ownership rule, we need to determine whether radio and television stations compete for sources of revenue generation – in this case, advertising.[863] If we find that they do, *i.e.*, that a significant number of advertisers consider radio and television to be good substitutes, then our concern would be that elimination or relaxation of the cross-ownership restrictions may enable a single firm to acquire sufficient market power to hinder small and independent broadcasters' efforts to generate revenue, and thereby put their continued viability at risk. However, if radio and television are not in the same product market, then we would have little concern that elimination or relaxation of the rule would have any negative effects on competition. Broadcasters compete with each other for audience share by offering quality programming of interest to local communities. Higher audience shares, in turn, attract advertisers, and thus, enable radio and television stations to generate revenue. Our continuing goal is to ensure that our rules and policies foster, rather than hinder, broadcasters' incentives and ability to compete for advertising revenues by providing consumers with innovative and quality programming, news, and information.

376 In the *Notice* we asked commenters to provide us with evidence regarding the degree to which radio serves as an economic substitute for broadcast television.[864] We noted that evidence showing radio and television are not economic substitutes would support relaxation or elimination of the current rule The *DOJ/FTC Guidelines*[865] define the relevant product market as the smallest group of competing products for which a hypothetical monopoly provider of the products would profitably impose at least a "small but significant and non-transitory price increase," presuming no change in the terms of sale of other products.[866] Thus, when one product is a reasonable substitute for the other in the eyes of consumers, it is to be included in the relevant product market even though the products themselves are not identical.[867] In the *Local Radio Ownership NPRM*, we noted that the Department of Justice views radio as a discrete market, "finding that advertisers find value in certain of radio's unique attributes."[868]

377. As described in greater detail above, we conclude that most advertisers do not consider radio and television stations to be good substitutes for advertising and, therefore, that generally

[863] The competitive analysis for both the local radio and the local television ownership rules focuses on two additional markets, delivered programming and programming production However, in analyzing the effects of combined ownership of radio and television stations in a local market, neither of the latter product markets is relevant Radio and television broadcasting are distinct programming markets with little overlap. The bulk of video entertainment and news programming available on commercial television is not suitable for radio Similarly, audio radio programming, which is predominately music and talk show formats, cannot be replicated on television. Thus, because the essential nature of each medium determines the type of programming each medium broadcasts, the content is not interchangeable. Authors Lin and Jeffres used media websites to analyze the programming of newspapers, radio stations, and television stations in 25 of the largest metro markets in the US. They concluded that each medium has a relatively distinctive content emphasis *See* Carolyn A. Lin and Leo W. Jeffres, *Comparing Distinctions and Similarities across Websites of Newspapers, Radio Stations, and Television Stations*, J MASS COMM Q (Columbia, Autumn 2001) at 555-573.

[864] *Notice*, 17 FCC Rcd at 18537 ¶ 104.

[865] *DOJ/FTC Guidelines*, *supra* note 282.

[866] *Id* § 1 11

[867] *Id* § 1.12. *See, e g*, *EchoStar/DirecTV HDO*, 17 FCC Rcd at 20605-06 ¶ 106

[868] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19879 ¶ 42.

combinations of these two types of media outlets likely would not result in competitive harm.[869] Again, in MOWG Study No. 10, Anthony Bush found weak substitutability between local media, including radio and television. In separately filed comments, both Professor Jerry Hausman and Dr. Bruce M. Owen criticize Bush for using national and regional, rather than local, advertising price data.[870] As we noted above, we recognize the limitations of the SQAD data but believe the effects of these measurement errors may cancel out such that the estimates of Bush are unbiased. We weight the study accordingly and consider the other evidence on the record.

378. Moreover, other studies confirm Bush's conclusion that advertisers do not consider radio and television to be good substitutes. Silk, Klein, and Berndt (2002) examine advertising in the national markets for eight different media outlets: magazines, newspapers, network television, spot television, network radio, spot radio, outdoor billboards, and direct mail.[871] The authors find that for advertisers in national markets, radio and television are weak substitutes. Reid and King (2000) used survey and interview methods to examine advertising managers' opinions of media substitutability.[872] Their reports suggest that managers consider radio and broadcast television to be weak substitutes.

379. In addition to the empirical evidence, differences between radio and television programming and formats suggest that they do not compete in the same product market. First, in any given market, radio stations can market and distinguish themselves to potential listeners through their identification with a particular format.[873] These formats allow radio advertisers to target specific demographics much more precisely than they can when they advertise on television. In addition, viewers and listeners experience these two mediums differently. Television uses both sight and sound to allow advertisers to reach their audience in a relatively comprehensive way. As an audio medium, radio is more limited. As a result, radio and television broadcast distinct programming. Video is not suitable for radio and vice versa. The difference is important for viewers and advertisers alike.

380. The essential nature of each medium determines, in large measure, the type of

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[869] CWA agrees that newspapers, television and radio are distinct and separate media product markets, with weak substitution by consumers and advertisers. CWA also urges the Commission to adopt structural rules that place ownership limits on each distinct media type See CWA Comments at 2-3, 46. In rare instances, advertisers may consider radio and television to be good substitutes. Buckley, for example, states that competition between radio and television advertising exists in smaller markets, such as in the Monterey-Salinas market, where radio and television advertising rates are approximately the same during certain times of the day. *See* Buckley Comments at 3 The local television ownership rule and the local radio ownership rule will prevent any one entity from owning all of the broadcast television stations or all the broadcast radio stations in a local market. Thus, those advertisers that consider radio and broadcast stations to be good substitutes, and play these media against one another to negotiate a good price, would continue to have access to these separately owned broadcast stations.

[870] *See* Clear Channel Comments in MM Docket No. 01-317 at 20-22, Exh 6 at 5-8; Fox Comments, Owen Statement; *see also* NAB Comments in MM Docket No. 01-317 at 30-33. These comments were submitted in the local radio proceeding, and do not discuss the relevant product market for the radio/television cross-ownership rule.

[871] Silk, Klein, and Berndt, *supra* note 519.

[872] Reid and King, *supra* note 520.

[873] Country, jazz, urban, pop, and rock are examples of these radio formats

programming each will broadcast.[874] For example, a car dealership or furniture warehouse wishing to quickly create strong brand recognition will likely place greater value on television ads where potential customers see the products, as opposed to using radio ads. Radio listeners are seldom completely engaged to listening because simultaneously they are perhaps, driving, working, cleaning, dining, or shopping. Thus, some advertisers may prefer, while others avoid, the radio listener as a significant audience to target. Additionally, television advertisements typically are more expensive than radio ads, suggesting that advertisers could not easily switch between the two mediums. Recent data suggest that an average 30 second evening television spot costs approximately $19 per thousand viewers, while on radio, the same spot costs approximately $11.[875] Radio stations typically do not garner the size audiences that television stations do, thus, making the 30 second television spot considerably more expensive than a radio spot. Small-scale, local establishments likely will find radio to be more affordable.

381. In sum, television and radio stations neither compete in the same product market nor do they bear any vertical relation to one another.[876] A television-radio combination, therefore, cannot adversely affect competition in any relevant product market. Accordingly, we cannot conclude that the current television-radio cross-ownership rule is necessary to promote competition.

b. Localism

382. In the *Notice*, we sought comment on how cross-ownership limitations affect localism, as measured by the quantity and quality of news and public affairs programming that stations provide to local communities.[877] We sought comment on the quantities of local news and public affairs programming provided by radio and television combinations as opposed to stand-alone stations in the same markets. We asked whether radio and television combinations produce more, less, or the same amount of news programming than stand-alone stations. We also asked commenters to address the implications of any such differences. We find that by prohibiting combinations of news gathering resources between radio and television stations, the current rule prohibits owners from maximizing local news and information production, which would benefit consumers.

383. There is no compelling or substantial evidence in the record that the rule is necessary to protect localism. The record in this proceeding, in fact, includes evidence to the contrary – that efficiencies and cost savings realized from joint ownership may allow radio and television stations to offer more news reporting generally, and more local news reporting specifically, than otherwise may be possible. The record in this proceeding suggests that station owners will use additional revenue and resource savings from television-radio combinations to provide new and innovative programming, provide more in-depth local interest programming, and provide better service to the public, including

[874] MOWG Study No 3 studies a number of different specifications for consumers of TV and radio and finds either weak or no substitution between these two media.

[875] Data represent average cost per thousand viewers or listeners during prime time for third quarter, 2002. Source of data is SQAD. For explanation of SQAD data *see* note 733, *supra*.

[876] Generally we identify both the product and the geographic markets. Because we find that radio and television advertising are separate product markets, it is not necessary to define the geographic market for these purposes.

[877] *Notice*, 17 FCC Rcd at 18537 ¶ 103.

locally oriented services.[878] As discussed in the Diversity Index section, consumers rely on both radio and television for coverage of news and public affairs.[879] Therefore, consumers will benefit from a policy which allows radio and television owners to maximize these offerings.

384. Some commenters assert that independent owners expend more resources to air local programming or produce more news and public affairs programming than do owners of combined stations.[880] Further, some commenters contend that cross-ownership of radio and television stations in local markets leads to reduced independent news and public affairs programming, more syndicated programming,[881] reductions of staff, cross-assigned journalists, re-use and re-purposing of content, and increased amounts of on-air advertising time.[882]

385 These parties have failed to show that the rule remains necessary in the public interest. First, isolated anecdotes of changes in news programming schedules following a transaction do not provide the kind of systematic empirical evidence necessary to support a general allegation that cross-owned stations produce lesser quantities of news, or news of lower quality, than do non-cross-owned stations. Second, shared support staff and conservation of resources does not necessarily mean a reduction in local news. The efficiencies derived from some of these practices may in fact, increase the amount of diverse, competitive news and local information available to the public.[883] Thus, the record does not demonstrate that the current rule specifically promotes localism, or that elimination of the rule would harm it.

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[878] Duhamel Comments at 1, 6; *see generally*, Clear Channel Comments in MM Docket No. 01-317 at 23; Cumulus Comments in MM Docket No 01-317 at 5-6; Viacom Comments in MM Docket No. 01-317 at 62-64; NAB Comments in MM Docket No 01-317 at 43-45.

[879] MOWG Study No 8; *see also* Diversity Index, Section VI(C)(3), *infra*.

[880] UCC Comments at 40-41. UCC points to Clear Channel's 2002 acquisition of the Ackerley Group, in which Clear Channel acquired 16 television stations, and created new radio and television combinations in eleven communities. Post-merger, UCC argues that in Watertown, New York, Clear Channel replaced the television station's morning, noon and weekend news broadcasts with a morning news show produced in Birmingham. UCC also complains that Clear Channel replaced its local news telecasts on stations in Binghampton and Utica with regional news programs However, without additional information, it is impossible to evaluate the actual reasons for the programming changes or effect of the changes on the aggregate news programming produced and distributed by the Clear Channel stations in the market

[881] AFTRA Comments in MM Docket No. 01-317 at 12. AFTRA believes that syndicated programming does not serve the interests of local communities *See also* AFTRA Comments at 12-15 regarding the sharing of news product between different local outlets.

[882] *Id* at 5-8 AFTRA cites CBS/Infinity's acquisition of Group W/Westinghouse, which resulted in the cross-ownership of television and radio stations in the Chicago market. AFTRA states that CBS proposes to cross-assign news reporters for television and its seven radio stations.

[883] We received substantially more comments on this issue in the context of the newspaper/broadcast cross-ownership rule. There, the record suggests that the newspaper/broadcast cross-ownership rule impedes efficiencies that might otherwise benefit the public. We believe that the same is true in the context of radio and television combinations.

c. Diversity

386. We asked in the *Notice* whether the cross-ownership rule is necessary to foster viewpoint diversity in today's media marketplace.[884] We sought comment on the types of media that contribute to viewpoint diversity and how the cross-ownership rule affects viewpoint diversity.[885] We noted that the current rule counts as a media voice commercial and non-commercial broadcast television and radio stations, certain daily newspapers, and cable systems. We asked whether additional types of media should also be counted as contributing to viewpoint diversity, such as the Internet, DBS, cable overbuilders, individual cable networks, magazines, and weekly newspapers.

387 As discussed above, in today's media market there are more media outlets than ever before.[886] The Commission has previously concluded that "the information market relevant to diversity includes not only television and radio outlets, but cable, other video media and numerous print media as well."[887] Not only have we seen an increase in the types of outlets available, but local markets have also experienced enormous growth in broadcast outlets. The record shows that in local broadcast markets of all sizes the numbers of radio and television stations have increased over the years.[888]

388. We conclude that the current television/radio cross-ownership rule is not necessary to ensure viewpoint diversity. As CanWest explains, we should not view specific markets in a vacuum for diversity purposes, but rather should consider that households get information from many sources. [889] Thus, we agree with the commenters that argue that a cross-ownership rule applicable only to radio and television is "inequitable and outdated."[890] Although several commenters argue that retention of the radio/television cross-ownership rule is necessary to protect the availability of diverse views, information, and local programming, [891] we believe that a rule limited to just radio and television fails to take into account all of the other relevant media in local markets available to consumers.

389. We agree with the commenters, however, that fostering the availability of diverse viewpoints remains an important policy goal, and that diversity of ownership promotes diversity of viewpoints. We are adopting modified service-specific local ownership rules that will protect and promote competition in the local television and radio markets and, as a result, will also protect and

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[884] *Notice*, 17 FCC Rcd at 18536 ¶ 100

[885] *Id* at 18536-37 ¶ 102

[886] *See* Media Marketplace, Section IV, *supra*

[887] *See 1984 Multiple Ownership Report and Order,* 100 F.C.C.2d at 25; *See* Viacom's Petition for Rulemaking (May 23, 2002) at 7; Clear Channel Comments at 5; NAB Comments at 68, Fox Comments at 58.

[888] *See* Media Marketplace, Section IV, *supra*; MOWG Study No 1

[889] CanWest Comments at 3. CanWest notes that cross-ownership in Canada has strengthened media companies and has encouraged greater diversity and more sources of information. *Id* at 6

[890] *See, e g*, NAB Comments at 69-70.

[891] Desmond Reply Comments at 7; AFTRA Comments at 10-11; CWA Comments at 2-3, 46; Nancy Stapleton Comments at 10-11, 16, *see also* Children Now Comments at 3-4 (if the Commission relaxes the cross-ownership rule, it should analyze the impact of proposed media mergers on children).

preserve viewpoint diversity within those services. In addition, we are adopting a new cross-media limit rule, described below, that is specifically designed to protect diversity of viewpoint in those markets in which we believe consolidation of media ownership could jeopardize such diversity. The local rules we are adopting in this *Order* are designed to reflect the substantial growth and availability of media outlets in local markets, and to account for concentration among all media outlets that substantially contribute to the dissemination of diverse and antagonistic viewpoints in local markets.[892] These rules make a rule directed only at radio and television unnecessary and anachronistic.

d. Conclusion

390 We do not have evidence in the record sufficient to support retention of the current radio/television cross-ownership rule. From a competitive perspective, radio and television are not good substitutes for the same revenue producing opportunities, and thus, cannot be regarded as competing in the same product market. There is little evidence that the current rule promotes localism and, to the contrary, the record indicates that combined station groups may be able to achieve cost savings that may accrue to the benefit of listeners and viewers. Finally, radio and television stations compete with many other electronic and print media in providing programming and information to the public, and the targeted cross-media limits adopted herein are therefore better designed to achieve our diversity goal in markets where diversity could be jeopardized by cross-ownership than the stand-alone radio/television cross-ownership rule. In addition, our local television and local radio ownership rules, which are designed to preserve competition in those markets, will also foster diversity of voices. We turn next to a discussion of the Diversity Index, which is intended to help us analyze outlets that contribute to viewpoint diversity in local markets.

3. The Diversity Index[893]

391. In order to provide our media ownership framework with an empirical footing, we have developed a method for analyzing and measuring the availability of outlets that contribute to viewpoint diversity in local media markets The measure we are using, the Diversity Index or DI, accounts for certain, but not all media outlets (newspapers, broadcast, television, radio, and the Internet) in local markets available to consumers, the relative importance of these media as a source of local news, and ownership concentration across these media. The DI builds on our previous approach to the diversity goal: We retain the principle that structural regulation is an appropriate and effective alternative to direct content regulation; we retain the principle that viewpoint diversity is fostered when there are multiple independently-owned media outlets in a market; we retain our emphasis on the citizen/viewer/listener and on ensuring that viewpoint proponents have opportunities to reach the citizen/viewer/listener. What we add is a method, based on citizen/viewer/listener behavior, of characterizing the structure of the

[892] MOWG Study No 8 shows that consumers use a wide variety of media to obtain entertainment, news and information, and that the general public views all of these sources as substitutes. MOWG Study No 3 shows consumers' increased use of the Internet at work and at home. Internet use has increased from 15% in 1997 to 46% in 2000 *Id* at Table 7. The UCLA Internet Report suggests that over the past three years a significant number of Internet users have been substituting away from television, getting more news and entertainment online "The UCLA Internet Report· Surveying the Digital Future, Year Three," UCLA Center for Communication Policy (Feb. 2003) at 33. *See also* CanWest Comments at 6; CST Comments at 5-7; Paxson Comments at 34-35. No commenters argue that a diversity analysis should be limited strictly to radio and television programming.

[893] The Commission wishes to recognize some of its economists for their efforts in developing this index including: Thomas Spavins, Enforcement Bureau, Judith Herman, Media Bureau, and John Scott, Media Bureau

"market" for viewpoint diversity. We use the DI as a tool to inform our judgments about the need for ownership limits. This section explains the rationale for the diversity index and discusses calculation methodology. The DI is based partly on the results of a consumer survey, which we acknowledge is not without flaws, and partly on our expert judgment and analysis of the local viewpoint diversity marketplace. While the Diversity Index is not perfect, nor absolutely precise, it is certainly a useful tool to inform our judgment and decision-making. It provides us with guidance, informing us about the marketplace and giving us a sense of relative weights of different media. It informs, but does not replace, our judgment in establishing rules of general applicability that determine where we should draw lines between diverse and concentrated markets.

392. Because of the limitations in the Nielsen survey, and the specific assumptions underlying the DI, it is a useful tool only in the aggregate. It cannot, and will not, be applied by the Commission to measure diversity in specific markets. Indeed, it could not be used on a particularized basis to review the diversity available in a specific market. For example, in determining the appropriate weights to apply to the various media, we have decided to give no weight to cable television or magazines as sources of local news, notwithstanding the results in the Nielsen survey to the contrary.[894] We recognize that consumers in certain markets do have access to local news from local magazines, local cable news channels, and PEG channels, but we believe that the Nielsen survey overstates this influence. On a national basis, we believe most consumers either do not have access to such sources (such as a local news magazine) or rely very little on them (such as PEG channels). Similarly, the DI assumes each town has only one weekly newspaper. In the aggregate, the DI reflects the market situation of most communities. In sum, excluding these sources or factors from the DI does not undermine the general conclusions we reach about market concentration because the DI is not capable of capturing particularized market characteristics; it is intended to capture generalized, typical market structures and identify trends.

a. Rationale for the Diversity Index

393. As discussed above, fostering diversity is one of the principal goals of the Commission's media broadcast ownership rules. In the past, the Commission has described its diversity goal as fostering "competition in the marketplace of ideas." Although the analogy between economic competition and diversity is not perfect, it is of use in structuring our approach. Viewpoint diversity refers to availability of a wide range of information and political perspectives on important issues. Information and political viewpoints are crucial inputs that help citizens discharge the obligations of citizenship in a democracy. We recognize that the number of political viewpoints or the number of perspectives on a particular issue may be greater than the number of media outlets in a market. And we recognize that, in an effort to cater to viewer/listener/reader preferences any single outlet may choose to present multiple viewpoints on an issue. However, we do not expect every outlet to present every perspective on every issue. The competition analogy suggests that having multiple independent decision-makers (i.e., owners of media outlets) ensures that a wide range of viewpoints will be made available in the marketplace.

394. News and public affairs programming is the clearest example of programming that can provide viewpoint diversity. As discussed above, we regard viewpoint diversity to be at the core of our public interest responsibility, and recognize that it is a product that can be delivered by multiple media.

[894] *See* our discussion excluding magazines and cable television in subsection, Choice of Media, Section VI(C)(3)(b), *infra*

Hence, in contrast to our competition-based rules, diversity issues require cross-media analysis.[895] Because what ultimately matters here is the range of choices available to the public, we believe that the appropriate geographic market for viewpoint diversity is local, *i.e.*, people generally have access to only media available in their home market.[896] To assist in our analysis of existing media diversity, and to help us determine whether any cross-media restrictions are necessary in the public interest, we use a summary index that reflects the general or overall structure of the market for diverse viewpoints. By analogy with competition analysis, the diversity index is inspired by the Herfindahl-Hirschmann Index (HHI) formulation, calculating the sum of squared market shares of relevant providers in each local market.

395. The measurement of market concentration has a long history in economics and several different measures have been proposed in the economics literature.[897] For example, a simple count of the number of firms in an industry (as the Commission has previously done in the media industry), the four-firm concentration ratio (measuring the percentage of the market held by the top four companies), and the HHI have all been ascendant at various times. The HHI measure, however, is particularly attractive for two reasons.

396 First, its mathematical properties correspond to our beliefs about the effects a merger would cause. Each possible measure of market concentration has benefits and weakness that can be captured by the list of mathematical properties, or axioms, that that particular measure satisfies.[898] In the case of measuring market concentration, a list of reasonable requirements or axioms limit us to the choice of few mathematical formulas.[899] Within this class of admissible indices, the HHI can be thought of as a very conservative choice in the following sense. If we ask "what is the loss of competition from a merger," known as the "delta" in the antitrust field, the HHI measure reflects the assumptions that: (i) an acquisition of a firm with given size will lead to a larger harm the larger the acquiring firm, and (ii) this harm is proportional to the size of both the merging parties. Applying a similar analysis to the Diversity Index, the Index reflects the assumptions that if newspapers have twice the diversity importance of television, a newspaper's acquisition of a broadcast television station will cause twice the loss of diversity as will a merger of two broadcast television stations. Conversely, if radio has less diversity weight than television, then a merger of a television and a radio station will cause less of a loss of diversity than will a merger of two television stations. In contrast, if the Commission were to adopt a

[895] See the discussion of the local radio and local television rules, Section VI(A) and (B), wherein we conclude that radio and television advertising markets are separate and that consumers of programming do not see radio and television as close substitutes.

[896] *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 24-25 ¶ 24; *Notice*, 17 FCC Rcd at 18546 ¶ 136.

[897] For an overview of this literature *see, e g*, Jean Tirole, THEORY OF INDUSTRIAL ORG. (MIT Press 1993) at 221-23; Michael Waterson, ECONOMIC THEORY OF THE INDUSTRY (Cambridge Univ Press 1984) at 166-74

[898] A requirement placed on an index is known in mathematics as an axiom. When we can show that there is a unique mathematical function that satisfies a given list of axioms, then that function is said to be *characterized* by the list of axioms. For a classic exposition of the axiomatic approach *see* J. Aczel, LECTURES ON FUNCTIONAL EQUATIONS AND THEIR APPLICATIONS (Academic Press 1966).

[899] The axioms are presented in David Encaoua and Alexis Jacquemin, *Degree of Monopoly, Indices of Concentration and the Threat of Entry*, 21 INT'L ECON REV. 87-105 (1980). Their list includes axioms such as, the value of an index should increase when two firms merge and decrease when a new firm enters

simple "voice test," for example, then it would be assuming that the loss of voice due to a merger is independent of the diversity importance of either party. Similarly, if the Commission were to adopt a concentration ratio measure, then it would implicitly be assuming that the loss of diversity is independent of the size of the larger firm in the transaction. It is in this sense -- that the size of the diversity loss increases as does the diversity importance of either merging party – that the Diversity Index developed here is a conservative measure, and one which we adopt in the interest of prudence.

397. Moreover, the HHI, from which our chosen measure derives, is widely used in economics and in antitrust. Thus, we can draw on our experience with the HHI in competition policy to determine threshold values for the Diversity Index. Indeed, the HHI formula is already widely used in the diversity literature for measuring content diversity.[900]

398. We assign market shares to these providers based in part on the results of responses to the Nielsen survey described in MOWG Study No. 8. The Diversity Index itself, however, is a blunt tool capable only of capturing and measuring large effects or trends in typical markets. Thus, the DI change from a particular transaction in a particular market might be more or less than we anticipate, or that it might result in a market DI higher or lower than that suggested by our examples. This is of no moment as the DI is a tool useful only in the aggregate and will not – and cannot in its current form - be applied on a particularized basis.

399. There are several conservative assumptions in our analysis of viewpoint concentration. First, we premise our analysis on people's actual usage patterns across media today. Fox reasonably argues that the Commission should set ownership limits based on the availability of news sources irrespective of their particular usage rates by consumers.[901] The record contains evidence that most people can and do substitute among different media for news and information.[902] Nonetheless, our method for measuring viewpoint diversity weights outlets based on the way people actually use them rather than what is actually available as a local news source. We adopt this approach out of an abundance of caution because we are protecting our core policy objective of viewpoint diversity. Second, our diversity analysis is based on preserving viewpoint diversity among local, not national, news sources. The effect is that we exclude, for purposes of measuring viewpoint concentration, the large number of national news sources such as all-news cable channels and news sources on the Internet and instead focus exclusively on the smaller set of outlets that people rely on for local news. Excluding those national sources thus leaves us with a smaller set of 'market participants' that we regulate to protect local news diversity in a way that might be unnecessary to protect diversity among national news sources. Third, we do not include low power television and low power radio stations in measuring viewpoint diversity. These stations are often operated with the express purpose of serving niche audiences with ethnic or political content that larger media outlets do not address. These low power outlets promote viewpoint diversity in a way that we have not addressed because of their more limited reach, but collectively they enhance viewpoint diversity beyond the levels that are reflected in our Diversity Index measurements.

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[900] The literature using the HHI to measure content diversity goes back to at least 1979. *See* Barry Litman, *The Television Networks, Competition and Program Diversity,* 23 J. OF B'CASTING 393-409 (1979).

[901] Fox Comments at 59.

[902] MOWG Study No 3 at 80.

400. We conclude that each of these judgments that inform our viewpoint diversity analysis are sound, but in each case we make the most conservative assumption possible. Thus, the results of our diversity index analysis can fairly be said to understate the true level of viewpoint diversity in any given market.

b. Choice of Media

401. We have determined which media to include in the Diversity Index based on the survey information derived from the "Consumer Survey on Media Usage" prepared by Nielsen Media Research (FCC MOWG Study No. 8). This survey tells us how consumers perceive the various media as sources of news and information. The key threshold implication of this study is that consumers use multiple media as sources of news and current affairs, and hence that different media can be substitutes in providing viewpoint diversity. For example, consider a citizen who acquires local news from television, newspapers, and radio. Suppose that a group of citizens in the consumer's home town wishes to oppose a bond issue for a new sports stadium, and that the local newspaper and television stations favor the bond issue and choose not to cover the position of opponents. If the opponents nevertheless get radio coverage for their position, they would be able to reach this particular citizen. Indeed, one might think that part of the radio coverage might address the fact that other media are "ignoring" the story. This could then raise the profile of the story to a level that might attract newspaper or television coverage. We put forward this hypothetical sequence of events not because we think that it describes a process that will happen with respect to any particular controversy. Rather it is a useful illustration of the process by which markets with multiple independent media outlet owners operate, particularly in an environment in which citizens generally do not depend on a single medium for their local news and current affairs.

402. FCC MOWG Study No. 8 asked respondents to identify the sources, if any, "used in the past 7 days for local news and current affairs." The same question was posed for national news and current affairs. The choices offered were television, newspaper, radio, Internet, magazines, friends/family, other, none, don't know, and refuse. The survey then asked follow-up questions regarding the first five choices. For each one of the five sources, respondents who did not mention a source were asked specifically if they used that source for local news and current affairs. The survey posed analogous questions with regard to national news and current affairs. Based on the initial and follow-up questions, the survey presents "summary data" on sources of local and of national news and current affairs information.

403. In an *ex parte* communication filed May 28, 2003, Media General submitted a critique of MOWG Study No. 8 by Prof. Jerry A. Hausman. Hausman argues that the Nielsen Survey has a number of serious flaws and questions its usefulness in any rule-making concerning cross-ownership of newspapers and broadcast stations.[903] First, he claims that the low response rate of the survey may lead to biased results.[904] Second, he argues that survey questions about hypothetical future circumstances are unreliable. He cites a number of cases where respondents, presented with relatively simple questions, are unlikely to consider the full, complete implications if a particular form of media were to become unavailable.[905] Third, he argues that the survey asks no questions that address the newspaper/broadcast

[903] Statement by Jerry Hausman, Media General Notification of Ex Parte Communication (May 28, 2003)

[904] *See* Hausman at 3

[905] For example, he cites where the Nielsen survey asks whether respondents would be more likely to use cable or satellite news channels for news if broadcast TV channels were not available. He notes that the question does not (continued.)

cross-ownership issues.[906]

404 We recognize Professor Hausman's concerns, but we believe that the Nielsen survey sample of 3,136 households provides us with useful information. In addition, Professor Hausman provides no evidence that the sample is, in fact, biased. Concerning Hausman's second point, we agree that answers to hypothetical questions are less useful than information about actual behavior. MOWG Study No. 8 provides a substantial amount of information on reported actual behavior. It is this information, not the hypotheticals, on which we rely to conclude that media can be substitutes in providing viewpoint diversity and to construct our Diversity Index. Regarding Hausman's third point, although the Nielsen survey may not directly ask respondents for their views concerning specific cross-ownership scenarios, we find that the results of the survey are useful in a number of areas, such as which forms of media are most heavily used for news. While questions could have been posed that contained more specificity concerning cross-ownership rules, we understand that such complexities could have made the survey design more difficult, as well as possibly lowered the response rate. Overall, while Hausman claims that the Nielsen survey does not "provide a basis for the measurements necessary for the specification of policy,"[907] the survey does, in fact, help us establish an "exchange rate" for converting newspaper, television, radio, and other media into common units so we can measure the extent of concentration in the "market of ideas." Finally, we emphasize that the Commission has not relied solely on the results of the Nielsen survey, but has used a number of studies and its own expert judgment on media in reaching its decision.

405. The data in the Nielsen study indicate that television, newspapers, radio, Internet, and magazines are the leading sources of news and current affairs programming.[908] Indeed, the summary data tables list only those five sources. In the initial questions, less than one percent of respondents cite "other" as a source. Based on the initial question, the average respondent uses two of the five major sources for news and current affairs, whether the category is local or national. Taking account of the follow-up questions, the average respondent uses three of the five major sources for news and current affairs, again regardless of whether the category is national or local.[909] These data strongly suggest that citizens do use multiple media as sources of viewpoint diversity, and that media can be viable substitutes for one another for the dissemination of news, information and viewpoint expression. On the basis of this finding, we proceed to an analysis of local media markets and whether there are particular kinds of cross-media transactions in particular kinds of markets that would likely result in high levels of concentration. To assist in making that determination, we rely in part on our Diversity Index.

406. Our Diversity Index focuses on availability of sources of local news and current affairs.

(Continued from previous page)
ask the respondent to consider a number of important factors, such as whether VHF and UHF news programs would cease to exist or whether only cable and satellite news programs would remain. Since it is not clear what hypothetical world the respondents are assuming, Hausman argues, the results of the survey are not reliable. Hausman, at 4-5.

[906] Hausman at 6.

[907] Hausman at 3.

[908] MOWG Study No. 8 at Tables 97 and 98

[909] The average respondent uses 2.93 different media for local and 2.71 different media for national news and current affairs.

As we explained in our policy goals section above, we are concerned with promoting viewpoint diversity in local media markets. Owners of media outlets clearly have the ability to affect public discourse. Consumers have numerous sources of national news and information available to them. Three major commercial broadcast networks, ABC, NBC, and CBS, provide this material and are available to 98% of US television households.[910] Several nonbroadcast networks also provide national news and current affairs information also are widely available. Subscribership to CNN is 77.4% of US television households.[911] The comparable figures for Headline News, Fox News, MSNBC, and CNBC are 74.1%, 71 8%, 68.4%, and 74.9%, respectively.[912] Local newspapers generally provide information on national issues, and a variety of major newspapers have national footprints. They include USA Today, the Wall Street Journal, the New York Times, and others. Moreover, a wide range of newspapers are available on-line at no charge. National news magazines, such as Time, Newsweek, US News and World Report, and more specialized political journals, such as Weekly Standard and New Republic are also widely available.[913] Therefore we do not believe that governmental regulation is needed to preserve access to multiple sources of national news and public affairs information.

407. The Diversity Index incorporates information on respondents' usage of television, newspapers, radio, and the Internet. Respondents also reported getting local news and information from magazines.[914] We exclude magazines, however, from our Diversity Index. First, as the description above makes clear, most (but not all) news magazines have a national rather than a local focus. Although there are exceptions (e.g., the Washingtonian and Texas Monthly), the figures in MOWG Study No. 8 on magazines use appear to be overstated. This simplification and assumption is supported by other aspects of the study. For example, unlike newspapers, radio, and television, almost no one cited magazines as their primary source of news and current affairs. MOWG Study No. 8 includes a question asking respondents to identify their single primary source of local or national news and current affairs. The figure for magazines is 0.6%.[915] A 2000 study by the Pew Research Center for the People and the Press provides similar results.[916] The study examines "Trends in Regular News Consumption" and finds that 12% of respondents, but only 4.2% of responses cite news magazines. An even lower share, 5% of respondents and 1.7% of responses, cite business magazines. Moreover, these figures include consumption of national as well as local news. The share of the sample utilizing magazines for local news is smaller, perhaps considerably so. The Pew Center data support our inference that magazines

[910] *See* OPP Working Paper 37 at 48 In January 2002, there were 105.5 million television households in the U.S. *See* Television Advertising Bureau, *Trends in Television* at www tvb org.

[911] *See* Kagan World Media, *Cable Television Investor* (July 29, 2002) at 14

[912] *Id* The total television households figure (105.5 million) is for January 2002 and is from Television Advertising Bureau, *Trends in Television* at www.tvb.org.

[913] *See* Appendix B for a summary list of major national news sources. We note that some of the sources for national news and information are owned by the same companies but we continue to believe that consumers have numerous independently owned sources of national news and information.

[914] Six percent of respondents answered that they received their local news and information from magazines.

[915] MOWG Study No. 8, Table 20

[916] Pew Research Center for the People and the Press, *Internet Sapping Broadcast News Audience*, http://people-press org/reports/display.php3?PageID=203.

play a negligible role overall as a source of local news. We must also note that, although the actual local news figure is small, because both the MOWG Study No. 8 and Pew Center figures combine local and national news, the precise magnitude of the local news figure is uncertain. Hence we are unable to assign to magazines a weight (even a small weight) in which we would have confidence. Nonetheless, the decision to exclude magazines will be re-examined in the next biennial review, and we will take the opportunity to gather additional survey data at that time on magazine usage.

408. For similar reasons, we also exclude cable from our Diversity Index. As discussed in the following section, we are concerned that some consumers may have confused broadcast and cable television Thus, we believe some consumers who replied that they receive their local news from cable may have been viewing broadcast channels over the cable platform. We also recognize, however, that cable systems do provide local news and current affairs information through PEG channels and, in some markets, local news channels. However, we do not have accurate data for this measure. Because we do not have reliable data on this point, we exclude cable from the DI to simplify our general analysis.[917]

c. Weighting Different Media

409. We have concluded that various media are substitutes in providing viewpoint diversity, but we have no reason to believe that all media are of equal importance. Indeed the responses to the survey make it clear that some media are more important than others, suggesting a need to assign relative weights to the various media. In view of our focus on local news and current affairs, we choose to base our weights on survey responses to the question asking respondents to identify the sources, if any, "used in the past 7 days for local news and current affairs."[918] We recognize that this is not a perfect measure, and that it requires some adjustment. We justify these adjustments and assumptions, however, by emphasizing that we are using the DI only to inform us of general market trends, not for precise measurements.

410. As noted above, the average respondent uses three different media for local news and current affairs information. It is likely that, for a given respondent, the three are not all of equal importance. If media differ in importance systematically across respondents (*e.g.*, if television were most important to everyone, and everyone made only minor use of radio to acquire news and current affairs information), then it would be misleading to weight all responses equally

411. Unfortunately, we do not have data on this question specifically with regard to local news and current affairs. The available "primary source" data address local and national news together and do show that different media have different importance, in the sense that primary usage differs across media.[919] Because "primary source" data are not available for local news and current affairs alone, we use the data identifying sources of local news and public affairs programming to weight the various media to reflect relative usage. As noted below, this leads to lower shares for television and higher shares for radio than the "primary source" shares reflect.

412. The local response summary data, Table 97 of MOWG Study No. 8, include five categories

[917] As with magazines, we will review this issue in the next biennial review, and may collect at that time more accurate survey data on consumers' use of cable for local news and current affairs

[918] MOWG Study No. 8, Table 97

[919] *Id*, Table 20

of media—Internet, magazines, radio, newspaper, television. Magazines account for 6.8% of responses to the questions on source of local news and current affairs. We exclude magazines as explained above and normalize the shares of the four remaining media to sum to 100%. The resulting weights are television (33.8%), newspapers (28.8%), radio (24.9%), and Internet (12.5%).[920] The local response summary data do not break down the television responses between broadcast television and cable/satellite television. Nor do these data separate out usage of daily and weekly newspapers. We make use of other FCC MOWG Study No. 8 questions to apportion the newspaper shares further.

413. Although the responses to one question in MOWG Study No. 8 suggests that cable is a significant source of local news and current affairs, other data from the study casts some doubt on this result. The following discussion explains the reasoning that leads us to exclude cable/satellite television from the current analysis of local news and current affairs for diversity purposes. As a threshold matter, DBS currently provides little or no local nonbroadcast content. We do, however, recognize that cable provides some such content and that it is becoming a more important source of local news and information. Some markets do have commercial local news channels on cable.[921] Moreover, at least one national cable news service (CNN Headline News) provides a five-minute local "cut-in" every half hour in some markets. Additionally, local public, educational, and governmental ("PEG") channels provide some local news and information, although the extent of their impact is unclear. MOWG Study No 8 asked respondents who get local news and current affairs from television (table 8) to indicate if the source is "broadcast television channels," cable or satellite news channels," "some other channel," "don't know," or "refuse " Virtually all responses fell into the first two categories, with 46.4% of respondents who get local news from television identifying cable as their source.[922]

414. Our experience suggests that the local cable news response is too high. A review of the responses reported in tables 6, 16, and 18 of MOWG Study No. 8 support this assumption. Table 18 provides responses from all who get news (local or national) from cable to the question "what are the names of the news channels you watched in the past 7 days on cable or satellite for local or national news or current affairs?" The list from which respondents can choose includes CNN, Fox News Channel, MSNBC, Local Cable News Channels, Headline News, CNBC, Other, Don't Know, and Refuse. The last two choices get minimal response, but 27.5% of responses are "Other." This suggests that some people may be counting retransmitted broadcast signals on cable or satellite as cable or satellite channels.[923] Moreover, joint examination of the responses reported in tables 6, 16, and 18 make it possible to infer that 94.3% of those who get news from cable (the table 18 universe) claim to get at least

[920] The "primary use" weights, excluding magazines, are television (57 8%), newspapers (25.8%), radio (10.3%), and Internet (6.1%). When magazines are included their weight is 0.6%. *Id*

[921] Roughly one-third of cable subscribers, 22.3 million, had access to a local or regional news channel in July 2002. *See* OPP Working Paper 37 at 126.

[922] The corresponding figure for national news (from table 16) is 51 1 percent.

[923] Because all cable systems carry local broadcast stations pursuant to our signal carriage rules, and because DBS carriers provide local broadcast signals in many markets, also pursuant to our signal carriage rules, it is possible, even likely, that the "other" category actually reflects viewing of retransmitted broadcast signals. If we assume that viewers are likely to be familiar with local broadcast signals, it is not likely that the "don't know" category includes broadcast signal viewing.

some local news from cable. However, only 6.1% of responses mention local cable news channels.[924] This disparity makes us question the responses regarding local news via cable and satellite channels and supports our conclusion that weighting cable 46.4% is too high. An additional reason that leads us to question cable as a local news source is that, of those local cable channels that meet Nielsen's minimum reporting standards, they are the least watched of any broadcast or cable stations in the market.[925] Given the low viewing of PEG channels and the facts that only one-third of cable subscribers have access to a local cable news channel and we do not have an accurate cable figure to use, we believe excluding cable from the Diversity Index on a national basis is a reasonable assumption. We will review the status of cable as a local news provider in the 2004 biennial review. Our review will include a follow-up to MOWG Study No. 8, which will include more detailed questions regarding the use of nonbroadcast video media for local news and current affairs.

415. With regard to newspapers, MOWG Study No. 8 indicates that 61.5% of those who cite newspapers as a source of local news and current affairs acquire that information from dailies only, 10.2% from local weeklies only, and 27.3% from both.[926] This works out to a share of 70.3% daily and 29.7% weeklies. We use these weights to divide the total newspaper share (28.8%) among daily and weekly newspapers. Our next biennial review will provide an opportunity for re-examination of the role of weekly newspapers. Accounting for the additional information on newspapers results in a revised set of weights. They are: broadcast television 33.8%, daily newspapers 20.2%, weekly newspapers 8.6%, radio 24.9%, and Internet 12.5%.

416. Various commenters agree that MOWG Study No. 8 supports the conclusion that citizens do, in fact, see different media as alternative sources of news. For example, NAA opines that the study, "a comprehensive survey...shows that the public makes ample use of a broad assortment of outlets" and that it "demonstrates that the public relies heavily on a range of alternative media."[927] Fox opines that the study "demonstrates that consumers are utilizing the wide variety of media available to them to obtain both local and national news and information." Later, this commenter states that this study, along with another study discussed in the comments "demonstrates that consumers are adept both at using various sources to obtain information and at using multiple sources simultaneously."[928] Critics of MOWG Study No. 8 include AFL-CIO and AFTRA, both of whom rely on a paper by Baker, attached to the AFL-CIO comments.[929] The Baker submission refers to the fact that MOWG Study No. 8 reports responses to a number of hypothetical questions regarding how respondents would behave if the availability to them of certain media were to change. Baker observes that the study "looks at what people say they will do" and

[924] Local cable news channels are, unlike the Internet, not available everywhere, but only in select markets. Only approximately one-third of cable subscribers have access to such channels *See* OPP Working Paper 37 at 126. The ownership limits apply nationwide, and the diversity index is intended to help us define these ownership limits. This was an additional reason for excluding cable from the DI while counting the Internet.

[925] Nielsen Television Index (Nov. 2000)

[926] MOWG Study No. 8, Table 7.

[927] NAA Comments at 8.

[928] Fox Comments at 11, 25

[929] *See* AFL-CIO Comments at 12 and Baker Study at 12-14 , AFTRA Comments at 8.

goes on to assert that "[E]conomists usually prefer looking at what people do."[930] We agree that answers to hypothetical questions are less useful than information about actual behavior. MOWG Study No. 8 provides a substantial amount of information on reported actual behavior. It is this information, not the hypotheticals, on which we rely to conclude that media can be substitutes in providing viewpoint diversity and to construct our Diversity Index. It is worth noting in this connection that much of the information we have on radio listening and television viewing is also based on reports by listeners and viewers of their behavior. Moreover, the information in MOWG Study No. 8 on the range of media that citizens use for news and information is quite similar to the results of a recent independent survey by the Pew Research Center.[931]

417. The most detailed analysis of MOWG Study No. 8 comes from the Consumer Federation of America.[932] CFA agrees that citizens get viewpoint diversity from multiple media. Their comments refer to the "two dominant political media—daily newspapers and television," although CFA asserts that these media "appear to play very different roles." As noted above, television has the largest weight in the DI (33.8%) and daily newspapers also loom large at 20.2%. Although the radio weight is somewhat higher at 24 9%, the fact that markets generally have far more radio stations than daily newspapers make our weights consistent with CFA's conclusion that newspapers are among the two most influential media. CFA finds that the Internet plays a small but growing role in citizen acquisition of news and information, a finding not inconsistent with the relatively low weight of Internet in our DI. CFA quotes statistics on daily use of television, newspapers, radio, and Internet that yield usage shares not too different from our DI weights. Drawing on two surveys, CFA suggests that people spend 4 minutes per day on average gathering news from the Internet, 25 minutes reading newspapers, 15 minutes listening to radio news, and "over half an hour" watching television news.[933] Ascribing half an hour to television leads to shares of 40.5% for television, 33 8% for newspapers, 20.3% for radio, and 5.4% for Internet. These are fairly close to our DI weights of 33 8%, 28.8%, 24.9%, and 12.5% for television, newspapers, radio, and Internet, respectively.

418 Although CFA does not dispute the proposition that different media address the same issues and stories, it asserts that they do so in different ways, suggesting, *inter alia*, that television is "the primary source for breaking news," that newspapers have a larger role in "the follow-up function," and that talk shows are a new and significant element of radio's role in disseminating viewpoints.[934] Although CFA does not discuss the role of radio as a source of breaking news, we acknowledge that different media do present information in different ways. CFA also argues that, particularly for "high use respondents" (the one-third of respondents in MOWG Study No. 8 whose total media use was above the sample average) there is evidence that the media are complements rather than substitutes, *i.e.*, people who use more of one medium tend to use more of the others. For the "low use respondents" (the one-half of respondents whose total media use was below the sample median), in many cases there are negative correlations in usage across many pairs of media. CFA suggests that this is consistent with

[930] Baker Study at 14.

[931] Pew Research Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers,* (Apr. 27, 2003) at http://people-press.org/reports/display.php3?PageID=243.

[932] *See generally* CFA Comments at 94-147.

[933] *Id* at 109.

[934] *Id* at 112, 100

substitution[935] Thus, CFA appears to conclude that media are substitutes for some citizens and complements for others.

419. We disagree with CFA's conclusion that the DI is invalid because some citizens may consider certain media outlets complements rather than substitutes. In the technical economic sense, two goods are substitutes if an increase in the price of good A (which leads to a decrease in consumption of good A) leads to an increase in the consumption of good B. In the context of our diversity goal, we are concerned with the question of what happens when one or more media outlets refuses to transmit a particular viewpoint. If most citizens accessed only one type of outlet, *e.g.*, radio but not newspapers or television, then our diversity goal would prompt us to analyze separately the structure of the "radio marketplace of ideas." If, on the other hand, most citizens access multiple media, then we can rely on the reasonable probability that, if, *e.g.*, the local newspaper refused to cover a particular story, citizens would be exposed to that story via independently-owned other media, such as radio or television. In other words, evidence that media are complements in the sense that, for at least some citizens, there is a positive correlation between use of one medium and use of another, does not invalidate the premise underlying the DI

d. Weighting Outlets Within the Same Medium

420 Having decided on relative weights for the various media, we next confront whether and how to weight different media outlets within each category. The decision of whether to do weighting turns on whether our focus is on the availability of outlets as a measure of potential voices or whether it is on usage (*i e.*, which outlets are currently being used by consumers for news and information). We have chosen the availability measure, which is implemented by counting the number of independent outlets available for a particular medium and assuming that all outlets within a medium have equal shares. In the context of evaluating viewpoint diversity, this approach reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, *i.e.*, blocked from transmission to the public

421. The underlying assumption here is that all outlets have at least similar technical coverage characteristics. This is a good, but not perfectly accurate assumption. Our signal carriage rules more or less equalize the coverage of all television stations in a particular DMA,[936] and it appears that newspapers (even those with limited current circulation) can expand their circulation area at relatively low cost. That is, assuming that additional readers are interested in the content, additional delivery personnel and vending machines are readily available at low cost. However, the assumption is less certain for radio. For example, a Class C FM station and a daytime AM station, in fact, have different coverage characteristics. The Class A station cannot expand its coverage to match that of the Class C FM station and thus reach additional listeners who might otherwise not have access to the views expressed on this outlet. Nevertheless, we believe the assumption to be reasonable across all cases. Arbitron radio metros are smaller than many radio station service areas and so would have the effect of truncating the service areas of more powerful stations. In addition, even though radio's total diversity share is 24.9%, on average there are enough radio stations so that the per-station share is fairly small. Any distortion in

[935] *Id.* at 142-145.

[936] We make this assumption for the purposes of constructing the DI; the actual differences in coverage are accounted for in the rules themselves, e g , the UHF discount in the national rule, and our waiver policy in the local TV and CML rules will look to the actual reach of stations.

share by overestimating the reach of small radio stations is therefore small.

422. Even though we choose to assign the same weight to each outlet of a particular medium, we reiterate the importance of assigning different weights to different media. As noted above in ¶ 409 *et seq.*, different media are of different importance. The differences in usage across media documented in MOWG Study No. 8 are in part reflections of the differential impact on the user of television, radio, newspapers, etc. We believe that the overall impact of a medium is substantially determined by the physical attributes of its distribution technology, along with user preferences. A radio station owner is able to change format, say from classic rock to all-news, and thus change its impact on the marketplace of ideas. But a radio station switching to all-news does not thereby turn itself into the equivalent of a television station nor does its impact on the marketplace of ideas become that of a television station. Conversely, if a home shopping television station began to carry substantial local news programming, the impact on the marketplace of ideas would be greater than that of the former classic rock radio station.

423. The case for a usage measure is that it reflects actual behavior. However, current behavior is not necessarily an accurate predictor of future behavior. Moreover, in order to implement a usage measure accurately, it would be necessary for us to define which content should be considered local news and current affairs. Current behavior, *e.g.*, viewing or listening to a broadcast station, is based on the content provided by the station in question. However, media outlets can change the amount of news and current affairs that they offer, perhaps in response to competitive conditions in the "viewpoint diversity" marketplace Such changes are unpredictable, so current market shares (e.g., of viewing or listening) may not be good predictors of future behavior. Indeed, advocates of a concentration approach to diversity analysis have noted the weakness of the usage approach, pointing out that "[E]vidence of past production does not, as a matter of logic, necessarily give a proper picture of a company's future ability to compete.' Only in examining 'its structure, history and probably future, does one provide' the appropriate setting for judging the probably anticompetitive effect of the merger'" [937] This point has particular force when dealing with competition in the marketplace of ideas because media outlets can rapidly expand their distribution of content (including local news and current affairs) at very low marginal cost. Of course, availability of media can also change. However, this is less likely to occur than is change in the program schedule or station format. Moreover, availability is far more likely to increase than decrease. Although a broadcast station owner could turn in the station license and take it out of service, this happens rarely if ever. A more likely scenario is an increase in media availability as a new station enters the market

424. If we were to adopt a usage measure designed to reflect our concern with local news and current affairs, we would need information on viewing/listening/reading of local news and current affairs material. To implement this procedure, it would be necessary first to determine which programming constituted news and current affairs. We believe that this type of content analysis would present both legal/Constitutional and data collection problems News and current affairs content is not necessarily limited to regularly-scheduled news programs. So we could be faced with deciding which other programs were news and current affairs, whether some portion of a program not primarily news should count as news, and, indeed, whether portions of a news report devoted, e.g., to movie reviews should count as news. Overall ratings or (in the case of newspapers) subscription data would not suffice. Someone who subscribes to a daily newspaper but only reads the (nationally-distributed) comics and the classified advertisements is undoubtedly getting a valuable service, but it is not clear that the service has anything

[937] Maurice E. Stucke and Allen P Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L J. 249, 277 (2001) (quoting *U S v General Dynamics Corp.*, 415 U.S 486, 501 (1974)).

to do with news and current affairs. Similarly, a television station that attracts large audiences by virtue of its movies and national sports programming provides an important service, but it would be misleading to judge the station's importance as a local news outlet by its overall ratings.

425. Ultimately, our goal is not to prescribe what content citizens access, but to ensure that a wide range of viewpoints have an opportunity to reach the public. This goal, the limitations of current usage as a predictor of future usage, and the content classification requirements for implementing a usage measure all lead us to adopt an "equal share" approach to weighting outlets within the same medium.

426. We deviate from this approach only in the case of the Internet. We use subscription shares to divide the Internet category among the two current significant sources of Internet access—telephone companies and cable companies. In order to determine the number of subscribers to telephone company based Internet access, it is necessary to add together "dial-up" and DSL subscribers. Dial-up service is available to anyone with a telephone line and offers a low-capacity connection (up to 56 kbps). DSL service offers much higher speed connections, but, due to the requirements of the technology and certain physical limitations of the telephone distribution network, it is not available everywhere. Cable companies offer high speed Internet access, and most cable plant has been upgraded to support this service. Some applications, such as viewing video clips of news and other content, are not fully supported by dial-up services. Trade and industry sources estimate that, as of the end of 2002, 85 million households had access to cable high speed Internet service and 11.3 million subscribed.[938] This leaves over 15 percent of households without access to cable modem service. Moreover, it is not clear how the areas in which cable modem service is unavailable compare to the areas in which DSL is unavailable. We therefore think it prudent to use subscriber figures to calculate how to divide the Internet category between cable and telephone companies.

427. Table 78 of FCC MOWG Study No. 8 provides information on Internet access. Respondents who said they have home access to the Internet were asked a follow-up question regarding how they access the Internet. The answers (in percentages) were as follows: cable line 18.9 percent, DSL line 14.7 percent, telephone line 66.1 percent, other 3 5 percent, don't know 5.9 percent, and refuse 0 5 percent. The responses sum to 109 6 percent. If we take the 99.7 percent of respondents who picked cable, DSL, or telephone line as the base, and if we combine telephone and DSL, the resulting shares are 19 percent cable and 81 percent telephone. We recognize that, given the relatively small share of Internet in the total diversity market (12.5% weight), using subscriber shares rather than equal availability for Internet providers has a very small impact on our Diversity Index calculation.[939] In this regard, however, we reject the argument made by some commenters that we should not include the Internet at all. They argue that people only utilize the Internet to access their newspapers' and local broadcast stations'

[938] *See Cable and Telecommunications Industry Overview 2002 Yearend,* at *http //www ncta com/industry_overview.*

[939] As explained in the next section, "Calculation Methodology," our diversity index is calculated by squaring relevant market shares. If we were to assume that the two Internet sources had equal shares, the contribution to the index of Internet would be 78 points The assumption we use as described in the text leads to a contribution to the index of 109 points. We do not attribute common ownership to Internet Service Providers, *e g*, even if Cox owns a television station and the local cable ISP in a market, we will not combine their market shares for the purposes of the Diversity Index calculation We will assume (subject to examination at the next biennial review and to future findings we might make in our cable modem proceeding), that ISPs do not restrict subscriber access to Internet content based on the identity of the content provider. We also note that, as explained above, we are looking at the availability of news and information sources generally -- and websites particularly -- not their popularity.

websites and, therefore, the Internet does not add to diversity.[940] Although many local newspapers and broadcast stations maintain websites with news content, that does not begin to plumb the extent of news sources on the Internet. Some websites compile news from numerous sources, many of which an individual may not have know of or known how to access (*e.g*, The Drudge Report). Others are unique to the Internet (*e g*, Salon). Moreover, we include the Internet because, as previously indicated, we are looking at availability of media, not the popularity of specific publications, stations, cable channels, or websites. There is a virtual universe of information sources on the Internet and there are websites not maintained by existing news media conveying information on everything from fringe political groups to local civic events. We cannot pretend that these are not in the "diversity" mix simply because only a small number of people may visit them.

e. Calculation Methodology

428. The Diversity Index is structured like an HHI, i.e., it is simply the sum of squared market shares. As explained above, squaring market shares, unlike measures based on the "raw" market shares, permits construction of an index that takes account of the market shares of all providers in the "market" for viewpoint diversity. As noted above, the geographic market we are using is local. We currently define television markets in terms of the Nielsen DMA. DMAs are exhaustive classifications, covering the entire United States, and it is straightforward to count the number of television stations in a DMA. We are including public as well as commercial stations. Public stations provide viewpoint diversity; indeed that is a specific part of their mandate. Although they do not have the same programming incentives that commercial stations do, their partial reliance on viewer contributions means that they, like commercial stations, must be sensitive to the demands of their audience. We choose not to include television stations from outside the DMA in question, even if they obtain a measurable audience share in the DMA. Our focus is on local news and current affairs and it is not reasonable to assume that stations outside of the DMA in question will devote significant resources to news and current affairs programming targeted to that DMA. Our cable television signal carriage rules generally permit a television broadcast station within a DMA to obtain cable carriage throughout the DMA, and our DBS signal carriage rules generally ensure that all television stations within a DMA are treated the same with respect to satellite retransmission.[941] For this reason, we assume that all television broadcast stations in a DMA are available throughout the DMA. As explained above, each broadcast television station receives an equal share of the broadcast television weight.

429 We combine the television stations in each DMA with the radio stations in the Arbitron radio metro with which the DMA is paired. There are 287 Arbitron radio metros in the country. Each one is smaller than the DMA within which it lies.[942] Arbitron radio metros do not cover the entire country. More sparsely populated areas are not included in radio metros; approximately one-half of radio stations are not in a metro market. As explained below in the cross-media limits section of this *Order*, we use the Diversity Index to help us identify markets that are "at risk" for excessive concentration in the

[940] *See, e g*, AFL-CIO Comments at 12-14, (citing Consumer Union Comments in MM Docket No. 01-235, Douglas Gomery, *The FCC's Newspaper-Broadcast Cross-Ownership Rule· An Analysis* (Econ. Policy Inst, Feb. 2001)); AFTRA Comments at 10; UCC at al Comments at 23

[941] *See* 47 C F R. § 76 56 (Cable) and § 76 66 (DBS).

[942] Most radio metros lie wholly within a single DMA; virtually all of the others are predominantly within a single DMA

"viewpoint diversity market." Once those markets have been identified, and cross-media limits imposed, the actual implementation of the cross-media diversity limits will not require information on a local radio market, only on the television market (DMA) within which the radio stations are located that are part of a proposed merger. As detailed in the cross-media limits section, the analysis that we use to identify at-risk markets is based on examination of a substantial sample of the 287 Arbitron radio metro markets.

430. Daily newspaper publication and circulation data are not collected based on Arbitron radio metros. A different market concept, developed by the Department of Commerce, is used by the industry. The basic building block is the "Metropolitan Statistical Area," or "MSA." The Department of Commerce recognizes 318 metropolitan areas, which include 248 MSAs, 58 "PMSAs" (primary metropolitan statistical areas), and 12 "NECMAs ("New England county metropolitan statistical areas"). For Diversity Index calculation purposes, these areas are matched to Arbitron radio metros. Each daily newspaper that is locally published in the metropolitan area is included in the market. The daily newspaper share of the Diversity Index is divided evenly among all daily newspapers included in the market. In the absence of market-specific information on weekly newspaper availability, we make the most conservative assumption that there is one independently-owned weekly newspaper in each local market, and assign to it the entire weekly newspaper share.[943]

431. In terms of calculating the Index, within each medium we combine commonly-owned outlets and calculate each owner's share of the total availability of that medium. We then multiply that share by the share of the medium in question in the total media universe (television plus newspaper plus radio plus Internet). Once these shares in the overall "diversity market" have been calculated, we add together the shares of properties that are commonly-owned (e.g., a newspaper and a television station), square the resultant shares, and sum them to get the base Diversity Index for the market in question.[944]

4. Cross-Media Limits

432. In this Section we modify our rules by adopting a new set of cross-media limits ("CML") in lieu of our former newspaper/broadcast and television/radio cross-ownership rules.. The CML have been designed specifically to check the acquisition by any single entity of a dominant position in local media markets -- not in economic terms, but in the sense of being able to dominate public debate -- through combinations of cross-media properties. Because we have traditionally relied upon blanket prohibitions on certain cross-media combinations, we have never before had to confront head-on the challenge of identifying specifically which types of markets give us the greatest cause for concern in terms of preserving diversity of viewpoint, and which types of transactions are most problematic in this regard. This effort is complicated by the nature of the public interest we are seeking to protect – diversity – which is as elusive as it is cherished.

433. Our modification of the newspaper/broadcast and television/radio cross ownership rules into a set of cross-media limits or CML is our first comprehensive attempt to answer this difficult and complex set of questions. The CML derives from data in the record regarding the relative reliance by consumers of various types of media outlets for news and information. To help us analyze that data, we

[943] In fact, there were 7,689 weekly newspapers in 2000, so it is likely that the average market has at least one weekly. *See* NAA, *supra* note 200 at *http //www naa org/info/facts02/13 facts2002 htm*

[944] Appendix C, Diversity Indices in Ten Sample Markets, contains the Diversity Index calculations for the ten markets examined in MOWG Study No 1, based on the market structure as of November 2002.

use a methodological tool – a diversity index or "DI" – that allows us to measure the degree to which any local market could be regarded as concentrated for purposes of diversity. Based on an analysis of a large sample of markets of various sizes, the diversity index suggests that the vast majority of local media markets are healthy, well-functioning, and diverse.

434. Moreover, because we are adopting herein intra-service competition caps for radio and television properties, those caps will ensure that local markets will continue to be served by a diversity of voices within each of these respective services. By the nature of the exercise, markets defined for competition purposes are no broader than, and generally are narrower than, markets defined for diversity purposes. Thus, our radio and television competition caps will not only serve to promote and protect competition within the radio and television services, they will also be protective of diversity interests when television-only or radio-only transactions are at issue. For example, in a market with 12 TV stations, our intra-service caps guarantee at least six different owners of television stations. If there are forty radio stations in the market, our radio cap will ensure at least six different owners of radio properties.

435. We recognize, however, that our intra-service caps will not address diversity concerns that may result from cross-media combinations Although our local radio and television caps will ensure a significant number of independent voices in larger markets, cross-media combinations in very small markets might result in problematical levels of concentration for diversity purposes. Accordingly, we are herein supplementing our two intra-service local rules with a narrowly drawn set of cross-media limits to reach those combinations that are not already prohibited by our television or radio caps, but which would give rise to serious diversity concerns. The cross-media limits are based on a set of assumptions drawn directly from the record evidence in this proceeding and premises that are consistent with past Commission policy and practice. Although we rely in part on our data analysis to help define the CML, we clearly respect that diversity is inherently subjective and cannot be reduced to scientific formula. We do believe, however, that greater use of empirical data and evaluation of that data can significantly strengthen the reasoning that underlies our expert judgment. The CML, therefore, ultimately rests on our independent judgments about the kinds of markets that are most at-risk for viewpoint concentration, and the kinds of transactions that pose the greatest threat to diversity.

a. Competition Caps Protect Diversity

436. As set forth above, we have adopted a cap both on the number of television stations that any one owner may hold in a market, and on the number of radio stations that any one owner may hold in a market. These caps were designed to promote and protect competition within these two distinct services. The caps are, therefore, based on product market definitions that consider only those products or services that may be regarded as reasonable substitutes for competition purposes. We recognize, however, that although radio and television outlets may not compete in economic terms with other types of speech outlets, *e.g.*, newspapers, they all inhabit the mass media landscape that Americans turn to for news and information In that sense, whatever the confines of their markets for competition purposes, many different outlets serve core democratic functions as purveyors of ideas, outlets for opinion, and distributors of news.

437. The data in the record evidence this difference. As set forth above, radio and television compete in economic terms in separate and distinct product markets. Both radio and television outlets, however, inhabit the larger speech market, as do several other types of entities. For example, MOWG Study No. 8, a consumer survey on media usage, reveals that, when asked to identify their primary source of all news and information -- both local and national -- , approximately 40% of Americans responded that broadcast television was their primary source and approximately 10% of Americans responded that

radio was their primary source.[945] However, nearly 24% of respondents identified daily newspapers as their primary source of news and information, 18% identified cable news networks, 6% identified the Internet, and 2% identified weekly newspapers or magazines.[946] These figures track closely results from a Pew Research Center survey asking similar questions about Americans' use of media for news and information. When asked where they turned for their primary source of election news, 39% of respondents said broadcast television, 24% said cable television, 24% said newspapers, 9% said radio, and 5% said the Internet.[947] Other studies confirm that, today, Americans substitute among and between many different sources for news and information on a regular basis.[948] The record reflects, in short, that the "viewpoint" market in which television and radio stations participate is broader than the economic product markets, as defined by standard competition theory, in which either competes.[949] As a result, intra-service caps designed to ameliorate competition concerns necessarily also will protect against undue concentration of speech outlets for diversity purposes.

438. Our diversity index helps to illustrate this point. Pursuant to our new local radio rule, no single owner, even in the smallest markets, will own more than 50% of the radio outlets. In larger markets, the percentage of radio outlets that can be held by any one entity is considerably smaller. Thus, using the most extreme set of facts, and using Altoona, Pennsylvania, as our test case, the diversity index focused on local news and information alone (again, the most conservative assumption) reveals a relatively minimal impact on viewpoint diversity even should the radio outlets become split between only two owners. The current base case DI for local news and information for Altoona is 960.[950] If the local radio market were to become restructured into a duopoly, the DI would rise to only 1,156.[951] Again, this hypothetical posits the most extreme restructuring of radio outlets in the smallest market among those in our test cases. The change in the diversity index will be far smaller as a result of radio transactions in larger markets or where the restructuring is less extreme.

439. Similarly, pursuant to our new local television rule, no single owner will be permitted to own more than two television outlets in most markets. Using Altoona again, a two-TV combination raises the base DI for local news and information by only 64 points.[952] Indeed, using a set of randomly sampled markets of varying sizes, the average change in DI as a result of an owner of one television property buying another to create a television duopoly in a small market with only five licensed

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[945] MOWG Study No 8, Table 20.

[946] *Id*

[947] The Pew Research Center for the People and the Press, *Sources for Campaign News, Fewer Turn to Broadcast TV and Papers* (Apr. 27, 2003) at http //people-press.org/reports/display php3?PageID=243

[948] *See, e g*, UCLA Internet Report.

[949] Fox Comments, Owen Statement.

[950] *See* Appendix C, Diversity Indices in Ten Sample Markets.

[951] *Id*

[952] *Id* In running this sample case, we assume that a duopoly would be permitted in the market even though, in fact, a new duopoly would not be permitted in Altoona under our new local television cap (Altoona has five stations and one existing duopoly; a second therefore would violate our top four restriction).

television stations is 91.[953] In markets with twenty licensed television stations the change in DI as a result of the creation of a television duopoly is only six.[954] Thus, although our intra-service television and radio caps are designed to protect and promote competition, they have a corollary benefit of also guarding against concentration in the viewpoint markets, at least with respect to intra-service combinations.

440. We recognize, however, that cross-media combinations that may impact the range and diversity of voices in local markets will not be captured by our television and radio caps. We therefore adopt, as described below, new cross-media limits targeted specifically and solely at the types of transactions that would give us the most concern and which are not already prohibited by our intra-service caps.

b. Foundations of the Cross-Media Limits

441. We begin with the proposition that, because this rule will limit the speech opportunities not only for broadcasters, but also for other entities that may seek to own and operate broadcast outlets (including those with the fullest First Amendment protection – newspapers), we should draw the rule as narrowly as possible in order to serve our public interest goals while imposing the least possible burden on the freedom of expression.[955] We also recognize that the tools that we are using to evaluate market diversity involve as much art as science. "Diversity" is not susceptible to microscopic examination; it cannot be mapped with any known formal system or reduced to mathematical equations. Although we attempt to measure it and assign some quantitative value to it in order to understand relative diversity of different types of markets, we recognize that this process is inherently approximate.[956] We must exercise great care, therefore, before categorically prohibiting any particular transaction or set of transactions as a prophylactic matter.

442. Nonetheless, it is apparent, based on the record in this proceeding, that certain types of transactions in certain markets present an elevated risk of harm to the range and breadth of viewpoints that may be available to the public.[957] Using our diversity index analysis and our independent judgment regarding desired levels of diversity, we first identify "at-risk" markets that might already be thought to be moderately concentrated for diversity purposes. We then identify the types of transactions that pose the greatest risk to diversity, and impose specific limits on those transactions in at-risk markets. Finally,

[953] *See* Appendix D, Diversity Index Scenarios

[954] *Id.* We note, also, that our local television ownership cap includes a prohibition on top-four combinations This will have the effect of prohibiting combinations of the local television stations most likely to produce and carry significant local news programming. Thus, although the top-four restriction is based on competition theory, the rule will also have beneficial effects on local diversity.

[955] *See* FOEF Comments at 41-42, WVRC Comments at 43-44.

[956] Using the Diversity Index allows us to see different market characteristics in markets of different sizes. We have also found, however, that differentiating markets by the number of newspapers present is too blunt while differentiating markets by the number of radio stations is too fine Therefore, we use the number of television stations as an identifier of market size.

[957] *Cf 1975 Multiple Ownership Second Report and Order, supra* note 33 (in which we required divestiture in "egregious" newspaper/broadcast cases).

because certain transactions in less concentrated markets pose a high risk of rapid concentration, we impose separate restrictions on transactions outside of the at-risk markets.

c. Identifying At-Risk Local Markets

443. We begin by identifying those markets most susceptible to high levels of viewpoint concentration; *i e.*, those markets where our diversity concerns cut most deeply. At the outset, consistent with our past practice and precedent, we focus in this regard on local, not national, viewpoint market(s).[958] Evidence in the record before us supports the conclusion that the number of outlets for national news and information is large and growing, and that government regulation is thus unnecessary to protect it.[959]

444. With respect to local markets, our ten city study and our DI test cases reveal that most local markets today are well-functioning, healthy markets for speech.[960] For example, as of 2000, the largest media market in the country, New York City, had 184 different media outlets owned by 114 different owners.[961] Perhaps more impressively, the Burlington/Plattsburgh market – market 141 out of 287 – had 53 outlets owned by 34 different owners.[962] Even Altoona, Pennsylvania, market 255, had 23 outlets owned by 15 different owners.[963] That is, in the 255th ranked market, there currently are fifteen different independent voices.

445. Not all voices, however, speak with the same volume. Using our Diversity Index, we have examined the concentration of media outlets in the ten markets that were the subject of our Ten City Study using weighted voices. New York has a base DI for local news and information of 373; Lancaster, Pennsylvania, has a DI of 939; and Myrtle Beach, South Carolina, has a DI of 989.[964] Indeed, the average DI for all ten markets, which range from the largest to near the smallest, is 758.[965] A DI of 758 is the equivalent of 13 equally-sized firms

[958] *See* Policy Goals Section III, *supra*, and the Diversity Index, Section VI(C)(3), *supra*.

[959] *See* Appendix B, National News Sources.

[960] *See* MOWG Study No. 1.

[961] *Id* Even though both MOWG Study No. 1 and Appendix C (Diversity Indices in Ten Sample Markets Study) used the same media markets, the number of outlets and owners in individual markets as described in MOWG Study No. 1 are different from the number of outlets and owners in Appendix C, Diversity Indices in Ten Sample Markets, for two reasons. First, MOWG Study No 1 used outlet and ownership data that was current in 2000, in order to make a comparison between 1960 and 1980. The Diversity Indices in Ten Sample Markets Study used more current outlet and ownership data from 2002, in order to be more up-to-date. In addition, MOWG Study No. 1 included the "embedded" radio metro markets that are physically in the NYC metro, for illustrative purposes The Diversity Indices in Ten Sample Markets Study used only the radio stations assigned to the NYC metro, for analytical purposes

[962] *Id*

[963] *Id*

[964] *Id*

[965] *Id*

446. Moreover, to ensure that the results of our ten city study were not anomalous, we have calculated the average DI for a different set of randomly selected markets, both large and small.[966] The average DI for markets in which there are 20 television stations is 612; the average DI for markets in which there are 15 television stations is 595; the average DI for markets in which there are 10 television stations is 635; and the average DI for markets in which there are 5 television stations is 911 – all well below the point at which one would characterize them as highly concentrated if one were using the analogous HHI to measure competition in the market.[967]

447. We believe the analogy to the HHI is apt. The HHI is an indicator of economic concentration; it provides an analytical framework for determining when and if an entity or group of entities is likely to wield market power in an economic market. Our DI, which was inspired by and modeled after the HHI, similarly is an indicator of viewpoint concentration. Using the DI as an analytical tool, we can assign approximate weights to different types of media outlets, account for the diversity effects of commonly-owned properties, and measure relative concentration between and among markets. The DI can help us, therefore, identify the point at which an entity or group of entities is likely to wield inordinate power in the marketplace of ideas.

448. Although competition theory does not provide a hard-and-fast rule on the number of competitors necessary to ensure that the benefits of competition are realized, a market that has ten or more equally- sized firms normally can be considered fully competitive.[968] A 1000 DI correlates to market in which there are roughly ten firms with approximately equal market power. An 1800 DI would correspond to a market with six roughly equal voices. Using our DI analysis of sample markets, we note that it is not until we reach markets with three or fewer licensed television stations that the average DI exceeds 1000, the point at which the market normally would be characterized as moderately concentrated for competition purposes.[969]

449. Our DI analysis of these sample markets, however, is not the end of our inquiry. Because of the importance we associate with maintaining diversity among the three principal platforms – newspaper, radio and television – for the expression of viewpoint at the local level, and because these same three outlets produce a large share of local news content,[970] we previously have used a "voice test" focused on one or more of these outlets for measuring diversity. Indeed, the *Sinclair* court suggested that our choice of an eight-voice test, then used in conjunction with the local television rule, was an exercise of agency discretion entitled to some deference.[971] Although we no longer are willing to base our rules

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[966] *See* Appendix D, Diversity Index Scenarios.

[967] *Id*

[968] A market with 10 or more equally-sized firms has an HHI of 1000 or less. DOJ/FTC regards markets in this region to be unconcentrated. Mergers resulting in unconcentrated markets are unlikely to have adverse competitive effects and ordinarily require no further analysis. *See DOJ/FTC Merger Guidelines* § 1.51.

[969] *See* Appendix D, Diversity Index Scenarios The average DI for markets with three television stations is 1027; the average DI for markets with two television stations is 1316; and the average DI for markets with a single television station is 1707

[970] CFA Comments at 32-39; UCC Comments at 23.

[971] *Sinclair,* 284 F 3d at 162.

upon the comparatively rudimentary eight-voice test, we continue to believe that unacceptable diversity losses can occur in very small markets when the principal distribution platforms for local news content come under common ownership and control. In larger markets, we expect that the number of distribution outlets for local news content will be larger, and that consumers will have greater access to secondary outlets for news and information.[972]

450. Finally, we are concerned not merely with the absolute level of diversity that might already exist in any market or type of market, but also with the degree to which diversity might be sacrificed as a result of likely transactions. Accordingly, in defining "at-risk" markets, we have used our DI and sampled the effect of transactions, in large and small markets, involving heavily used sources of local news and information.[973] In so doing, we have focused on the types of transactions that most likely will lead to large DI changes and rapid concentration. Our line-drawing effort is informed by the approach the DOJ has taken in assessing competition issues. Although DOJ policy is to review any transaction in a moderately concentrated market that would result in a change in HHI of 100 points or more, we have found no case in many years in which DOJ has filed suit to block a merger that produced less than a 400 or more point HHI change.[974] Based on our analysis, cross-media combinations involving newspaper and television, newspaper and radio, or radio and television properties do not produce a change in the DI of anything even approaching that magnitude other than in markets with three or fewer television stations.[975] For example, a newspaper/radio combination in markets with only two licensed television stations produces a DI change of more than 300 points, a television/radio combination in markets of that size produces a DI change of 301 points, and a newspaper/television combination in markets of that size produces a DI change of 731 points. A newspaper/television combination in a market with three licensed television stations produces a DI change of 331 points.[976]

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[972] *E g , Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 15 FCC Rcd 20913, 20918 (2000) (broadband access in rural areas limited); *2001 Price Survey Report*, 17 FCC Rcd 6301, 6318 (2002) (low capacity cable systems in rural areas offer fewer channels and are less likely to have stand-alone local or regional cable news channels)

[973] *See* Appendix D, Diversity Index Scenarios.

[974] Under the *FTC/DOJ Merger Guidelines*, an HHI between 1000 and 1800 suggests a moderately concentrated market, and an HHI above 1800 suggests a highly concentrated market. Where the post-merger market would be in the moderately concentrated range, the *Guidelines* suggest that a merger that increases the HHI by more than 100 points will, absent other factors, present antitrust concerns. Where the post-merger market would be in the highly concentrated range, the *Guidelines* suggest that a merger producing an increase in the HHI of more than 100 points, absent other factors, is presumed to create or enhance market power or facilitate its exercise *FTC/DOJ Merger Guidelines* ¶ 1.51. However, in the cases we found over the past 15 years, the FTC or the DOJ has filed suit to block a merger only when the change in the HHI is at least four times greater than the *Guideline's* standards *See, e g , FTC v Illinois Cereal Mills, Inc* , 691 F. Supp. 1131 (N.D. Ill., E. Div 1988); *U S. v Georgia-Pacific Corp.*, 1996 W.L. 634212 (D. Del 1996) In the majority of cases, the proposed merger would have resulted in a change in the HHI in excess of 1,000 points.

[975] *See* Appendix D, Diversity Index Scenarios.

[976] The calculated changes in the Diversity Index for these markets are premised on the assumption that the radio markets have consolidated to the maximum extent permissible under our new local radio ownership rule. On this basis, this is a "worst case" estimation of the impact of newspaper/radio and television/radio combinations under the Diversity Index.

451. These changes, of course, reflect approximations based upon sample data and are provided only to be illustrative of the diversity losses that can occur as a result of cross-media combinations in small markets. Nonetheless, based on all of the foregoing, we conclude that a market with the equivalent of ten or more equally-sized firms cannot be regarded as even moderately concentrated for diversity purposes. In light of that conclusion, and in consideration of the properties of small markets and on our analysis of potential transactional impacts in those markets, we conclude that markets with three or fewer licensed television stations should be regarded as "at-risk" markets for purposes of diversity concentration. Markets of that size, we expect, will be moderately concentrated and subject to rapid concentration if cross-media combinations are created involving radio, television and/or newspaper properties.[977] Accordingly, we will prohibit certain cross-media combinations involving those properties in markets with three or fewer television stations.[978]

d. Local Cross-Media Limits in At-Risk Markets

452. With respect to the limits themselves, we tread lightly in view of the sensitive First Amendment interests at stake and the deregulatory purpose of Section 202(h). Our intent is to draw our rules narrowly, focusing on those transactions that are likely to have a substantial impact on the diversity of voices available in the market. The record shows that broadcast television, daily newspapers, and broadcast radio are the three media platforms that Americans turn to most often for local news and information.[979] They are, accordingly, the focus of our diversity concerns, and we decline to impose any cross-media limit on transactions involving media properties other than radio, television, and newspaper outlets.

453. Further, we are establishing rules of nationwide applicability. We desire, therefore, to provide the industry and the public with clear, easy to administer rules reflective of common market trends and characteristics. We recognize that, in any given market, the lines we draw here may appear under- or over-inclusive. Indeed, that quality inheres in the nature of proscriptive rules themselves. Nonetheless, our analysis of the record in this proceeding gives us confidence that our rules will prevent the transactions that would seriously impair the availability of diverse viewpoints in any local market while permitting efficiency enhancing combinations. Again, although they have a methodological foundation in the DI, these judgments are based on agency expertise and experience dealing with broadcast markets and the media industries generally. Accordingly, except as specifically prohibited herein, cross-media combinations will not be subject to anything other than routine Commission review, i.e., unless the transaction is barred by the CML or our other ownership rules, the combination is

[977] A market with an HHI of more than 1800 is regarded as highly concentrated We noted above that a DI of 1800 would correspond to six equally-sized "voices " Because of the amorphous nature of diversity as an interest and the difficulty of measuring it with precision, we decline to draw an absolute line prohibiting transactions that would take a market beyond the 1800 DI (*i e.*, six voice) level The rules we are adopting herein, however, are intended to protect against markets becoming highly concentrated – in a qualitative sense – for diversity purposes.

[978] When we originally crafted the newspaper/broadcast rule we required divestiture of either a newspaper or a broadcast station in a limited number of so-called "egregious" cases. We defined the relevant market in those cases as the area encompassed by the city-grade signal of the relevant broadcast station. Divestiture was required where the only daily newspaper was published in a community within the city-grade signal of the only commercial television (or only commercial radio station in cases where no local TV station also existed) where the newspaper and the broadcast station were commonly owned. *See generally 1975 Second Report and Order*, *supra* note 33.

[979] *See* MOWG Study No. 8, Table 97.

permissible under our rules, and we will not apply the DI to it.[980]

454. As explained below, combinations of daily newspaper and broadcast properties in at-risk markets present a serious threat to local viewpoint diversity.[981] We therefore, adopt a rule prohibiting common ownership of broadcast stations and daily newspapers, and TV/radio combinations, in markets with three or fewer television stations. In order to determine which markets have 3 or fewer broadcast television stations, we will rely on Nielsen television Designated Market Areas (DMAs). We include for these purposes, commercial and noncommercial television stations assigned to the DMA. This is consistent with our overall measurement of the DI, explained above, as we assume that all television stations in the DMA are viewable in the radio metro with which it is paired.[982]

455. A number of parties have questioned whether a cross-ownership rule applicable to entities other than broadcasters, *e g*, newspaper owners, would be constitutional.[983] We continue to believe that a narrowly-drawn rule prohibiting or limiting common ownership of broadcast properties and daily newspapers is consistent with our constitutional framework. Our current newspaper/broadcast cross-ownership rule has been upheld by the Supreme Court against constitutional challenge[984] and, as discussed above,[985] broadcast/newspaper and radio/television cross-ownership rules, like broadcast ownership rules, are reviewed under the rational basis standard.[986] We believe that our new cross-media limits satisfy this standard because they are "a reasonable means of promoting the public interest in diversified mass communications,"[987] and they are founded on a substantial record. Nevertheless, we are mindful of the court's concern in another context, where a higher standard of constitutional scrutiny applied, that our rules should focus on those markets and transactions that are likely to result in substantial, rather than only incremental, changes in diversity.[988] Our new cross-ownership rules accomplish this because they are narrowly tailored to restrict cross-ownership only in select markets.

456 *Television-Newspaper*. Nielsen survey data reveal that daily newspapers and broadcast

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[980] Bright lines provide the certainty and predictability needed for companies to make business plans and for capital markets to make investments in the growth and innovation in media markets Conversely, case-by-case review of even below-cap mergers on diversity grounds would lead to uncertainty and undermine our efforts to encourage growth in broadcast services. Accordingly, petitioners should not use the petition to deny process to relitigate the issues resolved in this proceeding.

[981] *See, e g*, NABOB/Rainbow, PUSH Comments at 23-24; Gray Comments at 16-19.

[982] *See* ¶ 428, *supra*

[983] Media General Comments at 37, Tribune Comments at 17-28; Fox Comments at 50-51

[984] *See NCCB, supra*, note 20.

[985] *See* Legal Framework, Section II, ¶¶ 13-16, *supra*

[986] *Id*

[987] *NCCB*, 436 U.S at 802.

[988] *Time Warner II*, 240 F.3d at 1135.

television remain the two most important sources of local news and information.[989] The importance of these outlets is reflected in our DI. As noted above, a combination of a daily newspaper and a television station in a market with only three television stations leads to an average DI change of 331 points. These combinations in markets with only two or one television station lead to DI changes of 731 and 910 DI points, respectively. In these at-risk markets, a single combination of a daily newspaper and a television station could quickly jeopardize the range of viewpoints available to consumers in the market. We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast television facility in any market with three or fewer television properties. To trigger the rule, we will count all television stations assigned to the DMA that contains the newspaper's community of publication. We presume that broadcast television stations are generally carried throughout the DMA to which the station is assigned. Our rules will not, however, bar a broadcast television station in such a market from starting a new newspaper, as that would expand, not decrease, diversity.

457 One additional issue in the cross-interest context is the definition of "daily newspaper" for the purposes of newspaper/broadcast cross-ownership. Currently, Note 6 to the multiple ownership rule defines a daily newspaper as "one which is published four or more days per week, which is in the English language and which is circulated generally in the community of publication "[990] Commenters raised the issue of the English language requirement when applied in Puerto Rico where the Spanish language is the dominant language.[991] Caribbean argues that the Commission expressly rejected requests to exempt Puerto Rico from the rule at the time of its adoption and recognized that the goals underlying the rule were of equal concern in Puerto Rico as on the mainland.[992] Both Caribbean and Arso argue that the exclusion of foreign language newspapers also allows for the exercise of market power by the dominant newspapers in Puerto Rico which, due to the exclusion of non-English newspapers, could be owned in tandem with broadcast stations in the market.[993]

458. The exclusion of non-English language daily newspapers in areas where the dominant language of the market is not English creates a discrepancy in treatment that must be ended. As Caribbean notes, in adopting the original newspaper/broadcast cross-ownership rule, the Commission recognized that the need for diversity in Puerto Rico was the same as that elsewhere. Since the definition of a daily newspaper was adopted in 1975, the percentage of households in which Spanish has spoken has approximately doubled.[994] It is appropriate, therefore, at this point in time, that we apply the CML to

[989] Approximately 28.8 percent of Americans rely on newspapers as a source of local news and information, and 33.8 percent use broadcast television for this purpose. These figures are derived from normalizing the figures in MOWG Study No. 8, Table 097. Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100%. Also, magazines were excluded from the normalizing process as they typically are not sources of local news.

[990] 47 C.F.R § 73.3555 Note 6.

[991] Arso Comments at 1-4; Caribbean Comments in MM Docket No 01-235 at 22-35.

[992] Caribbean Comments in MM Docket No. 01-235 at 22.

[993] *Id.* at 30-38. Arso Comments at 3-4.

[994] In 2000, Spanish was the language spoken at home in 10.5 % of American households. *See* www.census.gov. In 1980, the percentage was 5.3%. This is derived from data contained in INFORMATION PLEASE ALMANAC (Otto Johnson ed , Houghton Mifflin Co. 1995) at 835.

non-English daily papers in markets in which the language that they are printed in is the dominant language of their market.[995] While the example of Puerto Rico was addressed in the comments, there may be other communities to which this will apply now or in the future. Those whose primary language is not English deserve the same protections of diversity and competition as do English speakers. Accordingly, for purposes of applying the CML to newspaper/broadcast transactions we will change the definition of daily newspapers to include non-English dailies printed in the primary language of the market.

459. *Radio-Newspaper*. Although broadcast radio generally has less of an impact on local diversity than broadcast television, according to the results of our Nielsen survey, discussed above, in at-risk markets the combination of a daily newspaper with one or more broadcast radio facilities can nonetheless have significant negative implications for the range of viewpoints available. Indeed, markets with three or fewer television stations have, on average, only 21 radio stations.[996] Under our radio cap, a single owner in a market with 21 stations could own six stations, or 29% of all the radio outlets in the market. Combining such a station group with, perhaps, the only daily newspaper could, therefore, seriously impair the range of independent viewpoints available in the market.[997] Again, based on a sample of markets with three or fewer television outlets, we find that the change in DI as a result of a newspaper-radio combination, assuming that the radio owner has reached the radio ownership cap under our new local rules, would be 242 points or higher.[998] Given that markets of three television outlets begin with an average DI of 1027, which we regard as the beginning of the moderately concentrated range, a 242 point DI increase moves the market substantially toward a highly concentrated state. We therefore, adopt a rule prohibiting the combination of a daily newspaper and a broadcast radio facility in any market with three or fewer television properties.[999] To trigger the rule for newspaper/radio combinations we will retain our current standard. That standard requires complete encompassment of the newspaper's community of publication by the requisite signal strength contour of the commonly owned radio station(s) [1000]

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[995] As previously indicated, to trigger the rule, we will count all television stations assigned to the DMA that contains the newspaper's community of publication For the purposes of evaluating whether the non-English daily is printed in the primary language of the "market," however, the market shall be defined as the newspaper's community of publication

[996] BIA Master Access Data Base (Nov. 2002).

[997] Although any given market may have more than one daily newspaper, and of course every radio owner does not buy stations up to the regulatory limit, we are adopting general rules of nationwide applicability. Accordingly, we are positing for these purposes that the market is as concentrated as possible consistent with our other local rules.

[998] *See* Appendix D (Diversity Index Scenarios).

[999] Again, we note that this rule does not apply in the event that a broadcast licensee seeks to found a new daily newspaper in the market.

[1000] For AM radio stations that standard is complete encompassment of the newspaper's community of publication by the predicted or measured 2mV/m contour computed in accordance with § 73 183 or § 73.186 of the Commission's Rules. For FM radio stations the standard is complete encompassment of the newspaper's community of publication by the 1 mV/m contour computed in accordance with § 73.313 of the Commission's Rules Previously, we discussed the inherent flaws in defining radio markets using a contour-based definition, and decided to move to a geographic based definition. Specifically, we found that a contour based definition for defining radio markets can create inconsistencies in counting stations that comprise a market, counting stations that (continued....)

460. *Television-Radio.* Combinations involving daily newspapers and broadcast properties are not the only cross-media combinations that present diversity concerns in at-risk markets. Approximately one-fourth of Americans rely on radio as a source of local news and information, and one-third use broadcast television for this purpose.[1001] Cross-media combinations involving television and radio properties also, therefore, are likely to give rise to systematic diversity concerns in at-risk markets. Our DI analysis confirms this fact.[1002] We therefore adopt a rule prohibiting the combination of broadcast radio and broadcast television facilities in any market with three or fewer television properties. In such markets, we will not permit an owner of a TV station to own any radio stations in the market, and vice versa. Although this modification is more stringent than our current radio/TV cross-ownership rule in a limited number of markets,[1003] the overall thrust of our CML approach has been to eliminate regulatory restrictions where they are unnecessary.[1004]

461. The television/radio cross-ownership rule is triggered when the radio station's community of license is in the commonly owned television station's DMA. Similar to requests for waiver of the newspaper/broadcast cross-ownership rule, parties seeking waiver of the television/radio cross-ownership rule can rebut this by showing that the stations' signals do not overlap and the television station is not carried on cable systems in the radio station's market.

5. Additional Cross-Media Limits in Small to Medium-Size Markets

462. Although markets with four or more licensed television stations do not qualify, in our judgment, as at-risk markets, a combination of a daily newspaper with a television duopoly and a significant radio presence can, in small to medium-size markets result in substantial changes in the level of diversity. For example, assuming that owners of broadcast properties are constrained only by our local radio and television caps (*i.e.*, they may acquire stations up to the cap in either service), a newspaper owner might attempt to acquire a television duopoly and several radio properties within the same market. Referring again to our sample markets we find that, in a five-television market, a combination of a newspaper, a television duopoly, and as many radio stations as permitted by the applicable local radio

(Continued from previous page)
an entity owns in a market, and determining a radio market's size and geographic area. *See* Local Radio/Problems with the Existing Radio Market Definition and Counting Methodologies, Section VI(B)(1)(a)(ii)(a), *supra.* However, such problems do not arise in the context of using contours to determine whether the cross-media limits rule is triggered. Here, we are concerned with the physical proximity of the broadcast station and the newspaper's community of publication, or in the case of radio/television cross-ownership, we are concerned with the relative distance between two specific stations. Because the cross-media rule relies, in part, on a geographic location, *i e* the community of publication or the communities of license, parties cannot take advantage of such discussed inconsistencies to circumvent the rules. Moreover, we are not relying on a contour-based definition to define a cross-media market; we are only using it to determine whether the rule is triggered.

[1001] MOWG Study No. 8, Table 097. The figures above are derived from normalizing the figures in Table 097 Because respondents were asked what sources they had used in the previous 7 days for local news and information, and because many respondents listed more than a single source, the totals in the Table add up to more than 100%. Magazines were excluded from the normalizing process because they typically are not used for local news

[1002] *See* Appendix D, Diversity Index Scenarios.

[1003] 47 C.F R. § 73.3555(c).

[1004] We discuss grandfathering of existing combinations in these markets below. See Grandfathering and Transition Section VI(D), *infra.*

cap results in an average DI change of 846 points. Indeed, even in an eight-television market, the resulting average DI change from such a newspaper/TV duopoly/radio combination DI is 734 points. Given that eight-television markets begin, on average, with a DI of almost 900 points, changes of this magnitude can lead quickly to a highly concentrated market.

463. We notice a dramatic difference, however, in the base DI, and in the DI changes that result from a combination involving a newspaper, a TV duopoly, and a radio station group, between our sample markets that have four to eight television stations and those that have nine or more television stations. The base DI for markets with eight television stations is still almost 900 points – nearly in the moderately concentrated range; there is almost a 200 point difference between these markets and those with nine television stations, which, in our sample, have a base case DI of 705 points. In addition, although a newspaper/TV duopoly/radio combination produces a change of over 700 points in an eight television market, bringing the DI up to approximately 1600 points, the change is fewer than 500 DI points in a nine television market, bringing the DI up to only 1200 points. These numbers accord with our experience and judgment regarding the operation of small to medium-size markets, and are supported by other evidence in the record.[1005]

464. We also note significant differences between the DI changes that result from newspaper/TV combinations in markets with between four and eight television stations and those with nine or more television stations. Using our sample markets, a newspaper combining with a television duopoly in a market with only five television stations leads to an increase in the DI of 376 points. Even in markets with eight television stations, the average DI increase as a result of such a combination is over 300 points. In markets with nine television stations, however, the DI increase from a merger of a newspaper with a television duopoly is only 172 points; it is about 100 points in markets with ten televisions.[1006] The potential for rapid concentration that may result from a combination of a newspaper with a television duopoly in markets with between four and eight licensed television stations ("small to medium markets") leads us to conclude that it would be prudent, in these markets, to impose additional local ownership restrictions as part of our CML.

465. We are cognizant, however, of the fact that substantial public interest benefits may flow from broadcast/newspaper combinations. As discussed above, television stations that are co-owned with daily newspapers tend to produce more, and arguably better, local news and public affairs programming than stations that have no newspaper affiliation. Because of the news resources available to local newspapers, we expect similar benefits to be associated with newspaper ownership of radio stations (*e.g.*, radio stations affiliated with a local newspaper may have an enhanced ability to produce local, all-news radio programming and to cover local political and cultural events in greater depth than stations unaffiliated with a newspaper). Accordingly, we are not inclined to prohibit outright newspaper/ broadcast combinations in markets with 4 – 8 television stations (referred to below as "small to medium size markets").

466. Balancing these interests, we believe it appropriate, in small to medium size markets (those

[1005] *See, e g* Buckley Comments at 4-5; UCC Comments at 16-17, 40-41

[1006] Because of the number of radio stations in the markets observed for our sample of seven-television-station markets, the DI increases in those markets are smaller than those in eight TV markets. This deviation does not undermine, in our judgment, the more general conclusions that we draw from the data and from our DI methodology regarding the markets most at risk for viewpoint concentration (*i e*, we do not deem markets with seven television stations, in general, to be less at risk than markets with eight television stations).

with between four and eight television stations) to allow the following: 1) one entity may own a combination that includes radio, television and newspaper properties, but the entity may not exceed 50% of either of the applicable local radio or the local television caps in the market; 2) a radio station group owner that also owns a newspaper in the market, but which does not own any television properties in the market, may acquire radio stations up to 100% of the applicable radio cap. In these small to medium size markets, therefore, we will prohibit: television broadcasters that also own a daily newspaper in the market from having a television duopoly in that market; a broadcaster with a duopoly from obtaining a daily newspaper in the same DMA; a newspaper owner from purchasing more than a single television station within the DMA; and a radio station owner that also owns a daily newspaper and a television station in the market from exceeding 50% of the applicable radio cap for the market.[1007]

467. We believe that this CML achieves an appropriate balance in small to medium size markets between fostering the production of high quality local programming and protecting diversity. To begin with, the public interest benefits of newspaper ownership (the benefits of cross-fertilization between media) likely are realized primarily in the first broadcast station co-owned in either service. Although there may be economic benefits to the owner from more extensive combinations, it is not as clear that those benefits will accrue to the public in any meaningful way; at least the public interest component of these benefits is likely to decline incrementally as the number of stations increases. Given that no owner will be permitted, in accordance with our local television cap, to hold more than two television stations in a small to medium size market, a limit of one station in these markets for owners of local newspapers will maximize the public interest benefits, while reducing any loss of diversity. Although the loss of diversity that might result were that owner to add a significant radio presence in the market warrants a further 50% limit in the number of radio properties that owner might hold, such is not the case if the combination does not include any television properties.

468. Again, our DI and a set of sample markets help to illustrate the fact that our modified 50% CML for newspaper combinations in small to medium size markets will significantly reduce any loss of diversity that might result from efficiency-enhancing newspaper/broadcast combinations. In a five-television station market, a combination involving a newspaper, a TV duopoly and a radio station group at the radio cap would result in an average DI increase of 846 points, which would take the market to 1757 points, near the highly concentrated range.[1008] If the combination is limited to a single television station and no more than 50% of the applicable radio cap, the DI change is 393 points, a decrease of 453 points In an eight-television market, a combination involving a newspaper, a TV duopoly, and a radio station group at the cap results in an increase in the average DI of over 700 points. By limiting the combination to 50% of both the television cap and the radio cap, the DI increase is reduced to 314 points.

469. Similarly, whereas a combination involving a newspaper and a television duopoly alone will, on average, raise the DI of a five-television station market by 376 points, a combination involving a newspaper and a single television station in a market of that size will raise the DI, on average, only 223

[1007] For these purposes, we use the Arbitron or contour-overlap market definitions discussed above in determining whether the newspaper and a radio station serve the same market. We are not imposing a limitation that would preclude a top four television station in a market from being combined in common with a newspaper or radio station similar to the restriction imposed in the local television rule context The top four restriction imposed under the local TV ownership rule is specifically designed to protection competition, as fully discussed in that section. The cross-media limit, on the other hand, is designed to protect viewpoint diversity, not economic competition.

[1008] Under the *DOJ/FTC Merger Guidelines,* an HHI above 1800 suggests a highly concentrated market.

points. The difference is more dramatic in markets with eight licensed television stations, where the average DI increase drops from 308 points to only 152 points for a newspaper/TV duopoly combination. Newspaper/radio group combinations result in significantly lower levels of viewpoint concentration when the combination does not include any TV properties. Accordingly, we will permit newspaper/radio combinations in small to medium size markets, provided they comply with the local radio rule.

470. Similarly, our DI analysis indicates that radio/television combinations in small to medium size markets result in relatively small DI changes. For example, in a market with only four television stations, a radio television combination, even assuming the radio owner holds the maximum number of stations permitted under our local radio cap, results in a DI change of fewer than 150 points.[1009] Such a combination in a market with eight television stations results in a DI change of fewer than 100 points.[1010]

471. We have engaged in this analysis using our DI and a randomly selected sample of markets not with the idea of slavishly following the numbers that our index generated, but to confirm and support the judgments we make regarding the kinds of markets that are most susceptible to viewpoint concentration, and the kinds of transactions that are most likely to have a significant impact on the level of diversity available in any given market. As noted above, we do not believe that markets with between four and eight television stations can be regarded as moderately concentrated for viewpoint purposes or otherwise "at risk." We do, however, believe, and our DI confirms, that these markets are approaching a level of viewpoint concentration that we would regard as moderate, and we are concerned that some combinations involving the three major sources of local news and public affairs information in these markets would lead to inordinate diversity losses. Accordingly, we will permit television/radio combinations in small to medium size markets, provided they comply with the local radio and television rules.

472. In markets with 9 or more TV stations, we will permit any newspaper and broadcast cross-media combinations that comply with our local TV ownership rule and local radio rule. These tiers are derived from our DI analysis and our judgment as to what markets are sufficiently diverse so that combined newspaper/broadcast ownership would not unduly harm diversity.

473. With respect to markets with nine or more TV stations ("large markets"), we impose no cross-media restrictions. To begin with, markets of this size today tend to have robust media cultures characterized by a large number of outlets and a wide variety of owners. New York City, for instance, which has 23 licensed television stations, 61 radio stations, and 21 daily newspapers, had 61 different owners of broadcast stations and daily newspapers as of November 2002.[1011] Using our diversity index as a measure, New York City today has a base DI of only 373.[1012] More striking, perhaps, is the example provided by Kansas City, Missouri, which has only nine licensed television stations. Our Ten City Study reveals that Kansas City had 35 different owners and our Diversity Index analysis shows that Kansas City

[1009] *See* Appendix D, Diversity Index Scenarios.

[1010] *Id*

[1011] *See* Appendix C, Diversity Indices in Ten Sample Markets.

[1012] *Id*

has a base DI today of only 509.[1013]

474. Again, to ensure that the results of our Ten City Study were not anomalous, we conducted a DI analysis on a random sample of markets of various sizes, including markets with nine licensed television stations, markets with ten television stations, markets with fifteen television stations, and markets with twenty television stations. Among our sample markets, the average DI for those with nine television stations is 705; the average DI for those with ten television stations is 635; the average for those with fifteen television stations is 595; and the average DI for those with twenty television stations is 612.[1014] That is, markets with nine or more television stations today are very much un-concentrated.

475. The local radio and local television caps adopted herein will help to ensure that large markets continue to be served by a large number of different local media owners. For example, positing Kansas City, Missouri, again as a typical market of nine television stations, and assuming that four television duopolies could in fact be created in that market, and further assuming maximum radio consolidation under our new local radio rule, there should still remain five different owners of television stations and seven different owners of radio stations.[1015] There currently also are five daily newspaper owners serving the market. Therefore, even assuming that, in the absence of any cross-media limit in the market, the owners of the radio, television, and newspaper properties combine to the maximum extent possible, there would remain at least seven different owners of local media in the market, each with a significant presence. In accordance with the mandate of Section 202(h), we do not believe that we can justify a restriction in a market where the worst case scenario (indeed, one that may not even be possible given existing combinations in the market), still results in a market with at least seven different owners of the major sources of local news and information.

476. More realistically, although some cross-media combinations are likely to occur in the absence of a restriction, constraints imposed by existing groups and the presence of public stations that cannot be acquired by commercial entities make it highly unlikely that Kansas City, or any market, will consolidate to the level described in the preceding paragraph. In order to get a better sense, therefore, for the actual affect of various cross-media combinations in markets with nine or more television stations, we use our DI in sample markets and test hypothetical combinations.[1016]

477. Beginning in markets with nine licensed television stations, we see that, on average, the change in DI that would result from a television owner acquiring a radio group consisting of the maximum number of radio stations permissible under our local radio rule is only 64 points [1017] If instead it were the owner of a daily newspaper acquiring that radio group, the DI change would be 198 points,

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[1013] *See* MOWG Study No 1 and Appendix C, Diversity Indices in Ten Sample Markets.

[1014] *See* Appendix D (Diversity Index Scenarios).

[1015] *See* Appendix C (Diversity Indices in Ten Sample Markets). That is, in a market with nine television stations, four duopolies can, in theory, be created, leaving one singleton station, so that five owners of television stations would remain If there are forty-four radio stations in the market, and group owners assembled the largest combinations possible under the radio cap (seven), there would remain at least seven group owners, six with groups of six stations and one with a group of two stations.

[1016] *See* Appendix D (Diversity Index Scenarios)

[1017] *Id*

leaving the market below 1000 DI.[1018] If the owner of a daily newspaper were to purchase a television station instead of a large radio group in a market of this size, the DI would increase only 86 points.[1019] Indeed, the largest combination possible in the market – a combination that would include a daily newspaper, a television duopoly, and a large radio group – would result in a DI increase of 473 points, taking the average nine television market to a base DI of under 1200 points, only marginally in the range that we would consider moderately concentrated.[1020]

478. As detailed in Appendix D (Diversity Index Scenarios), in markets with ten television stations, the average base DI is 635 and the increase that would result from the assemblage of the largest media combination possible would be 292 points – leaving the market un-concentrated.[1021] In markets with fifteen television stations, the average base DI is 595 and a newspaper/television duopoly/large radio group combination would increase the DI only 302 points.[1022] Similar results obtain in markets with twenty television stations.

479. This analysis is premised on the creation of very large combinations of media properties at the local level. Even so, the results show that markets with nine or more television stations are un-concentrated today and are unlikely to become highly concentrated even in the absence of cross-media limits. Section 202(h) requires that we justify broadcast ownership limits on more than supposition or inchoate fears; our governing law requires that we target our structural limits at real and demonstrable harms. Based on the foregoing, we cannot, therefore, justify cross-media restrictions in markets with nine or more licensed television stations.

480. The tiers adopted above – "at-risk" markets, "small to medium size" markets, and "large" markets – are derived from our DI analysis and our independent judgment regarding market operation and the effect of various combinations on diversity. Our diversity concerns are greatest in at-risk markets and we have accordingly prohibited all forms of cross-media combinations in those markets. In small to medium markets we have imposed specific limitations on particular kinds of combinations that would, in our estimation, most likely result in unacceptable harm to viewpoint diversity. In large markets, our analysis indicates that no cross-media limit is necessary, nor can one be justified, given the large number of outlets and owners that typify these markets and the operation of our intra-service television and radio caps.

481. *Conclusion.* Although we generally prohibit television-radio, and newspaper-broadcast, cross-ownership in at-risk markets, and we limit newspaper-broadcast combinations in small to medium size markets, we recognize that special circumstances may render these cross-media limits unnecessary or counter-productive in particular markets. Accordingly, we will continue to entertain requests for waiver of these cross-media limits and, in particular, will give special consideration to waiver requests demonstrating that an otherwise prohibited combination would, in fact, enhance the quality and quantity

[1018] *Id*

[1019] *Id*

[1020] *Id*

[1021] *Id*

[1022] *Id*

of broadcast news available in the market.[1023] In addition, of course, we will review our entire local broadcast ownership framework, including our new cross-media limits, beginning next year, in our 2004 biennial review. We will not, however, permit collateral attack upon our rules in individual cases on diversity grounds based upon more particularized showings using the DI in a given market. The rules we adopt herein are rules of general applicability. The lines that have been drawn and the judgments that have been made reflect our conclusions regarding the probable effects of given transactions in the run of cases. Those conclusions necessarily rely upon generalizations, approximations, and assumptions that will not hold true in every case. Indeed, many of these assumptions would not be true in a particular context or specific market. As we stated above, the Diversity Index itself is a blunt tool capable only of capturing and measuring large effects and general trends in typical markets. It is of no use, therefore, for parties to attempt to apply the DI to a particular transaction in a particular market.

D. Grandfathering and Transition Procedures

1. Grandfathering Provisions

482. *Existing Combinations.* There may be some existing combinations of broadcast stations that exceed the new ownership limits due to the modifications of both the local TV and the local radio ownership rules. Because the modified local TV rule permits increased common ownership of local TV stations, we expect few existing ownership combinations to violate the rule adopted herein. However, some existing same-market combinations may not comply with the modified TV ownership rule because of the elimination of the Grade B overlap exclusion that is in the current rules. In addition, there may be instances in which a party currently owns a radio/television combination that may not comply with the new cross-media limits.[1024]

483. As for radio, we are modifying the definition of many radio markets, replacing the existing signal-contour based definition with a geographic based market definition.[1025] This may result in a different number of stations being considered as participating in a local radio market. Because our radio ownership rule is based on a tiered system, if fewer stations comprise the radio market, and the market falls into a smaller tier, then the number of stations an entity may own would decrease. We also are attributing in-market radio JSAs, which could increase the number of radio stations that count toward an entity's numerical ownership limit.

[1023] As is the case with our new local television ownership rules, we will require that a licensee who obtains a waiver of our cross-media limits show at renewal time the benefits that have accrued to the public as a consequence of the waiver. At the end of the broadcast station's (or stations') license term(s), the licensee of the station(s) must certify to the Commission that the public interest benefits of the Commission's grant of the waiver are being fulfilled. This certification must include a specific, factual showing of the program-related benefits that have accrued to the public Cost savings or other efficiencies, standing alone, will not constitute a sufficient showing.

[1024] While we are not aware of any existing newspaper/broadcast combinations that have been previously grandfathered or approved by the Commission that would be barred under the new rules, to the extent such combinations do exist, they will be subject to the grandfathering and transferability provisions described in this section.

[1025] We are retaining a modified contour-based definition outside of Arbitron markets until we have completed a rulemaking to define geographic radio markets in these areas. The grandfathering and transition procedures adopted herein apply to Arbitron and non-Arbitron areas. In areas not defined by Arbitron, through the completion of the rulemaking, licensees should apply the modified contour-based market definition for these purposes.

484. We are persuaded by the record to grandfather existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations.[1026] As such, we will not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules.[1027] As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules.[1028] Also, we also are sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. We also agree with the commenters that argue that compulsory divestiture would be too disruptive to the industry [1029] On balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.

485. While commenters overwhelmingly support grandfathering existing combinations, many nonetheless argue that grandfathering will create competitive imbalances which favor existing group owners - those that assembled combinations under the current rules - and disfavor those that cannot assemble competing combinations because of new ownership restrictions.[1030] Like all grandfathering

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[1026] We requested comment on grandfathering issues in the Radio NPRMs: *Radio Market Definition NPRM*, 15 FCC Rcd at 25081-82 ¶ 11; *Local Radio Ownership NPRM*, 16 FCC Rcd at 19888 ¶ 65.

[1027] Secret proposes that we grandfather general radio station ownership limits for markets rather than grandfathering specific ownership combinations. In the alternative, it proposes that we permit any broadcaster to own at least as many stations as the largest group owns presently in the specific market. Secret Comments in MM Docket No. 00-244 at 4. Secret's approach is administratively problematic, requiring the Commission to create and monitor a range of numerical limits in all of the Arbitron metros, as well as in non-Arbitron areas. Moreover, it would create disparate treatment in radio markets, not based on competitive analysis or public interest assessment, but based solely on existing combinations. Because these existing combinations were created using the current contour-based market definition, which we find does not promote our competition goals, some combinations may raise competition concerns and may violate the new rules. To allow additional groups to obtain the same numerical limits would only exacerbate such concerns.

[1028] *See, e g*, NAB Comments in MM Docket No. 01-317 at 50; WVRC Comments in MM Docket No. 01-317 at 35, Cumulus Comments in MM Docket No. 01-317 at 20; Eure Comments in MM Docket No. 01-317 at 5; HBC Comments in MM Docket No. 01-317 at 13, n.2; MBC Comments in MM Docket No. 01-317 at 11-12; Clear Channel Reply Comments in MM Docket No. 01-317 at n.5; MBC Reply Comments in MM Docket No. 01-317 at 4, Zimmer Comments in MM Docket No. 00-244 at 7; Weigle Comments in MM Docket No. 00-244 at 6; NAB Comments in MM Docket No. 00-244 at 29-30; Entercom Comments in MM Docket No. 00-244 at 7.

[1029] NAB Comments in MM Docket No 01-317 at 50; MBC Reply Comments in MM Docket No. 01-317 at 4; Zimmer Comments in MM Docket No 01-317 at 7-8; NAB Comments in MM Docket No. 00-244 at 29-30. We disagree with the commenters that support divestitures of current combinations. *See* Dick Broadcasting Comments in MM Docket No 01-317 at 6-7, Idaho Wireless Comments in MM Docket No. 01-317 at 8; NABC Comments in MM Docket No. 01-317 at 17. The Commission has required divestitures of existing combinations pursuant to changes in media ownership rules in "egregious cases." *1975 Multiple Ownership Second Report and Order*, 50 F C C 2d at 1049

[1030] NAB Comments in MM Docket No. 01-317 at 48; WVRC Comments in MM Docket No. 01-317 at 26; Blakeney Comments in MM Docket No 01-317 at 2; Cox Comments in MM Docket No. 01-317 at 12; Daugherty Comments in MM Docket No. 01-317 at 4; Davis Comments in MM Docket No. 01-317 at 2; MBC Reply Comments in MM Docket No. 01-317 at 3; NABOB Reply Comments in MM Docket No. 01-317 at 8, Secret Comments in MM Docket No. 00-244 at 3; NAB Comments in MM Docket No. 00-244 at 8, 9, n.15; Brill (continued .)

decisions, some disparity will exist between grandfathered owners and non-grandfathered owners. We do not believe this fact outweighs the equitable considerations that persuade us to grandfather existing combinations.

486. We expect that the issue of grandfathering existing combinations will affect predominately radio group owners because of the changes we make herein to the radio market definition. We recognize that a geographic based radio market definition may result in a fewer number of stations in certain markets. In those instances, parties may not be able to acquire the same number of stations as the largest owner in a particular market.[1031] However, those combinations were created based upon the contour-based definition that we find herein fails to adequately address our competition goals in local radio markets. To allow additional broadcasters to obtain such combinations would disserve our goals. Our decision to grandfather existing combinations simply reflects the substantial equitable considerations discussed above, considerations that we conclude outweigh our interest in improving the precision of our radio market definition in these particular cases.

487. *Transferability.* We also asked for comments on whether to allow licensees to assign or to transfer control of grandfathered combinations that violate of the new ownership rules.[1032] In general, we will prohibit the sale of existing combinations that violate the modified local radio ownership rule, the local television ownership rule, or the cross media limits.[1033] Therefore, parties must comply with the new ownership rules in place at the time a transfer of control or assignment application is filed. However, as discussed earlier, in order to help promote diversity of ownership,[1034] we will allow sales of grandfathered combinations to and by certain "eligible entities." We do not agree with commenters that advocate allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with our adopted rules.[1035] As NABC, Idaho Wireless, and ARD

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Comments in MM Docket No. 00-244 at 1, Aurora Comments in MM Docket No. 00-244 at 27; Great Scott Reply Comments in MM Docket No. 00-244 at 2

[1031] At the same time, however, we believe that the impact on radio owners will be mitigated because we are retaining, not decreasing, the current numerical caps, counting non-commercial stations as participants in the market, and counting any station licensed in the Arbitron market whether or not it meets Arbitron's minimum audience share requirements In addition, a geographic based definition will allow for more regional consolidation of radio stations than our prior contour based approach.

[1032] *Definition of Radio Markets NPRM,* 15 FCC Rcd at 25081 ¶ 11; *Local Radio Ownership NPRM,* 16 FCC Rcd at 19888 ¶ 65.

[1033] Likewise, modification of the facilities of a station in a grandfathered combination will be prohibited if the proposed modification would create a new violation of the ownership rules

[1034] *See* Policy Goals, Section III(A)(5), *supra.*

[1035] Cumulus Comments in MM Docket No. 00-244 at 9; Clear Channel Comments in MM Docket No. 00-244 at 5, Entercom Comments in MM Docket No. 00-244 at 7; Citadel Comments in MM Docket No 00-244 at 12; Viacom Comments in MM Docket No. 00-244 at 8; NAB Comments in MM Docket No. 00-244 at 29; Great Scott Reply Comments in MM Docket No. 00-244 at 3, Zimmer Comments in MM Docket No. 00-244 at 7; NAB Comments in MM Docket No. 01-317 at 50, Clear Channel Comments in MM Docket No. 01-317 at 26; MBC Comments in MM Docket No. 01-317 at 12.

suggest, such an approach would hinder our efforts to promote and ensure competitive markets.[1036] Grandfathered combinations, by definition, exceed the numerical limits that we find promote the public interest as related to competition. Moreover, in the case of radio ownership, these combinations were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions. Unlike our decision not to require existing station owners to divest stations, here, the threat to competition is not outweighed by countervailing considerations. Buyers will be on notice that ownership combinations must comply at the time of the acquisition of the stations. Thus, they do not have the same expectations as present owners who acquired stations under the current ownership rules. In addition, because of the limited number of broadcast licenses available, station spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. They could also give smaller station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined operations. Because divestitures are not required until a sale of the station groups, owners have sufficient time to minimize any specific complications due to joint operations.[1037] Therefore, we reject the argument that prohibiting transfers of station groups that exceed the new ownership limits would be unacceptably disruptive or would negatively impact the availability of bank financing, as some commenters suggest.[1038] Finally, requiring future assignments and transfers to comply with our ownership rules upon sale is consistent with Commission precedent.[1039] In keeping with the policy we adopted in 1975, the prohibition on the transfer of grandfathered stations will not apply to *pro-forma* changes in ownership or to involuntary changes of ownership due to a death or legal disability of the licensee.[1040]

488. *Eligible Transfer.* We are adopting an exception to our prohibition on the transfer of grandfathered combinations in violation of the new rules. This exception applies to grandfathered radio and television combinations that exceed the ownership limits adopted in this *Order*, cross-media combinations in at-risk markets, and cross-media combinations in small to medium sized markets that exceed the ownership limits adopted in this *Order*. Entities may transfer control of or assign a

[1036] NABC Comments in MM Docket No. 01-317 at 17; Idaho Wireless Comments in MM Docket No. 01-317 at 7, ARD Reply Comments in MM Docket No 00-244 at 2

[1037] NAB Comments in MM Docket No. 00-244 at 9; Clear Channel Comments in MM Docket No 00-244 at 6, Viacom Comments in MM Docket No. 00-244 at 8; NAB Comments in MM Docket No. 01-317 at 51.

[1038] NAB Comments in MM Docket No. 01-317 at 50-51; Clear Channel Comments in MM Docket No. 01-317 at 26, n 83, NAB Comments in MM Docket No. 00-244 at 9, Entercom Comments in MM Docket No. 00-244 at 8.

[1039] *See 1970 Multiple Ownership First Report and* Order, 22 F.C.C.2d at 323 ¶ 2; 1975 *Multiple Ownership Second Report and Order*, 50 F.C.C.2d at 1076 ¶ 103; *Local TV Ownership Report and Order*, 14 FCC Rcd at 12965 ¶ 146 (any transfer of permanently grandfathered television combinations after 2004 must meet the television duopoly rule or waiver policies in effect at the time of the transfer). Contrary to Clear Channel and NAB's assertions, our decision is consistent with the *1992 Radio Ownership Order*, *supra* note 94. NAB Comments in MM Docket No. 00-244 at 30; Clear Channel Comments in MM Docket No 00-244 at 7. In the *1992 Radio Ownership Order*, we relaxed the ownership limits, permitting entities to own more stations in local markets based on numerical caps, and we also adopted an audience share cap, which precluded acquisitions of stations if the combined audience share at the time the application was filed exceeded 25%. At the time the rules went into effect, no entity owned more than the numerical caps or owned stations with a combined audience share exceeding 25% Therefore, grandfathering existing combinations was not at issue.

[1040] *1975 Multiple Ownership Second Report and Order*, 50 FCC 2d at 1076 ¶ 103; *see also* 47 C F.R. §§ 73.3555, note 4, 73.3540(f); 73 3541(b).

grandfathered combination to "eligible entities" as defined herein.[1041] In addition, "eligible entities" may sell existing grandfathered combinations without restriction. As we define in greater detail below, we limit "eligible entities" to small business entities, which often include businesses owned by women and minorities. We believe that facilitating new entry by and growth of small businesses in the broadcast industry will further our goals of promoting diversity of ownership as well as competition and localism.[1042]

489. We define an "eligible entity" as an entity that would qualify as a small business consistent with SBA standards for its industry grouping.[1043] For example, the SBA small business size standard for radio stations is $6 million or less in annual revenue. For TV stations the limit is $12 million.[1044] In addition, to tailor this exception to meet our public interest objectives and ensure that the benefits of this proposal flow as intended, we will further require that any transaction pursuant to this exception may not result in a new violation of the rules. Moreover, control of the eligible entity purchasing the grandfathered combination must meet one of the following control tests. The eligible entity must hold (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity controls more than 25% of the outstanding stock, or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power.

490. In addition to the above, we will allow entities that meet the definition of "eligible entity" to transfer any existing grandfathered combination generally without restriction. We believe that small businesses that qualify as eligible entities require greater flexibility than do larger entities for the disposition of assets. Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms compared to that of larger firms, which have additional revenue streams. To prevent abuse of this policy, however, an eligible entity may not transfer a grandfathered combination acquired after the adoption date of this *Order* to an entity other than another eligible entity unless it has held the combination for a minimum of three years.[1045] Also, we will prohibit eligible entities from

[1041] We are not grandfathering existing combinations of stations that exceed the ownership limits because of an attributable interest in a station pursuant to an LMA or JSA. Existing LMAs and JSAs that result in a combination of stations exceeding the ownership limits must be terminated at the time of the sale or within two years, whichever comes first.

[1042] MMTC suggests we define a category of "eligible purchasers" based on the eligibility standards set forth in S. 267 "Telecommunications Ownership Diversity Act of 2003." Because that pending legislation contemplates further definition of eligible purchasers by the Treasury Department after passage, we do not rely on its terms and therefore, set forth our criteria based on our judgment and the record of this proceeding.

[1043] *See* 13 C.F.R. § 121.201 (North American Industry Classification System (NAICS) code categories) The definition of small business for the radio industry is listed in NAICS code 515112, and the definition of a small business for the TV industry is listed in NAICS code 515120

[1044] To determine qualifications as a small business, SBA considers the revenues of the parent corporation and affiliates of the parent corporation, not just the revenues of individual broadcast stations. *See* 13 C F R. §§ 121 103, 121.105.

[1045] We do not intend to restrict pro forma transfers of grandfathered combinations or transfer of control to heirs or legatees by will or intestacy if no new ownership violation would occur.

granting options to purchase, or rights of first refusal to prevent non-eligible entities from financing an acquisition in exchange for an option to purchase the combination at a later date. Finally, any transaction pursuant to this policy may not result in a new violation of the rules.

491. *Radio LMA Combinations.* As we discussed in the context of attributable JSAs in the Local Radio Ownership Section, there also may be instances in which an existing LMA may affect a licensee's compliance with the ownership limits adopted herein. As we stated in instances of attributable JSAs, because we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers, we will give licensees two years from the effective date of this *Order* to terminate any LMAs that result in a violation of the new ownership limits, or otherwise come into compliance with the new rules. If the licensee sells an existing combination of stations within the two year grace period, it may not sell or assign the LMA to the buyer if the LMA causes the buyer to exceed the ownership limits adopted in this *Order*. Parties are prohibited from entering into an LMA or renewing an existing LMA that would cause the broker of the station to exceed the ownership limits.

492. *TV LMA Combinations.* In our *Local TV Ownership Report and Order*, we grandfathered LMA combinations that were entered into prior to November 5, 1996, through the end of our 2004 biennial review. We do not alter this policy. These LMAs are not affected by the grandfathering policy adopted herein.

493. *TV Temporary Waivers.* A few licensees have been granted temporary waivers of our local TV ownership rule, and some have filed requests for an extension of waivers that are currently pending, or have sought permanent waivers. Any licensee with a temporary waiver, pending waiver request, or waiver extension request must, no later than 60 days after the effective date of this *Order* or the date on which the waiver expires, whichever is later, file one of the following: (i) a statement describing how ownership of the subject station complies with the modified local TV ownership rule; or (ii) an application for transfer or assignment of license of those stations necessary to bring the applicant into compliance with the new rules.

494. *Cross-Media Conditional Waivers* A few licensees have been granted conditional waivers of the previous one-to-a-market rule. Although we are eliminating the current radio/television cross-ownership rules, we are adopting new cross-media limits. Parties that currently have conditional waivers for radio/television combinations must submit a statement to indicate whether the combination they hold (1) is located in an at-risk market, (2) is located in a small to medium size market, and (3) is in compliance with the cross-media limits. For the combinations that comply with the cross-media limits adopted herein, we will issue a letter replacing the conditional grant with permanent approval. For any combinations that violate the cross-media limits, we will issue a letter indicating that the combination will continue to be grandfathered until a decision in the 2004 Biennial Review is final. As part of the 2004 Biennial Review, we will review and reevaluate the status of such grandfathered combinations to determine whether they should continue to be grandfathered. On a case-by-case basis, we will consider the competition, diversity, equity, and public interest factors the combinations may raise.

495. *Other Cross-Media Waivers.* Our cross-media limits are founded on the presumption that, by reason of cable carriage, television stations are available throughout the DMA to which they are assigned. We recognize, however, that this may not be true in every case. Accordingly, those requesting waiver of our cross-media limits may attempt to rebut this presumption in individual cases. For example, a television licensee assigned to a DMA to which only two other television stations are assigned (*i.e.*, an at-risk market) may request a waiver of the bar on its ownership of a daily newspaper published within that DMA by demonstrating that the newspaper's community of publication neither receives television

service from the station over-the-air nor through cable carriage.

2. Elimination of Flagging and Interim Policy

496. 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.[1046] 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.[1047] Flagged transactions were subject to a further competition analysis, the scope of which is embodied in the interim policy we adopted in the *Local Radio Ownership NPRM.*

497. We believe that the changes we make today to the market definition will address many of the market concentration concerns that led the Commission to begin flagging radio station transactions and to adopt the interim policy. By applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, in virtually all cases, the rule will protect against excessive 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 the transaction is contrary to the public interest.[1048] Accordingly, effective upon adoption of this *Order*, the Commission will no longer flag radio sales transactions or apply the interim policy procedures adopted in the *Local Radio Ownership NPRM* in processing them.

3. Processing of Pending and New Assignment and Transfer of Control Applications.

498. The processing guidelines below will govern pending and new commercial broadcast applications for the assignment or transfer of control of television and radio authorizations commencing as of the adoption date of this *Order*. These guidelines also cover pending and new modification applications that implicate our multiple ownership rules. Applications filed on or after the effective date of this *Order* as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules, including, where applicable, the interim methodology for defining radio markets as adopted herein. The staff is directed to issue a Public Notice containing these guidelines contemporaneously with the adoption of this *Order*.

- *New Applications*. The Commission has established a freeze on the filing of all commercial radio and television transfer of control and assignment applications that require the use of FCC Form 314 or 315 ("New Applications"). We will revise application Forms 301, 314 and 315 to reflect the new rules adopted in the *Order*. The freeze will be in effect starting with the *Order's* adoption date until notice has been published by the Commission in the *Federal Register* that OMB has approved the revised forms. Upon such publication, parties may file New Applications, but only if they demonstrate compliance with the new multiple ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining

[1046] *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

[1047] *See AMFM, Inc* , 15 FCC Rcd at 16066 ¶ 7 n.10.

[1048] 47 U.S C § 309(d).

radio markets outside Arbitron metros, or submit a complete and adequate showing that a waiver of the new rules is warranted. We will continue to allow the filing of short-form (FCC Form 316) applications at any time and will process them in due course.

- *Pending Applications* Applicants with long-form assignment or transfer of control applications (FCC Form 314 or 315) or with modification applications (FCC Form 301) that are pending as of adoption of the *Order* ("Pending Applications") may amend those Applications by submitting new multiple ownership showings to demonstrate compliance with the ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining radio markets outside of Arbitron metros, or by submitting a request for waiver of the new rules.[1049] Parties may file such amendments once notice has been published by the Commission in the *Federal Register* that OMB has approved the information collection requirements contained in such amendments. Pending Applications that are still pending as of the effective date of the new rules will be processed under the new rules. Applications proposing *pro forma* assignments and transfers (FCC Form 316) will be processed in the normal course

- *Pending Petitions and Objections.* Petitions to deny and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that raise issues unrelated to competition against Pending Applications (as defined above) will be addressed with respect to those issues at the time we act on such Applications. Petitions and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that contest Pending Applications solely on grounds of competition pursuant to the interim policy[1050] will be dismissed as moot.

VII. NATIONAL OWNERSHIP RULES

499. In this section, we consider the national TV ownership rule and the dual network rule. We conclude that we should modify the former by raising the cap to 45%, and we retain the latter.

A. National TV Ownership Rule

500. The current national TV ownership rule prohibits any entity from owning televisions stations that in the aggregate reach more than 35% of the country's television households.[1051] In the *Notice*, we sought comment on whether we should retain, eliminate, or modify this rule.[1052] We asked

[1049] The Commission may determine that the nature of the amendment warrants a new public notice for the Pending Application.

[1050] *See Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[1051] Section 73.3555(e)(1) of the Commission's rules provides that "[n]o license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent." 47 C.F.R. § 73.3555(e)(1). Reach is determined by the number of television households in a DMA. 47 C.F.R. § 73 3555(e)(2).

[1052] *Notice*, 17 FCC Rcd at 18543-52 ¶¶ 126-55.

whether the current rule is necessary in the public interest as the result of competition and whether it promotes the goals of competition, diversity, and localism.[1053] We also solicited comment on whether UHF television stations should continue to be attributed with only 50% of the television households in their DMA market or whether cable and DBS carriage of UHF signals eliminates the need for this "UHF discount."[1054] We conclude that the current rule cannot be justified and we raise the cap to 45%. We retain the UHF discount.

501. In the *1984 Multiple Ownership Report and Order*, we determined that repealing the national TV ownership rule would not harm competition or diversity.[1055] Consistent with our decision in 1984, we find that restricting national station ownership is not necessary to promote either of those policy objectives. We depart, however, from our 1984 decision to repeal the rule because evidence in the record demonstrates that the national television cap serves localism. The localism rationale for retaining the national television cap was articulated in our *1998 Biennial Review Report*. In that decision we explained that preserving a balance of power between the networks and their affiliates serves local needs and interests by ensuring that affiliates can play a meaningful role in selecting programming suitable for their communities.[1056] We continue to believe that to be the case and, consequently, that a national cap is necessary to limit the percentage of television households that a broadcast network may reach through the stations it owns. Although the record supports retention of a national ownership cap, it does not support a cap of 35% The evidence before us shows that the cap at the current level is not necessary to preserve the balance of bargaining power between networks and affiliates. The record also indicates that the cap appears to have other drawbacks. Most importantly, the cap restrains some of the largest group owners – broadcast networks – from serving additional communities with local news and public affairs programming that is of greater quantity and at least equal, if not superior, quality than that of affiliates. Moreover, we believe that a modest relaxation of the cap will help networks compete more effectively with cable and DBS operators and will promote free, over-the-air television by deterring migration of expensive programming to cable networks. Balancing these competing interests, we raise the national cap from 35% to 45%.

1. Background

502 Since 1941, the Commission has limited the national ownership reach of television broadcast stations.[1057] The Commission has modified the restriction several times to keep pace with the changing marketplace.[1058] In 1984, the Commission repealed the rule, concluding that it was not

[1053] *Id* at 18544 ¶ 129

[1054] *Id* at 18544 ¶¶ 130-31. *See* 47 C F.R § 73 3555(e)(2)(i).

[1055] *1984 Multiple Ownership Report and Order*, 100 F C.C 2d at 46, 50-56 ¶¶ 86, 97-114 (repealing the station ownership restriction and instituting a six-year transitional ownership limitation of 12 stations). The Commission subsequently reversed its decision to repeal the rule. *1985 Multiple Ownership MO&O*, 100 F.C.C.2d at 88-92 ¶¶ 33-40 (eliminating the sunset provision and adding a 25% cap on national audience reach, calculated as a percentage of all Arbitron ADI television households) .

[1056] *1998 Biennial Review Report*, 15 FCC Rcd at 11074-75 ¶30.

[1057] *Notice*, 17 FCC Rcd at 18543 ¶ 127

[1058] *See Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941) (imposing a national ownership limit of three television stations); *Rules Governing Broadcast Services Other Than Standard* (continued..)

necessary to promote competition or diversity, and instituted a six-year transitional ownership limit of twelve television stations nationwide.[1059] On reconsideration, the Commission affirmed its underlying conclusions, but it eliminated the sunset provision out of a concern that repealing the rule would create a disruptive restructuring of the national broadcasting industry.[1060] The Commission retained the twelve station limit and, in addition, prohibited an entity from reaching more than 25% of the country's television households through the stations it owned.[1061]

503. In 1996, the Commission adopted the current 35% cap in response to the Congress' directive to raise the cap (from 25% to 35%) and to eliminate the rule that an entity could not own more than twelve stations nationwide.[1062] The Commission subsequently affirmed the 35% cap as part of its 1998 biennial review of media ownership regulations.[1063] In affirming the cap, the Commission reasoned that it would be premature to institute revisions to the national TV ownership limit before fully observing the effects of changes to the local TV ownership rules and the effects of raising the cap from 25% to 35%.[1064] The Commission also concluded that the national TV ownership rule helps promote better service to local communities by preserving the power of affiliates to negotiate with the networks and to make independent programming decisions.[1065] In addition, the Commission concluded that the national TV ownership rule facilitates competition in the program production market and in the national advertising market.[1066]

504. Several broadcast networks challenged the Commission's decision to retain the national TV ownership rule In *Fox Television Stations, Inc. v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission's 1998 decision to retain the rule was arbitrary and capricious, and it remanded the rule for further consideration.[1067] The court rejected the Commission's "wait-and-see" approach on the grounds that it was inconsistent with the Commission's statutory mandate to determine on a biennial basis whether its rules are necessary in the public interest.[1068] The

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Broadcast, 9 Fed Reg 5442 (May 23, 1944) (raising the ownership limit from three to five stations); *Amendment of Multiple Ownership Rules*, 43 F C.C 2797, 2801-02 ¶ 14 (1954) (raising the ownership limit from five to seven stations).

[1059] *1984 Multiple Ownership Report and Order*, 100 F.C.C 2d at 46, 54-56 ¶¶ 86, 108-114.

[1060] *1985 Multiple Ownership MO&O*, 100 F.C C 2d at 88-92, 97 ¶¶ 33-40, 52.

[1061] *Id*

[1062] *Implementation of Sections 202(c)(1) and 202(e) of the Telecommunications Act of 1996 (National Broadcast Television Ownership and Dual Network Operations)*, 11 FCC Rcd 12374 (1996).

[1063] *1998 Biennial Review Report*, 15 FCC Rcd at 11072-75 ¶¶ 25-30

[1064] *Id* at 11072-74 ¶¶ 25-29.

[1065] *Id.* at 11074-75 ¶ 30.

[1066] *Id.* at 11073 ¶ 26 n.78

[1067] 280 F.3d 1027.

[1068] *Id* at 1042.

court also held that the Commission failed to demonstrate that the national cap advanced competition, diversity, or localism.

505. With respect to competition, in its *1998 Biennial Review Report*, the Commission provided a study and a table showing that large group owners of television stations had acquired additional stations and increased their audience reach since the 1996 Act's passage.[1069] The court was not persuaded by the Commission's evidence that large group owners have undue market power, and it agreed with the networks that the figures alone, absent evidence of an adverse effect on the market, were insufficient to support retention of the rule.[1070] The court also found unsupported the Commission's statement in the *1998 Biennial Review Report* that the national cap is necessary to safeguard competition in the national advertising or program production markets.[1071] The court concluded that the Commission's analysis of the state of competition in the television industry was incomplete and did not satisfy the requirement under Section 202(h) to show that the rule is necessary in the public interest as the result of competition.[1072]

506. The court held that diversity and localism are valid public interest goals within the context of broadcast regulation and made it clear that the Commission could determine that the national TV ownership rule was necessary in the public interest under Section 202(h) if it served either interest.[1073] The court, however, ruled that the Commission had not provided sufficient evidence that either one of these goals was served.[1074] The court noted that the Commission, in its *1998 Biennial Review Report*, "mentioned national diversity as a justification for retaining the [national TV ownership rule], but did not elaborate upon the point."[1075] The court found the Commission's statement did not explain why the rule is necessary to further national diversity. The court also found that the Commission failed to justify its departure in the 1998 decision from its 1984 decision, in which the Commission concluded that the national TV ownership restriction should be phased out after six years because: (1) the rule no longer was necessary for national diversity given the abundance of media outlets and (2) a national rule was irrelevant to local diversity.[1076] In addition, the court held that the Commission did not adequately demonstrate that the rule strengthens the bargaining power of independently-owned affiliates and thereby promotes program diversity, particularly in light of its 1984 conclusion that no evidence suggested that stations that are not group-owned responded better to community needs or spent proportionately more revenue on local programming.[1077] However, the court acknowledged the Commission's right to reverse

[1069] *Id* at 1041-42 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 27).

[1070] *Id* at 1042.

[1071] *Id* (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n.78)

[1072] *Id.* at 1044.

[1073] *Id.* at 1042.

[1074] *Id* at 1042-43.

[1075] *Id.* at 1042 (citing *1998 Biennial Review Report*, 15 FCC Rcd at 11073 ¶ 26 n.78)

[1076] *Id* at 1034, 1042-45 *See 1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 27, 30-31, 37 ¶¶ 31-33, 43, 60.

course, provided the reversal is supported by a reasoned analysis.[1078] Recognizing that sufficient evidence may exist to justify the national TV ownership rule, the court determined that the appropriate remedy was to remand, rather than to vacate, the rule.[1079] We now consider whether the current rule can be justified as necessary to promote competition, diversity or localism.

2. The Current National TV Ownership Rule Cannot Be Justified

507. Under Section 202(h), we must evaluate whether the national TV ownership rule continues to be "necessary in the public interest as the result of competition."[1080] To make this determination, we consider whether the rule serves the public interest by furthering our policy goals of competition, localism, or diversity. The evidence demonstrates that a national TV ownership limit is necessary to promote localism by preserving the bargaining power of affiliates and ensuring their ability to select programming responsive to tastes and needs of their local communities. However, the evidence also demonstrates that the current cap of 35% is not necessary to preserve that balance.

a. Competition

508. In analyzing whether the current rule is necessary to protect competition, we focus on whether and to what extent market power exists in any relevant market, and what effect the rule has on the existence and exercise of this market power. In the 1984 decision to eliminate the national ownership cap, the Commission limited its competition analysis to the national television advertising market.[1081] In this decision, we expand our competition review to include the national program acquisition market. The national cap affects economic concentration in national markets by limiting the size of group owners of television stations, but does not affect concentration in the local video delivery market, and thus does not raise competition concerns that were discussed in the local ownership rule sections above. The national cap limits the ability of group owners to purchase television stations in individual local markets. The effect of this ownership restriction on station performance in the video delivery market is discussed in the localism section below.

509. Based on our analysis of the relevant markets, we find that the current rule is not necessary to maintain competition in the three economic markets we examine. As the record before us indicates, the media marketplace is undergoing unprecedented change. Broadcast stations are subject to competition from cable and DBS,[1082] and they face increased competition for viewers, advertising revenues, station network affiliations, and programming.[1083] We conclude that the 35% cap is no longer

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[1077] *Fox Television*, 280 F.3d at 1043 (citing *1984 Multiple Ownership Report and Order*, 100 F.C.C.2d at 35 ¶ 53).

[1078] *Id* at 1044-45.

[1079] *Id* at 1048-49.

[1080] 1996 Act, § 202(h)

[1081] *1984 Multiple Ownership Report and Order*, 100 F.C C.2d at 39-40 ¶¶ 67-71.

[1082] *See* Modern Media Marketplace, *supra* Section IV.

[1083] Paxson notes that broadcasters face competition today from "a dizzying array of diverse and high quality entertainment and news choices." Paxson Comments at 11.

necessary to protect competition in the media marketplace and unnecessarily constrains the organization of, and investment in, free, over-the-air (*i.e.*, non-subscription) broadcast television.

510. *Broadcast competition framework.* The evolution of non-price competition in television has implications for the economic organization of broadcast television networks. Higher channel capacity cable systems and the growth in the number of cable networks, together with the programming options offered by DBS, have intensified the competitive pressure on broadcast television networks to slow the erosion of viewer market share and to build strong network brand identity reflecting program focus, quality and reputation.[1084]

511. Two broadcast television network organizational changes, which are viewed as responses to the growth in viewer options, are noteworthy, namely, (1) the extensive backward integration into program supply, and (2) the desire to increase the extent of forward vertical integration through ownership of additional local television stations. Transaction cost economics suggests that such organizational integration induced by increased rivalry within the media industry may improve economic efficiency.

512 Transaction cost economics adopts a contractual approach in understanding the economic organization of firms.[1085] The transaction—the exchange of goods or services for money or other goods between parties—is the focal point of economic analysis. Determining the governance structure that minimizes the economic cost of effectuating a particular type of transaction is a central objective of a transaction cost analysis. Transaction cost economics identifies three, discrete governance structures, namely, (1) the market; (2) hybrid contracting; and (3) hierarchy, where transactions are placed under unified ownership in a firm subject to administrative controls and management.[1086] Whether it is economically efficient (cost minimizing) to effectuate exchange using market contracting or through hierarchy (vertical integration) depends on certain behavioral assumptions, and key attributes of any given transaction.[1087]

[1084] Reputation may constitute a mobility barrier that helps deflect continuing market share erosion in the mass audience strategic group. An empirical study of the relationship between reputation and strategic groups in the insurance industry is provided by T. D. Ferguson, D. L. Deephouse, and W. L. Ferguson, *Do Strategic Groups Differ in Reputation?*, 21 STRATEGIC MGMT J 1195, 1195-1214 (2000).

[1085] Oliver E Williamson, THE MECHANISMS OF GOVERNANCE 54 (Oxford Univ. Press 1999).

[1086] *Id.* at 378

[1087] From a transaction cost perspective, transactions differ one from another in three important dimensions, namely, (1) the frequency of a given type of transaction; (2) the degree and type of uncertainty implied by the transaction; and (3) the condition of asset specificity. While all three dimensions are important in determining the least costly governance structure for organizing transactions, the condition of asset specificity is especially important Asset specificity refers to the degree that an asset can be redeployed to alternative uses and by alternative users without a substantial loss in productive value. Asset specificity is similar to the concept of *sunk cost* as found in the literature on the theory of contestable markets and recent game-theoretic models of industry structure and performance. Asset specificity is a somewhat broader concept than sunk cost, however, and its full significance is apparent only within the context of incomplete contracting. Transaction cost economics recognize that asset specificity can take many different forms including, but not limited to, site specificity; physical asset specificity, human asset specificity derived from learning-by-doing; and dedicated assets, representing discrete investments in general purpose plant or facilities for meeting the demand for output for a specific customer. *See* Williamson, *supra* note 1085 at 50.