.

[837] *See, e g*, AFL-CIO Reply Comments in MM Docket No. 01-235 at 11-12; UCC Comments in MM Docket No. 01-235 at 2-8, Attachments 2, 3 (purporting to show that local broadcast media have become less diverse and more concentrated between 1993 and 2001); UCC Reply Comments in MM Docket No. 01-235 at 24-26, Attachments.

[838] AFL-CIO Comments at 1-3.

[839] CFA Comments at 283.

[840] *Id.* at 244-46.

[841] *See, e g*, AFL-CIO Comments at 36-43; AFTRA Comments at 28-32; CFA Comments at 221-24, CWA Comments at 29-40 (citing, *e g.*, Brown, *supra* note 826.

[842] Tribune Comments in MM Docket No 01-235 at 36-38.

the ability of media outlets to survive and thrive in this evolving media landscape.[843] They must "give recognition to the changes which have taken place and to see to it that [they] adequately reflect the situation as it is, not was."[844]

d. Conclusion

368. As discussed above, we find that a newspaper-broadcast combination cannot adversely affect competition in any relevant product market and, thus, we cannot conclude that the current newspaper-broadcast cross-ownership rule is necessary to promote competition. Similarly, we conclude that the evidence in the record of this proceeding demonstrates that combinations can promote the public interest by producing more and better overall local news coverage and that the current rule is thus not necessary to promote our localism goal. Instead, we find that it, in fact, is likely to hinder its attainment. Finally, the record does not contain data or other information demonstrating that common ownership of broadcast stations and daily newspapers in the same community poses a widespread threat to diversity of viewpoint or programming.[845]

369. As outlined above, the types of media and the number of outlets within each media, except daily newspapers, have increased dramatically in the past twenty years. In addition, evidence shows that the link between common ownership of newspapers and broadcast outlets and common viewpoint is tenuous, ill-defined, and difficult to measure. In any event, we do not think that the current rule is necessary to preserve diversity of viewpoint. The local cross-media limits adopted herein are more precisely targeted at specific types of markets in which particular combinations are most likely to harm diversity. We conclude, therefore, that the current rule is no longer necessary in the public interest.[846]

2. Radio/Television Cross-Ownership Rule

370. The radio/television cross-ownership rule limits the number of commercial radio and television stations an entity may own in a local market. Currently, the rule allows a party to own up to two television stations (provided it is permitted under the television duopoly rule) 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[847] would remain post-merger. Where parties may own a combination

[843] *See, e g*, S. Rep. No 104-23, 104th Cong., 1st Sess. at 64 (1995) (statement of Sen. Burns) (the industry is "now operating under archaic rules that are better suited the 1950s than the 1990s").

[844] *1975 Multiple Ownership Second Report and Order,* 50 F.C C.2d at 1075.

[845] *See* CanWest Comments in MM Docket No. 01-235 at Appendix A (no structural link between the number of owners and the degree of diversity), NAB Comments in MM Docket No. 01-235 at 20-26 (citing David Haddock and Daniel Polsby, *Bright Lines, the Federal Communications Commission's Duopoly Rule and the Diversity of Voices*, 42 FED COMM L. J 331 (1990); Benjamin Compaine, *The Impact of Ownership on Content Does It Matter?*, 13 CARDOZO ARTS & ENT L. J 755 (1995))

[846] On March 11, 2003, Media General, Inc., filed a "Motion to Bifurcate and Repeal" That Motion asked the Commission to break the newspaper/broadcast cross-ownership rule out of the biennial review, and repeal the rule, if it could not act in the biennial review in the spring of 2003. Because we are acting in the biennial review in the spring of 2003 and are repealing the subject rule, we dismiss Media General's Motion as moot

[847] Media voices include (1) independently owned and operating full-power broadcast television stations within the DMA of the television station's community of license that have Grade B signal contours that overlap with the Grade B signal contour of the television station at issue; (2) independently owned and operating broadcast radio (continued .)

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 television duopoly rule) and up to four radio stations (as permitted under the local radio ownership rule) in markets where, post-merger, at least ten independently owned media voices would remain. A combination of one television station and one radio station is allowed regardless of the number of voices remaining in the market.[848]

371. Based on the record in this proceeding, we do not find that the radio/television cross-ownership rule remains necessary in the public interest to ensure competition, diversity or localism. Our decision reflects the substantial growth and availability of media outlets in local markets, as well as the potential for significant efficiencies and public interest benefits to be realized through joint ownership. We find that our diversity and competition goals will be adequately protected by the local ownership rules adopted herein.

372. *Background.* In 1970, the Commission restricted the combined ownership of radio and television stations in local markets.[849] The purpose of the rule (originally referred to as the one-to-a-market rule) was twofold: (1) to foster maximum competition in broadcasting, and (2) to promote diversification of programming sources and viewpoints.[850] In 1995, the Commission requested comment to determine whether the cross-ownership limitations were still warranted in light of the then current market conditions [851] Before the Commission issued a decision, Congress passed the 1996 Act.[852] Section 202(d) of the 1996 Act required the Commission to extend the radio-television cross-ownership presumptive waiver policy to the top 50 television markets "consistent with the public interest, convenience and necessity." Prior to implementing the statutory change, we issued a *Second Further Notice* requesting comment on whether modification of the rule was warranted beyond the Section 202(d) requirements.[853] We asked whether, instead of just extending the waiver policy to the top 50 markets, we

(Continued from previous page)

stations that are in the radio metro market of the television station's community of license or the radio station's community of license, (3) independently owned out-of-market broadcast radio stations with a minimum share as reported by Arbitron; (4) English-language newspapers that are published at least four days a week within the television station's DMA and that have a circulation exceeding 5 percent of the households in the DMA; and (5) 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. 47 C.F R. § 73.3555(c)(3)

[848] 47 C.F R § 73.3555(c).

[849] Originally, the rule prohibited the common ownership of commercial radio and television stations in the same market if the 2 mV/m contour of an AM station or the 1 mV/m contour of an FM station encompassed the entire community of license of a television station or, if the Grade A contour of a television station encompassed the entire community of license of an AM or FM station. *Amendment of Section 73 35, 73 340 and 73 630 of the Commission's Rule Relating to Multiple Ownership of Standard, FM and TV Broadcast Stations,* 22 F.C.C.2d 306, 308 ¶ 8 (1970) ("*1970 Multiple Ownership First Report and Order*").

[850] *Id.* at 307 ¶ 3.

[851] *TV Ownership FNPRM, supra*

[852] *See* note 1, *supra*

[853] *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules,* 11 FCC Rcd 21655, 21682-89 ¶¶ 59-89 (1996) ("*TV Second FNPRM*").

should eliminate the rule in its entirety based on a finding that radio and television do not compete in the same market. We also asked whether television and radio stations should be considered competitors, and if the radio/television cross-ownership rule could be eliminated because the respective radio and television ownership rules alone sufficed to ensure sufficient diversity and competition in the local market [854] In the event we found that the cross-ownership rule was necessary, we sought comment on specific options for modification of the rule.[855]

373. In 1999, the Commission modified the rule to its current form.[856] We found that the growth of media outlets and cable systems, the efficiencies of joint ownership, and the public service benefits obtained from joint operations all supported our decision to allow additional common ownership of radio and television stations [857] Although we decided not to eliminate the rule, we stated that we would continue to monitor the impact of the broadcast ownership rules on the industry and that we would further consider relaxation of the radio/television cross-ownership rule in future biennial reviews.[858] In June 2000, we released the *1998 Biennial Report*, where we concluded that further relaxation of the broadcast ownership rules was not then warranted.[859] In light of the 1999 relaxation of the broadcast ownership rules, we decided to proceed cautiously and monitor the impact of the new rules on diversity and competition.[860]

374. Under our statutory mandate pursuant to Section 202(h) of the 1996 Act, we are required to consider biennially whether "to 'repeal or modify' any rule that is not 'necessary in the public interest.'"[861] In determining whether the rule meets this standard, we consider whether it is necessary to promote any of our public interest objectives.[862] With respect to cross-ownership of radio and television stations in the same market, we reexamine the impact of the rule on competition, localism and diversity.

a. Competition

375. *The Product Market.* To assess the competitive impact of our radio/television cross-

[854] *Id* at 21684 ¶ 63.

[855] *Id* at 21685-87 ¶¶ 65-71.

[856] *Local TV Ownership Report and Order, supra* note 96 Also in the Local TV Ownership Report and Order we eliminated the five factor case-by-case waiver standard. Currently, waivers are granted only in situations involving a "failed station" or other extraordinary circumstances.

[857] *Id* at 12948 ¶ 102

[858] *Id* at 12949 ¶ 106.

[859] *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26.

[860] In the 2000 Biennial Review proceeding, the Commission did not alter the recommendations it had made in the 1998 Biennial Review proceeding with respect to the radio/television cross-ownership rules. *See 2000 Biennial Regulatory Review, supra,* note 509

[861] *Fox Television,* 280 F.3d at 1042.

[862] *Id*