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

In the Matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket 01-317
	)	
Definition of Radio Markets	)	MM Docket 00-244
	)	
Definition of Radio Markets for Areas Not Located in an Arbitron Survey Area	)	MB Docket 03-130

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING

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By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

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I. INTRODUCTION

1. With this Report and Order ("*Order*"), we bring to completion our third biennial ownership review, the most extensive review yet, addressing all six broadcast ownership rules. We address these rules in light of the mandate of Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which requires the Commission to reassess and recalibrate its broadcast ownership rules every two years.[1] In the Notice of Proposed Rulemaking in this proceeding ("*Notice*"),[2] we initiated review of four ownership rules. the national television multiple ownership rule;[3] the local television multiple ownership rule;[4] the radio-television cross-ownership rule;[5] and the dual network rule.[6] The first

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

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

[3] 47 C F R § 73 3555(e) (prohibiting any entity from controlling television stations the audience reach of which exceeds 35% of television households in the United States) For a definition of what constitutes an attributable interest for purposes of applying our multiple ownership rules, *see* notes to 47 C.F.R. § 73 3555.

[4] 47 C F R § 73 3555(b) (allowing the combination of two television stations in the same Designated Market Area ("DMA"), as determined by Nielsen Media Research or any successor entity, provided. (1) the Grade B contours (continued)

two rules have been reviewed and the proceedings remanded to the Commission by the U S. Court of Appeals for the District of Columbia Circuit [7] In addition, the Commission previously initiated proceedings on the local radio ownership rule[8] and the newspaper/broadcast cross-ownership rule.[9] Comments filed in those proceedings have been incorporated into this docket along with comments on the rules filed in response to the *Notice*.[10] After we released the *Notice*, we issued 12 Media Ownership Working Group ("MOWG") studies for public comment [11]

2. In this *Order* we review the legal context within which this review is conducted, identify and describe the public interest policy goals that guide our decision, assess changes in the media marketplace over time, repeal some rules, modify others, and adopt some new rules In consideration of the record and our statutory charge, we conclude that neither an absolute prohibition on common ownership of daily newspapers and broadcast outlets in the same market (the "newspaper/broadcast cross-ownership rule") nor a cross-service restriction on common ownership of radio and television outlets in the same

(Continued from previous page)
of the stations do not overlap; or (2) (a) at least one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and noncommercial television stations would remain in that market after the combination)

[5] 47 C F R § 73.3555(c) (allowing common ownership of one or two TV stations and up to six radio stations in any market in which at least twenty independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market in which at least ten independent "voices" would remain post-combination, and one TV and one radio station notwithstanding the number of independent "voices" in the market. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For this rule, a "voice" includes independently owned and operating same-market, commercial and noncommercial broadcast TV stations, radio stations, independently owned daily newspapers, and cable systems (all cable systems within the DMA are counted as a single voice)).

[6] 47 C F R § 73 658(g) (permitting a television broadcast station to affiliate with a network that maintains more than one broadcast network, unless the dual or multiple networks are created by a combination between ABC, CBS, Fox, or NBC).

[7] *Fox Television Stations, Inc v FCC*, 280 F.3d 1027, 1044 (D C. Cir 2002) ("*Fox Television*"), *rehearing granted*, 293 F 3d 537 (D C Cir 2002) ("*Fox Television Re-Hearing*") (addressing the national TV ownership rule) *Sinclair Broadcast Group, Inc v FCC*, 284 F 3d 148 (D C. Cir. 2002) ("*Sinclair*") (addressing the local TV ownership rule)

[8] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001) ("*Local Radio Ownership NPRM*"), *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000) ("*Definition of Radio Markets NPRM*"). The local radio ownership rule limits the number of radio stations that an entity may own in a single market 47 C F R § 73 3555(a)

[9] *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001) ("*Newspaper/Broadcast Cross-Ownership NPRM*"). The newspaper/broadcast cross-ownership rule prohibits the common ownership of a daily newspaper and a broadcast station in the same market 47 C.F.R. § 73.3555(d).

[10] Short references to commenters' names are contained in the list of commenters attached as Appendix A.

[11] *FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Ownership Rules*, 17 FCC Rcd 19140 (2002) *See* www fcc gov/ownership for the public notice, a summary of the studies, and the studies themselves.

market (the "radio-television cross-ownership rule") remains necessary in the public interest With respect to both of these rules, we find that the ends sought can be achieved with more precision and with greater deference to First Amendment interests through our modified Cross Media Limits ("CML"). We also revise the market definition and the way we count stations for purposes of the local radio rule, revise the local television multiple ownership rule, modify the national television ownership cap, and retain the dual network rule.

3. The changes described herein provide a new, comprehensive framework for broadcast ownership regulation. As described in detail below, Americans today have more media choices, more sources of news and information, and more varied entertainment programming available to them than ever before. A generation ago, only science fiction writers dreamed of satellite-delivered television, cable was little more than a means of delivering broadcast signals to remote locations, and the seeds of the Internet were just being planted in a Department of Defense project. Today, hundreds of channels of video programming are available in every market in the country and, via the Internet, Americans can access virtually any information, anywhere, on any topic.

4 Nonetheless, while the march of technology has brought to our homes, schools, and places of employment unprecedented access to information and programming, our broadcast ownership rules, like a distant echo from the past, continue to restrict who may hold radio and television licenses as if broadcasters were America's information gatekeepers Our current rules inadequately account for the competitive presence of cable, ignore the diversity-enhancing value of the Internet, and lack any sound basis for a national audience reach cap. Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest. Not surprisingly, therefore, several of the existing rules have been questioned, reversed, and in some cases vacated by the courts. Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that, while laudable in principle, do not serve the interests they purport to serve.

5. Inaction on our part and the market uncertainty that would result from a perpetuation of the open-ended policy limbo that exists today would ill serve our nation. The adoption of this *Order* is critical, therefore, to the realization of our public interest goals in that it puts an end to any uncertainty regarding the scope and effect of our structural broadcast ownership rules Most importantly, the rules discussed and described below serve our competition, diversity and localism goals in highly targeted ways and, working together, form a comprehensive framework that is responsive to today's media environment.

6 We adopt herein limits both for local radio and local television station ownership. Both of these rules are premised on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained below, however, because markets defined for competition purposes (*i e* , defined in terms of which entities compete with each other in economic terms) are generally more narrow than markets defined for diversity purposes (*i e.*, defined in terms of which entities compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby protecting diversity. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, we adopt below a set of specific cross-media limits

7. Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, we have for the first time substantial evidence

regarding the localism effects of our national broadcast ownership rules. We can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks In addition, under our dual network rule, we continue to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect localism. In combination, our new national broadcast ownership reach cap and our "dual network" prohibition will ensure that local television stations remain responsive to their local communities

8 In sum, the modified broadcast ownership structure we adopt today will serve our traditional goals of promoting competition, diversity, and localism in broadcast services. The new rules are not blind to the world around them, but reflective of it; they are, to borrow from our governing statute, necessary in the public interest.

9 We received more than 500,000 brief comments and form letters from individual citizens. These individual commenters expressed general concerns about the potential consequences of media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity and affect competition. We share the concerns of these commenters that our ownership rules protect our critical diversity and competition goals, as they are designed to do, and we believe that the rules adopted herein serve our public interest goals, take account of and protect the vibrant media marketplace, and comply with our statutory responsibilities and limits As we make plain in the *Order* below, we have assessed and recalibrated our rules to form a local and national rules framework that promotes diversity, competition and localism, the core concerns of these commenters, and we will address these core concerns in each section of this *Order* as we address each of our ownership rules.

II. LEGAL FRAMEWORK

10 We conduct this biennial ownership review within the framework established by Section 202(h) of the 1996 Act, which provides

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[12]

11. Two aspects of this statutory language are particularly noteworthy. First, as the court recognized in both *Fox Television* and *Sinclair,* "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules."[13] That is, Section 202(h) appears to upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule.[14] Second, Section 202(h) requires the Commission to determine whether its rules remain "necessary

[12] 1996 Act, § 202(h)

[13] *Fox Television,* 280 F 3d at 1048; *Sinclair,* 284 F.3d at 159 Several parties, citing *Fox Television* and *Sinclair,* support the notion that Section 202(h) presumptively favors repeal or modification of the ownership rules *See, e.g*, Bonneville Comments at 3; Fox Comments at Exhibit I; Morris Comments at 4; Tribune Comments at 12-13; Fox Reply Comments at 4; NAB Reply Comments at 2-3.

[14] 5 U S C § 706(2)(A); *Motor Vehicle Mfgs of the United States v State Farm Mutual Auto. Ins. Co*, 463 U S 29 (1983)

in the public interest "[15]

12. As described below, we conclude that in its current form only the dual network rule remains necessary in the public interest as a result of competition. We also conclude that the other ownership rules should be modified as described in this *Order*.

13 *The First Amendment*. The ownership rules we adopt in this proceeding must be consistent not only with the legal standard in Section 202(h), but also with the First Amendment rights of affected media companies and consumers. We conclude, based on the decisions in the *Fox Television* and *Sinclair* cases, that the rational basis standard is the correct First Amendment standard to apply to the broadcast ownership rules.[16] In so doing, we reject, as did the court, the application of the intermediate scrutiny ("*O'Brien*") standard[17] applicable to cable operators[18] or the strict scrutiny standard applicable to the print media and to content-based regulations.[19] Under the rational basis standard, the Commission's broadcast regulations satisfy the First Amendment if they are "a reasonable means of promoting the public interest in diversified mass communications."[20] As the court noted in *Sinclair*, there is no unabridgeable First

[15] *See 2002 Biennial Regulatory Review*, 18 FCC Rcd 4726, 4730 ¶ 13 (2003)

[16] *Fox Television*, 280 F.3d at 1027, *Sinclair*, 284 F.3d at 148 In the *1998 Biennial Review Report*, the Commission applied the *O'Brien*, or intermediate scrutiny, test to the newspaper/broadcast cross-ownership rule. *1998 Biennial Regulatory Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11121-22 ¶¶ 116-18 (2000) ("*1998 Biennial Review Report*") (applying *United States v O'Brien*, 391 U S 367 (1968) ("*O'Brien*")). Also, in considering the application of the First Amendment to the newspaper/broadcast cross-ownership rule, in the *Newspaper/Broadcast NPRM*, which was released before the *Fox Television* and *Sinclair* cases, we asked about the significance of *Time Warner Entertainment Co v FCC*, 240 F 3d 1126 (D C. Cir. 2001), *cert denied*, 122 S Ct 644 (2001) ("*Time Warner II*"), in which intermediate scrutiny was applied to cable regulations *Newspaper/Radio Cross-Ownership NPRM*, 16 FCC Rcd at 17296-97 ¶¶ 31-33 The decisions in the *Fox Television* and *Sinclair* cases have settled these issues.

[17] Under *O'Brien*, government regulation of speech will be upheld only if· (1) it furthers an important or substantial governmental interest, (2) the interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest *O'Brien*, 391 U S. at 377-78, *Turner Broadcasting System v FCC*, 520 U S 180, 185-86 (1997) ("*Turner II*")

[18] In general, ownership limits on cable operators have been subject to the *O'Brien* test *Time Warner Entertainment Co v United States*, 211 F 3d 1313, 1316-22 (D C Cir. 2000) ("*Time Warner I*"), *cert denied*, 121 S Ct 1167 (2001), *Satellite Broadcasting & Commun Ass'n v FCC*, 275 F.3d 337, 346, 355 (4th Cir. 2001), *cert. denied* 122 S Ct 2588 (2002) The Supreme Court has determined that "promoting the widespread dissemination of information from a multiplicity of sources" is a government interest that is not only important, but is of the "highest order" and is unrelated to the suppression of free speech. *Turner Broadcasting System, Inc. v. FCC*, 512 U S 622, 662-63 (1984) ("*Turner I*"), *Turner II*, 520 U.S. at 190. On the other hand, the Commission may not burden cable operators' speech with "illimitable restrictions in the name of diversity." *Time Warner II*, 240 F.3d at 1136

[19] Strict scrutiny First Amendment analysis would require the Commission to demonstrate that its rules are the "least restrictive means available of achieving a compelling state interest." *Sable Communications of California, Inc v FCC*, 492 U S 115, 126 (1989)

[20] *FCC v National Citizens Committee for Broadcasting*, 436 U.S 775, 802 (1978) ("*NCCB*").

Amendment right to hold a broadcast license, would-be broadcasters must satisfy the public interest by meeting the Commission criteria for licensing, including demonstrating compliance with any applicable ownership limitations.[21]

14 In applying the rational basis test, the *Fox* and *Sinclair* courts relied on longstanding Supreme Court precedent which also supports our decision [22] In *NCCB*, the Supreme Court applied the rational basis test to the Commission's newspaper/broadcast cross-ownership rules, finding that they "are a reasonable means of promoting the public interest in diversified mass communications; thus they do not violate the First Amendment rights of those who will be denied broadcast licenses pursuant to them."[23] The *NCCB* Court explained that the rational basis test is the appropriate standard to govern our broadcast ownership regulations because spectrum scarcity requires "Government allocation and regulation of broadcast frequencies," and because these regulations are not content related.[24] The rational basis standard therefore governs our broadcast ownership regulations, whether they govern those that own only broadcast outlets or those that might seek to combine ownership of a broadcast outlet with a cable system or a newspaper [25]

15 We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits and that our diversity and competition goals are inherently content-based.[26] The goals of promoting diversity and localism do not render our ownership rules content-based. As the Supreme Court noted in *NCCB*, the cross-ownership rules at issue were "not content related, moreover, their purpose and effect is to promote free speech, not to restrict it."[27] Furthermore, the courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here.[28] Accordingly, the rational basis test continues to apply to our ownership rules.

16. First Amendment interests are implicated by any regulation of media outlets, including broadcast media. We endeavor to be sensitive to those interests and to minimize the impact of our rules

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[21] *Sinclair*, 284 F 3d at 168 (citing *NCCB*, 436 U S at 795-97)

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

[23] *Id*

[24] *Id* at 799, 801

[25] *See id* at 798-02 (rational basis test applied to newspaper/broadcast rule), *Fox Television*, 280 F 3d at 1045-46 (rational basis test applied to broadcast-cable cross-ownership ban). Several commenters argue that the Commission is bound by court decisions to apply the rational basis test to First Amendment review of the broadcast ownership rules UCC Comments at 63-64, UCC Reply Comments at 25-32, Cox Reply Comments at 4

[26] *See* Media General Comments at 36-37, Media General Reply Comments at 21-24; Tribune Comments at 18-20

[27] *NCCB*, 436 U S at 801, *see also Fox Television*, 280 F 3d at 1046.

[28] *Fox Television*, 280 F 3d at 1046 (quoting *Turner I*, 512 U.S. at 638)

on the right of speakers to disseminate a message.[29] As discussed below, our decision today to eliminate the newspaper/broadcast cross-ownership rule and the radio-television cross-ownership rule, and to modify our other local ownership rules and our national audience reach cap, turns in part on our determination that these rules in their current form are not a reasonable means to accomplish the public interest purposes to which they are directed. We turn next to identifying the policy goals that will inform this determination.

III. POLICY GOALS

17 In the *Notice*, we sought comment on the policy objectives that should guide our actions in regulating media ownership. We identified diversity, competition, and localism as longstanding goals that would continue to be core agency objectives in this area.[30] We requested comment on how these goals should be defined and measured, and on whether other goals should be added to these three overarching objectives. To fulfill our biennial review obligation, we will first define our goals and the ways we will measure them We can then assess whether our current broadcast ownership rules are necessary to achieve these goals.

A. Diversity

18 There are five types of diversity pertinent to media ownership policy: viewpoint, outlet, program, source, and minority and female ownership diversity. We discuss them in turn.

1. Viewpoint Diversity

19. *Background.* Viewpoint diversity refers to the availability of media content reflecting a variety of perspectives. A diverse and robust marketplace of ideas is the foundation of our democracy.[31] Consequently, "it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public "[32] This policy is given effect, in part, through regulation of broadcast ownership.

20. Because outlet owners select the content to be disseminated, the Commission has

[29] Several parties comment on the First Amendment principles that should guide our broadcast ownership review. *See, e g*, CFA Comments at 30-32 (arguing that diversity of media types promotes vibrant civic discourse and comports with the First Amendment), Noam Schechner Comments at 8-13 (stating that the First Amendment requires the Commission to engage in detailed examination of viewpoint diversity), Sandra M. Ortiz Comments at 12 (arguing that safeguarding the First Amendment rights of the public permits restriction of media ownership); Prairie Reply Comments at 2-3 (arguing that the availability of diverse and local information is crucial to the spirit of the First Amendment)

[30] *Notice*, 17 FCC Rcd at 18516-27 ¶¶ 33-71

[31] *See* Richard Brown, *Early American Origins of the Information Age*, A NATION TRANSFORMED BY INFO.: HOW INFORMATION HAS SHAPED U.S. FROM COLONIAL TIMES TO THE PRESENT (Oxford Univ. Press, New York, NY, 2000) at 44-49 *passim* ("Because people widely believed that their republican government required an informed citizenry, they scrambled to make sure that they, and often their neighbors, were properly informed ").

[32] *Turner I*, 512 U S. at 663-64 (internal quotation marks omitted) (quoting *United States v Midwest Video Corp.*, 406 U S 649, 668 n 27 (1972) (plurality opinion) (quoting *Associated Press v United States*, 326 U.S 1, 20 (1945))

traditionally assumed that there is a positive correlation between viewpoints expressed and ownership of an outlet. The Commission has sought, therefore, to diffuse ownership of media outlets among multiple firms in order to diversify the viewpoints available to the public. Prior Commission decisions limiting broadcast ownership concluded that a larger total number of outlet owners increased the probability that their independent content selection decisions would collectively promote a diverse array of media content.[33]

21. The *Notice* sought comment on whether this longstanding presumed link between ownership and viewpoint could be established empirically.[34] The record evidence on this point includes a study by Professor David Pritchard, which examined whether ownership affects the viewpoint expressed on commonly-owned television stations and daily newspapers.[35] The study evaluated how ten television-newspaper combinations covered the final weeks of the 2000 presidential election to see whether commonly-owned outlets exhibited common "viewpoints" through their coverage of the election. The two theoretical extremes for the news stories in question were 100 percent pro-Gore and 100 percent pro-Bush. When news coverage on two commonly-owned outlets was sufficiently similar on the continuum between these two points, the study deemed those two outlets to exhibit a common editorial viewpoint.[36] The study concluded that five of the ten television-newspaper combinations exhibited common editorial slants, and that the other five combinations did not. The basis for this conclusion was the "distance" on a continuum between the coverage of the campaign by the television station and the newspaper. Professor Pritchard concluded that "common ownership of a newspaper and a television station in a community does not result in a predictable pattern of news coverage and commentary."[37]

22 Some commenters agree. Belo and Media General contend that separating ownership of media outlets to achieve diverse viewpoints is unnecessary for two reasons. First, Belo and Media General assert that their news outlets do not express viewpoints, but provide balanced news coverage in response to consumer preferences.[38] They contend that viewers would reject local newscasts having a perceived bias and would turn to other news sources. Second, both companies explain that each outlet under common control has editorial independence and is not subject to top-down news policies from their corporate parents.[39] Declarations submitted by the Chief Executive Officers of Belo and Media General assert that their companies' ability to succeed in the marketplace is directly tied to their objectivity in

[33] *See, e g, Rules and Regulations Relating to Multiple Ownership*, 18 FC.C. 288 (1953) ("[T]he fundamental purpose of this facet of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoints..."), *Amendment of Sections 73 74, 73 240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations*, 50 F C C 2d 1046, 1079-80 (1975) ("*1975 Multiple Ownership Second Report and Order*")

[34] *Notice*, 17 FCC Rcd at 18519-20 ¶ 44.

[35] MOWG Study No. 2, Viewpoint Diversity in Cross-Owned Newspapers and Television Stations A Study of News Coverage of the 2000 Presidential Campaign by David Pritchard (Sept 2002) ("MOWG Study No. 2").

[36] *Id* at n 15

[37] *Id* at 12-13

[38] Belo Comments, Statement of Robert Dechard at 3; Media General Reply Comments, Statement of J Stewart Bryan III, at 2

[39] Belo Comments, Dechard Statement at 3-4, Belo Comments, Bryan Statement at 2-3.

selecting and reporting news.

23. Others challenge Dr Pritchard's conclusion. CFA and UCC assert that the Pritchard study is flawed by the absence of a control group of independently-owned newspapers and television stations with which to compare the tested stations.[40] In addition, they reject the study because, they say, the sample size was too small from which to draw inferences. UCC also claims that the study's categorization of a particular news item as "pro-Gore" or "pro-Bush" was subjective and ill-defined.[41]

24. CFA cites two studies in support of its view that ownership affects viewpoint. The first examined newspaper coverage of 60 senatorial campaigns across three election cycles and found that "information on news pages was slanted in favor of the candidates endorsed on the newspaper's editorial pages."[42] The second examined newspaper coverage of Congress's decision to allocate spectrum for digital television by newspaper firms that also owned television stations. According to CFA, newspaper-television firms earning 20 percent or less of their revenue from television uniformly editorialized against the spectrum allocation, while those earning more than 20 percent of their revenues from television uniformly editorialized in favor of the allocation [43]

25. A second way in which ownership may affect viewpoint is self-censorship by journalists and editors. UCC submitted a survey by the Pew Research Center which found that 41 percent of reporters and executives employed by the four broadcast networks said they "purposely avoided newsworthy stories and/or softened the tone of stories to benefit the interests of their news organizations."[44] UCC also refers us to anecdotal evidence that the editorial decisions of the broadcast networks have been affected by their financial interests [45] Similarly, the Writers Guild suggests that newspaper writers and editors select and write stories, with a bias in favor of satisfying the views of their owner.[46] CFA and UCC also cite studies showing that media companies news decisions are affected by pressure from advertisers [47]

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[40] CFA Comments at 47 n 68, Center for Economic and Policy Research Comments at 5-6

[41] UCC Comments at 11-12

[42] CFA Comments at 41 (quoting Kim Fridkin Kahn and Patrick J. Kenny, *The Slant of the News: How Editorial Endorsements Influence Campaign Coverage and Citizens' Views of Candidates*, American Political Science Review, 96 (2002) at 381)

[43] *Id* at 43 (citing James H Snider and Benjamin I. Page, *Does Media Ownership Affect Media Stands? The Case of the Telecommunications Act of 1996*, paper delivered at the Annual Meeting of the Midwest Political Science Assn (Apr 1997)

[44] UCC Comments at 4 (citing Pew Research Center for the People & the Press, *Self Censorship How Often and Why, Survey Reports* (rel Apr. 30, 2000) available at www.people-press.org/reports/display.php3?ReportID=39.

[45] Dmitri Williams, *Synergy Bias: Conglomerates and Promotion in the News*, 46 J. OF B'CASTING & ELEC. MEDIA 453 (Sept 1, 2002)

[46] Writer's Guild Comments at 8-9.

[47] CFA Comments at 44-45 (citing Marion Just, Rosalind Levine and Kathleen Regan, *News for Sale. Half of Stations Report Sponsor Pressure on News Decisions*, COLUM J REV (Project for Excellence in Journalism Nov /Dec 2001) at 2)

26. *Discussion* We adhere to our longstanding determination that the policy of limiting common ownership of multiple media outlets is the most reliable means of promoting viewpoint diversity Nothing in the record causes us to reconsider this conclusion. The principal record evidence purporting to demonstrate a lack of connection between ownership and viewpoint – the Pritchard study -- contains a significant methodological flaw. The study did not employ a control group to compare with the test set of commonly-owned outlets. The absence of a baseline control group in this study precludes us from placing significant probative value on this study's assessment of ownership and viewpoint.

27. Indeed, the balance of the evidence, although not conclusive, appears to support our conclusion that outlet ownership can be presumed to affect the viewpoints expressed on that outlet. We therefore continue to believe that broadcast ownership limits are necessary to preserve and promote viewpoint diversity. A larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners We believe this proposition, even without the benefit of conclusive empirical evidence, remains sound.[48]

28 Further, owners of media outlets clearly have the ability to affect public discourse, including political and governmental affairs, through their coverage of news and public affairs. Even if our inquiry were to find that media outlets exhibited no apparent "slant" or viewpoint in their news coverage, media outlets possess significant *potential* power in our system of government. We believe sound public policy requires us to assume that power is being, or could be, exercised.

29. We also disagree with Belo and Media General that local ownership restrictions are unnecessary to promote diversity because financial incentives will keep local newscasts unbiased. First, media companies may have multiple financial incentives that drive news decisions, and avoiding an appearance of bias is only one such financial incentive. Record evidence suggests that media companies' handling of the digital spectrum issue was affected by the extent of the company's financial interest in that issue.[49] Second, there may be factors in news coverage decisions that are unaccounted for in the Belo/Media General argument regarding financial incentives The record contains evidence that reporters and other employees of broadcasting companies alter their news coverage to suit their companies' interests [50] This suggests that whatever financial interest that media companies may have in presenting unbiased news coverage, those incentives are not the only factors that explain news coverage decisions. Consequently, we cannot agree with Belo and Media General that diverse ownership is wholly unnecessary to ensure diverse perspectives on the news.

30. Lest this finding be misconstrued, we do not pass judgment on the desirability of owners using their outlets for the expression of particular viewpoints. Indeed, we have always proceeded from the assumption that they do so and that our rules should encourage diverse ownership precisely because it is likely to result in the expression of a wide range of diverse and antagonistic viewpoints. We merely observe here that evidence from a variety of researchers and organizations appears to disclose a meaningful connection between the identity of the outlet owner and the content delivered via its outlet(s).

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[48] *NCCB*, 436 U.S at 797 ("[T]he Commission was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly-owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run '"), *Metro Broadcasting, Inc v FCC*, 497 U S 547, 571 n.16 (1990); *Sinclair*, 284 F 3d at 162.

[49] Williams, *supra* note 45

[50] *See supra*, note 44.

This evidence provides an additional basis to reaffirm our longstanding conclusion that regulating ownership is an appropriate means to promote viewpoint diversity.

31 Our conclusion also should not be read to suggest that each and every incremental increase in the number of different outlet owners can be justified as necessary in the public interest. To the contrary, there certainly are points of diminishing returns in incremental increases in diversity.[51] Moreover, such increases may, in some instances, harm the public interest in localism and competition.[52] The balancing of these interests we address in the sections below dealing with individual rules.

32. *Measuring Viewpoint Diversity.* Viewpoint diversity is a paramount objective of this Commission because the free flow of ideas under-girds and sustains our system of government. Although all content in visual and aural media have the potential to express viewpoints, we find that viewpoint diversity is most easily measured through news and public affairs programming Not only is news programming more easily measured than other types of content containing viewpoints, but it relates most directly to the Commission's core policy objective of facilitating robust democratic discourse in the media Accordingly, we have sought in this proceeding to measure how certain ownership structures affect news output

33. Nonetheless, we agree with Fox and CFA that content other than traditional newscasts also contributes to a diversity of viewpoints [53] Television shows such as *60 Minutes*, *Dateline NBC*, and other newsmagazine programs routinely address matters of public concern. In addition, as Fox points out, entertainment programming such as *Will & Grace, Ellen, The Cosby Show*, and *All in the Family* all involved characters and storylines that addressed racial and sexual stereotypes. In so doing, they contributed to a national dialogue on important social issues.

34 Although we agree that entertainment programs can contribute to our goal of viewpoint diversity, we will focus on the news component of viewpoint diversity where the record permits us to do so Our objective of promoting program diversity in this proceeding subsumes the viewpoint diversity contained within entertainment programming We address our policy goal of program diversity in the following subsection.

35 Finally, we conclude that the diversity of viewpoints by national media on national issues is greater than that regarding local issues This is principally due to the vast array of national news sources available on the Internet, cable television and DBS.[54]

2. Program Diversity

36 We conclude that program diversity is a policy goal of broadcast ownership regulation Program diversity refers to a variety of programming formats and content. With respect to television, this

[51] *Time Warner II*, 240 F 3d at 1135 (questioning the point at which a marginal increase in diversity no longer qualifies as an "important" governmental interest)

[52] *See, e g*, Cross-Ownership Section VI(C)(1)(b), *infra*, regarding the localism benefits of relaxing the newspaper-broadcast cross-ownership ban

[53] CFA Comments at 27-28; Fox Comments at 8-9

[54] See Appendix B, National News Sources

includes dramas, situation comedies, reality shows, and newsmagazines, as well as targeted programming channels such as food, health, music, travel, and sports With respect to radio, program diversity would be reflected in a variety of music formats such as jazz, rock, and classical as well as all-sports and all-news formats Programming aimed at various minority and ethnic groups is an important component of program diversity for both television and radio.

37. In general, we find that program diversity is best achieved by reliance on competition among delivery systems rather than by government regulation. The rules adopted in this proceeding will ensure competition in the delivered video and radio programming markets Programming is an input to the retail product offered by competing delivery systems. As long as the broadcast markets remain competitive, we expect program diversity to be best achieved by relying on media companies responding to consumer preferences Delivery systems compete fiercely for consumer attention and have powerful financial incentives to tailor their program offerings to serve consumers' diverse demands for programming

3. Outlet Diversity

38. In the *Notice*, we requested comment on the definition of "outlet diversity" and whether it should be a goal of media ownership policy. Outlet diversity simply means that, in a given market, there are multiple independently-owned firms. The question is whether diversification of outlet ownership *by itself* is a policy goal. We have previously found that outlet diversity has not been viewed as an end in itself, but a means through which we seek to achieve our goal of viewpoint diversity.[55] As we have explained, "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level "[56]

39. We find that independent ownership of outlets by multiple entities in a market contributes to our goal of promoting viewpoint. Regulating the ownership of outlets to achieve those goals is far preferable to attempting to engineer outcomes directly, because ownership regulation reduces the need for the Commission to make subjective judgments about program content.

40 However, our review of the record persuades us that outlet diversity within radio broadcasting continues to be an important aspect of the public interest that we should seek to promote. We are committed to establishing a regulatory framework that promotes innovation in the field of broadcasting. Innovation is not just a matter of preserving a "magic number" of independent owners in a market Such a scheme would ignore the fact that the most potent sources of innovation often arise not from incumbents but from new entrants.[57] We seek therefore to establish a regulatory regime that preserves opportunities for new entry into the broadcast industry. Although our interest in promoting new entry extends to all broadcasting, that interest is greatest in radio broadcasting. Radio remains one of the

[55] *Notice*, 17 FCC Rcd at 18517 ¶ 36; *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1724 ¶ 7 (1989) ("*1989 Multiple Ownership Report and Order*").

[56] *Amendment of Sections 73 35, 73 240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1477 ¶ 3 (1964) ("*1964 Media Ownership Report and Order*").

[57] *See, e g , 1998 Biennial Regulatory Review – Testing New Technology*, 14 FCC Rcd 6065, 6077 ¶ 28 (1999)

most affordable means by which a potential new entrant can enter the media business.[58] Radio thus is a likely foothold through which a new entrant can gain the experience necessary to operate and grow a successful media enterprise.

41 Finally, we believe that one benefit of outlet diversity is the promotion of public safety. The rules we adopt to promote competition, diversity, and localism also will serve the public interest by ensuring that multiple owners control the broadcasting outlets in any market. In an emergency, the separation of broadcast facilities and personnel among multiple independent broadcast companies in a given market will avoid any possibility that the failure of one broadcast company to transmit critical public safety information will not leave that area without other broadcast owners to perform that service.

4. Source Diversity

42 "Source diversity" refers to the availability of media content from a variety of content producers The *Notice* explained that source diversity can contribute to our "retail" goals of viewpoint diversity and program diversity.[59] Past Commission efforts to regulate source diversity centered on broadcast television. The Prime Time Access Rule (PTAR) and the Financial Interest and Syndication (Fin-Syn) rules limited vertical integration between program producers and broadcast television networks [60] The Commission eliminated those regulations when it could not justify them in light of media marketplace changes.[61]

43. The record before us does not support a conclusion that source diversity should be an objective of our broadcast ownership policies. The Center for Creative Community (CCC), the Coalition for Program Diversity (CPD), and the Writers' Guild of America (WGA) contend that source diversity is lacking on prime time broadcast television today, and therefore that the Commission should require the largest networks to purchase a portion of their prime time programming from unaffiliated program producers.[62] In support of its recommendation, CPD contends that in 1993, 68% of prime time programming on the three largest broadcast networks was independently produced versus 24% today.[63] This decrease in independently-produced prime time programming, CPD argues, establishes that source

[58] A review of radio station sales in the past 16 years shows that the average sale price of a radio station is $5.74 million dollars versus $43 14 million dollars for a television station *See BIA State of the Industry Television Reports,* various years

[59] *Notice*, 17 FCC Rcd at 18517-18 ¶ 37

[60] PTAR forbade local stations carrying the programming of ABC, CBS, and NBC in the top 50 markets from offering more than three hours of prime time network programming Monday through Saturday. The Commission hoped that the hour vacated by the networks would encourage non-network production of quality prime time programming The Fin-Syn rules prohibited the then-dominant television networks from obtaining a financial interest in independently-produced programming and from syndicating any program domestically. *Amendment of Part 73 of the Commission's Rules and Regulations with Respect to Competition and Responsibility in Network Television Broadcasting*, 23 F.C.C.2d 382 (1970).

[61] *Schurz Communications, Inc v FCC*, 982 F.2d 1043(7th Cir. 1992) (remanding the Commission's decision to retain modified financial interest and syndication rules), *In re Review of the Syndication and Financial Interest Rules,* 10 FCC Rcd 12165 (1995) (eliminating the fin-syn rules).

[62] CPD Comments at 3, CCC Comments at 7, WGA comments at 3.

[63] CPD Comments at 4-5

diversity is rapidly declining and its revitalization should be the principal goal of this rulemaking.[64]

44 When prime time television viewing was dominated by three broadcast networks, the Commission elected to require broadcast networks to purchase prime time programming from unaffiliated producers in order to encourage diversity on television In light of dramatic changes in the television market, including the significant increase in the number of channels available to most households today, we find no basis in the record to conclude that government regulation is necessary to promote source diversity

45 In 1979, the vast majority of households had six or fewer local television stations to choose from, three of which were typically affiliated with a broadcast network.[65] Today the average U.S. household receives seven broadcast television networks and an average of 102 channels per home.[66] Commenters recommending that the Commission adopt source diversity as a goal offer no evidence of the quantity of programming sources across the delivered video programming market (*i e* both broadcast and non-broadcast channels) and why that quantity is deficient. Given the explosion of programming channels now available in the vast majority of homes today, and in the absence of evidence to the contrary, we cannot conclude that source diversity should be a policy goal of our broadcast ownership rules .

5. Minority and Female Ownership Diversity

46. Encouraging minority and female ownership historically has been an important Commission objective,[67] and we reaffirm that goal here In 1995, the Commission issued a Notice of Proposed Rulemaking to "explore ways to provide minorities and women with greater opportunities to enter the mass media industry."[68] Thereafter, in 1996, the Commission issued a Notice of Inquiry

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[64] CPD Comments at 1

[65] Michael L. Katz, *Old Rules and New Rivals An Examination of Broadcast Television Regulation and Competition* at 38 (Sept 1999)

[66] 2002 Video Competition Report. Opening Statement of David F Poltrack, Executive Vice President, CBS Television, Before the Forum on Media Ownership Rules, Col U Law School, New York, NY (Jan. 16, 2003)

[67] *See, e g, Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F C C 2d 979 (1978) (articulating policies to increase the level of broadcast facility ownership by minorities, including the comparative hearing minority preference, distress sale, and tax certificate policies), *see also Amendment of Section 73 3555 (formerly sections 73 35, 73 240 and 73 636) of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F C C.2d 74, 97 (1985) *("1985 Multiple Ownership MO&O")* (enabling· (1) persons acquiring "cognizable interests" in minority owned and controlled broadcast stations to own 14 of each AM, FM, and television stations (instead of the standard numerical cap of 12 each); and (2) a television station owner to reach a maximum of 30% of the national audience (instead of the standard 25% cap) provided that at least 5% of the aggregate reach of its stations is contributed by minority controlled stations)

[68] *See Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 10 FCC Rcd 2788 (1995) In its subsequent 1998 Report and Order, the Commission amended FCC Form 323, Annual Ownership Report, to include race and gender data of parties with attributable interests in commercial broadcast licenses, thereby enabling the Commission to "determine accurately the current state of minority and female ownership of broadcast facilities, to determine the need for measures designed to promote ownership by minorities and women, to chart the success of any such measures that we may adopt, and to fulfill our statutory mandate under Section 257 of the 1996 Act and Section 309(j) of the Communications Act of 1934 to promote opportunities for small (continued)

seeking comments on the nature of market entry barriers for small businesses [69] In addition, the Commission held public forums to identify barriers to competition and to formulate strategies to overcome them [70]

47 We have received comments advocating various policies to enhance minority and female ownership of broadcast companies [71] NABOB recommends that we should maintain our current ownership rules; use Arbitron markets to define radio markets, give greater consideration to the promotion of viewpoint diversity and minority ownership when we review assignment of license and transfer of control applications; eliminate our policy of granting temporary waivers of our multiple ownership rules (which allow merging broadcasters 6-24 months to come into compliance with the rules); adopt a bright-line test to limit radio ownership consolidation; and urge Congress to reinstate the minority

(Continued from previous page)
businesses and businesses owned by women and minorities in the broadcasting industry." *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, 13 FCC Rcd 23056, 23095 (1998). *See* 47 U.S C § 309(j)(3)(B) (requiring the Commission, in designing systems of competitive bidding for broadcast licenses, to "promot[e] economic opportunity and competition and ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including . . businesses owned by members of minority groups and women").

[69] *See Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 11 FCC Rcd 6280 (1996), *see also Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd 16802 (1997) The Commission, in a separate proceeding, tentatively concluded that it should take steps to further its "longstanding goal of increasing minority ownership of broadcast stations" and sought comment on what competitive bidding tools could be used to achieve this goal, and the goal of increased female ownership *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 12 FCC Rcd 22363, 22399-401 (1997) In its First Report and Order following this NPRM, the Commission noted that it had commenced a series of studies to examine the market entry barriers encountered by minorities and women, and would wait for review of, and public comment on, these studies prior to determining competitive bidding rules affecting minorities and women As an interim measure, the Commission adopted a "new entrant" bidding credit. *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses; Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 13 FCC Rcd 15920, 15994-95 (1998)

[70] *See Forum on Small Business Market Entry Barriers*, FCC Public Notice 64975 (rel Sept. 5, 1996). In 2000, the Commission released five studies regarding the market entry barriers faced by minorities, women, and small businesses in the communications industry *See FCC Chairman Kennard and Commissioner Tristani to Host Policy Forum on Market Entry Barriers Faced by Small, Women- and Minority-Owned Businesses on Tuesday, December 12, 2000*, 16 FCC Rcd 3772 (2000) We believe additional evidence is necessary, however, before we reach conclusions on these important issues We note that MMTC asks that we include in this record and seek comment on these five studies We take official notice of the 2000 market entry barrier studies, as they were publicly released and are available on our web site, so it is unnecessary to include them in the record.

[71] *See, e g*, MMTC/NABOB Motion for Further Extension of Time, filed Dec. 9, 2002 at 4-5 (asking the Commission to affirm that minority ownership is a central interest in ownership proceedings)

tax certificate policy [72]

48. IPI argues that maintenance of broadcast ownership caps will best serve the distinct programming preferences of minority groups [73] AWRT asks us to include the goal of increasing the number of female-owned broadcast businesses as we consider changes to our broadcast ownership rules.[74] UCC urges the Commission to "explicitly advance through its ownership rules" the policy goal of promoting broadcast ownership opportunities for women, minorities and small businesses.[75]

49 MMTC proposes business and regulatory initiatives that "would go a long way toward increasing entry into the communications industry by minorities."[76] MMTC's initiatives include: (1) equity for specific and contemplated future acquisitions; (2) enhanced outreach and access to debt financing by major financial institutions, (3) investments in institutions specializing in minority and small business financing, (4) cash and in-kind assistance to programs that train future minority media owners; (5) creation of a business planning center that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing, and pursue acquisitions; (6) executive loans, and engineers on loan, to minority owned companies and applicants; (7) enhanced access to broadcast transactions through sellers undertaking early solicitations of qualified minority new entrants and affording them the same opportunities to perform early due diligence as the sellers afford to established non-minority owned companies; (8) nondiscrimination provisions in advertising sales contracts; (9) incubation and mentoring of future minority owners; (10) enactment of tax deferral legislation designed to foster minority ownership, (11) examination of how to promote minority ownership as an integral part of all FCC general media rulemaking proceedings; and (12) ongoing longitudinal research on minority ownership trends, conducted by the FCC, NTIA, or both[77], (13) sales to certain minority or small businesses as alternatives to divestitures.

50 These comments contain many creative proposals to advance minority and female ownership. Clearly, a more thorough exploration of these issues, which will allow us to craft specifically tailored rules that will withstand judicial scrutiny, is warranted [78] Therefore, we will issue a Notice of Proposed Rulemaking to address these issues and incorporate comments on these issues received in this proceeding into that proceeding.

51 We see significant immediate merit in MMTC's proposal regarding the transfer of media

[72] NABOB Comments at 3-4, 17-25, NABOB Reply Comments at i-ii, 2-5, 9-11.

[73] IPI Comments at 58.

[74] AWRT Comments at 5-7

[75] UCC Comments at 17-19. UCC also asks that we reject NAB's proposal for a more relaxed television duopoly rule waiver standard, arguing that more easily-obtained waivers would undermine opportunities for new market entrants, including women and minorities. UCC Reply Comments at 23-25.

[76] MMTC Nov. 5, 2002 Comments at Tab 10, "Twelve Minority Ownership Solutions."

[77] *Id*

[78] *See Adarand Constructors Inc v Pena*, 515 U.S. 200, 227 (1995) (holding that all racial classifications imposed by a governmental agency must be analyzed by reviewing courts under strict scrutiny, and are constitutional "only if they are narrowly tailored measures that further compelling governmental interests").

properties that collectively exceed our radio ownership cap MMTC recommends that the Commission generally forbid the wholesale transfer of media outlets that exceed our ownership rules except where the purchaser qualifies as a "socially and economically disadvantaged business (SDB) "[79] As discussed in the Grandfathering and Transition Procedures, Section VI(D) *infra*, we agree with MMTC that a limited exception to a "no transfer" policy for above-cap combinations would serve the public interest. We agree with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities, which we define below, outweigh the potential harms of allowing the above-cap combination to remain intact. Greater participation in communications markets by small businesses, including those owned by minorities and women, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.

52. In addition, MMTC proposes that we adopt an "equal transactional opportunity" rule similar in some respects to our EEO requirements.[80] While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, is contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.[81]

B. Competition

53. In this section, we define our objectives with respect to media competition and we address arguments that we should not pursue competition as a public interest objective and instead defer all competition concerns to the antitrust authorities, *i e.*, the Department of Justice or the Federal Trade Commission [82]

54 Since the beginning of the federal government's regulation of broadcast spectrum, it has been a basic tenet of the communications policy that "there be competition in the radio broadcasting industry."[83] For that reason, the Communications Act prohibits us from "grant[ing] a monopoly in the

[79] MMTC Comments at 107 *See also* NAB Reply Comments at 44 ("Although NAB would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser, whether an SDB or not, NAB does not oppose MMTC's proposal.").

[80] MMTC Comments at 115-120.

[81] We anticipate that the Committee will make recommendations on ways to improve our regulatory programs designed to enhance new entry into broadcasting.

[82] Fox Comments at 57-59; NAB Comments in MM Docket No 01-317 at 28-30, Viacom Comments at 53, 67-69, WVRC Comments in MM Docket No 00-244 at 18; Cox Comments in Docket No. 00-244 at 15-16; Entercom Comments in Docket No. 00-244 at 3.

[83] *Mansfield Journal Co v FCC*, 180 F 2d 28, 33 (1950).

field of broadcasting,"[84] and we are directed instead to serve the "public interest" by "assur[ing] fair opportunity for open competition in the use of broadcasting facilities."[85] From its inception, the Commission has adhered closely to that mandate and sought to ensure that transfers and assignments of station licenses remain consistent with the policy of free competition embodied in the Communications Act.[86]

55 The 1996 Act reinforces the link between competitive markets and the public interest. One of the central aims of the 1996 Act was to introduce competition to communications industries that traditionally have been thought of as "natural monopolies."[87] As the preamble to the 1996 Act makes manifest, Congress believed that greater competition and reduced regulation would "secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[88] Thus, the 1996 Act embodies a philosophy – new to telecommunications, but well-established in broadcasting – that competition is the most effective means of producing the marketplace results that best serve the public interest.

56 We thus see nothing in the 1996 Act that signifies a retreat from our deep and abiding interest in promoting and preserving competition in broadcasting. Indeed, by directing us to determine whether our ownership rules are "necessary in the public interest *as a result of competition*," we believe Congress charged us to implement policies that create opportunities for greater competition – both among broadcasters and between broadcasters and other outlets – that would lessen the need for prescriptive ownership regulations. Regardless of whether we conclude in a particular context that maintaining, modifying, or repealing one of our ownership rules best advances our interest in competition, it is clear that competition is a policy that is intimately tied to our public interest responsibilities and one that we have a statutory obligation to pursue. As recently as last year, the Court of Appeals for the District of Columbia reaffirmed this point when it stated· "[t]o the extent Sinclair maintains that consideration of competition is beyond the proper purview of the Commission, it is simply wrong."[89]

57. We hereby affirm our longstanding commitment to promoting competition by ensuring pro-competitive market structures Consumers receive more choice, lower prices, and more innovative services in competitive markets than they do in markets where one or more firms exercises market

[84] *FCC v Sanders Bros Radio Station*, 309 U S 470, 474-76 (1940)

[85] *United States v Storer Broadcasting Co*, 351 U S 192, 203 (1956), *see also FCC v. Pottsville Broadcasting Co*, 309 U S 134, 137 (1940) ("Congress moved under the spur of a widespread fear that in absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field ")

[86] *See Genesee Radio Corp*, 5 F C.C. 183, 186-87 (1938).

[87] *See Sanders Bros*, 309 U.S. at 474-75.

[88] 1996 Act Preamble, 110 Stat 56; *see also* Joint Explanatory Statement at 113 (1996 Act "provide[s] for a procompetitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition")

[89] *Sinclair*, 284 F 3d 148 (citing *NCCB*, 436 U S. at 795)

power.[90] These benefits of competition can be achieved when regulators accurately identify market structures that will permit vigorous competition.

58 In limiting broadcast ownership to promote economic competition, we also take major strides toward protecting and promoting our separate policy goal of protecting competition in the marketplace of ideas -- viewpoint diversity. This is because antitrust theory has at its core an objective that is similar to this agency's goal of promoting viewpoint diversity: both public policy objectives share a common belief that the aggregation of inordinate market share by a small number of firms will tend to harm public welfare, both are built on the notion that highly concentrated markets tilt the proper balance of power too far in favor of some firms and against those who would challenge them.[91]

59 In this proceeding, Fox argues that because economic markets are narrower than idea markets, we should eliminate our broadcast ownership rules. Fox contends that antitrust enforcement will prevent mergers on economic competition grounds before markets would become unreasonably concentrated on diversity grounds.[92] Although our own analysis of the record does not support Fox's view in all cases, we take this opportunity to underscore that in many markets, the record evidence does show that our competition-based ownership limits (*i.e.* the caps on local radio and local television ownership) more than adequately protect viewpoint diversity in a large number of markets despite being based on standard antitrust principles. For example, as explained below, we adopt rules allowing television combinations subject to the proviso that one company may not combine two of the top four-rated stations in a local market [93] This rule is grounded in economic competition analysis, but it also has the effect of separating ownership of those local television stations most likely to be significant contributors to local viewpoint diversity through the production of local news and public affairs programming. Nonetheless, contrary to Fox's contention, our analysis of the record leads us to conclude that preserving competitive markets will not, in all cases, adequately protect viewpoint diversity. As discussed in the Cross-Media Limits section below, we find that certain combinations in smaller markets would unreasonably threaten viewpoint diversity even if they would not, under standard antitrust theory, result in competitive harms

60 *Measurement of competition.* Historically we have relied on assessments of competition in advertising markets as a proxy for consumer welfare in media markets.[94] We found that competition

[90] See F.M Scherer and David Ross, INDUS. MKT STRUCTURE AND ECON PERFORMANCE (3rd Ed) at 19-28 (Houghton Mifflin Co , Boston MA, 1990)

[91] Because of this common theoretical underpinning between competition policy and viewpoint diversity policy, some have advocated in favor of expanding antitrust regulation to include protecting competition in the marketplace of ideas *See* Maurice E. Stucke and Allen P. Grunes, *Antitrust and the Marketplace of Ideas*, 69 ANTITRUST L J 249 (2001)

[92] Fox Comments at 26-29.

[93] *See* Local TV Ownership Rule, Section VI(A), *infra*.

[94] *Amendment to § 73 3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and TV Broadcast Stations*, 100 F.C.C.2d 17 (1984) ("*1984 Multiple Ownership Report and Order*"); *Revision of Radio Rules and Policies*, 7 FCC Rcd 6387 (1992) ("*1992 Radio Ownership Order*"); *Review of the Commission's Regulations Governing TV Broadcasting, TV Satellite Stations Review of Policy & Rules*, 14 FCC Rcd 12903 (1999) ("Local TV Ownership Report and Order"); *clarified in Memorandum Opinion & Second Order on Reconsideration*, 16 FCC Rcd 1067 (2001)("Local TV Ownership Recon Order").

among broadcast outlets was likely to benefit consumers by making available programming that meets the programming preferences of consumers. In our 2001 decision modifying the dual network rule, however, we suggested that the changing nature of electronic media markets – particularly the direct payment by a majority of consumers for delivered video programming – might cause us to revisit our traditional focus on advertising markets as the appropriate means of measuring competition in connection with our broadcast ownership limits.[95]

61. Although advertising markets continue to be a reasonable basis on which to evaluate competition among media companies, in this *Order* we will rely more heavily on other metrics. We do so because changing business models affect the nature of competition in the relevant economic markets. In the past, television stations generally faced economic competition from other television stations, and radio stations from other radio stations. The television and radio markets relied principally on advertising revenues to fund their businesses. Today, the financial models for the television and radio businesses are changing. A large portion of the revenue in the television business now consists of direct payments by consumers. Eighty-five percent of American households subscribe to television programming supplied by multichannel video programming service from delivery systems (MVPDs) – cable television and direct broadcast satellite -- to watch television.[96] MVPDs, in turn, typically pay non-broadcast programming networks, such as ESPN, CNN, and MTV, for the right to deliver those channels to subscribers. The payments received by program networks represent one source of their revenue Non-broadcast programming networks also however, sell advertising time on their channels. Thus, in competing with broadcasters, non-broadcast programming networks typically have two income streams to develop or purchase programming. Broadcasters continue to rely overwhelmingly on advertising revenue.[97]

62. We also find that the subscription model of cable television and DBS offer an additional competitive advantage over advertising-only broadcast television stations. Broadcast stations are limited in their ability to maximize consumer welfare because broadcast programming is a public good.[98] Local television stations have thus far been unable to capture and profit from viewers' relative intensity of preference for certain programming That is, the advertising-based business model for broadcast stations does not differentiate between programming that viewers value highly and programming that is viewed, but valued less.[99] As long as viewers are watching a broadcast show, they are "sold" to advertisers at a

[95] *Amendment of Section 73 658(g) of the Commission's Rules – The Dual Network Rule*, 16 FCC Rcd 11114 (2001).

[96] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 26901, 26975 (2002) ("*2002 Video Competition Report*")

[97] For example, the cable industry received $15 5 billion in advertising revenues and $35 5 billion in subscriber payments for video programming in 2001 By contrast, the broadcast television industry received $38.9 billion in advertising revenue (Universal McCann, U S. Advertising Vol. (March 2003)) Kagan World Media, *Broadband Cable Financial Databook 2002* (2002) at 10-11.

[98] A public good is a good whose consumption does not preclude consumption of the same good by other consumers Andrew Mas-Colell, Michel D Whinston, and Jerry R Green, MICROECONOMIC THEORY (Oxford Univ. Press 1995) at 359-64.

[99] For a discussion of the effects of the public good nature of broadcast television and the issues faced by broadcasters and regulators, see Thomas G Krattenmaker and Lucas A. Powe, Jr, REGULATING B'CAST PROGRAMMING (MIT Press and AEI Press, 1995) at 40-43.

particular rate irrespective of the intensity of their preference for that show.

63. The business model of cable television and DBS, by contrast, permits non-broadcast channels to extract direct payments from viewers based partly on viewers' strength of preference for different programming. MVPDs accomplish this by tiering groups of specialized video channels and by selling certain other highly valued channels on a channel-by-channel basis. The vast majority of MVPD viewers purchase the "basic" tier of MVPD service that includes both general interest channels and special interest channels. MVPDs also offer highly desired, niche-oriented, channels as part of separate tiers and certain others as stand-alone premium channels. Viewers that highly value either purchase them as part of a tier of channels or on a stand-alone basis. This ability of non-broadcast channels to charge viewers for their programming, along with selling advertising on that programming, allows certain non-broadcast channels to segment the viewing market through tiered or premium offerings, thereby capturing and profiting from viewers' intensity of preference in a way that broadcast stations, through an advertising-based business model, cannot

64 We agree with broadcasters who contend that the MVPD business model, with two revenue streams, has become a competitive dynamic for which our competitive analysis should account.[100] Therefore, in analyzing markets comprised of both free over-the-air broadcasters as well as subscription delivery systems, we will look to audience share as one metric for assessing the state of competition, which we find to be a more accurate gauge of competition in these circumstances. We will not discard advertising market analysis where appropriate, but we limit its reliance to discrete markets where we believe the foregoing analysis is inapplicable. This includes our analysis of the dual network rule and the national television ownership cap and in determining whether different media platforms should be regarded as economic substitutes For those purposes, we will continue to look to advertising market shares as one consideration, where that is an appropriate gauge of competition, in determining whether opportunities for media properties to earn revenue may be put at risk absent some structural regulation.

65. To the extent we rely on other competitive metrics, we note that the antitrust authorities generally focus their inquiry on price competition, and their primary concern is in ensuring economic efficiency through the operation of a competitive market structure. Although related, the Commission's public interest inquiry has a different focus. As our predecessor, the Federal Radio Commission put it, "[t]he emphasis must be first and foremost on the interest, the convenience, and the necessity of the . . . public, and not on the interest, convenience, or necessity of the individual broadcaster, or the advertiser "[101] Thus, in evaluating our interest in preserving competitive broadcast markets, we will consider the ultimate effect that a diminution in competition would have on the consuming public.

66. There is no serious dispute that, if consumers uniformly paid a subscription fee to all television and radio stations to access programming, we would have an interest in ensuring competition in broadcasting [102] One reason for our interest is that competition works to constrain prices to efficient

[100] Victor B. Miller, Christopher H Ensley, Tracy B. Young, *Television Industry Summit 2002. Leveling the Playing Field, The Case for Deregulation,* Bear Stearns (Jan. 2003) at 51-64, 168-69, 184.

[101] Fed Radio Comm'n, Second Ann Rpt 169-70 (1928) (quoting in *Pottsville Broadcasting*, 309 U.S. at 138 n 2).

[102] *See, e g , Application of EchoStar Communications Corp , General Motors Corp , and Hughes Electronics Corp* (Hearing Designation Order), 17 FCC Rcd 20559, 20603 (2002) (*"EchoStar/DirecTV HDO"*).

levels, making access to programming services more affordable and therefore more available to a greater number of Americans.[103] Here, of course, radio and television programming is a public good, supported by advertising revenues and available without charge to everyone with the proper equipment. But it does not follow from the public good nature of broadcast television and radio that our competition concerns are any less important in this area.

67. Although lower prices are an important benefit of competitive markets, we have repeatedly emphasized that competition also is the wellspring of greater innovation and improvements in the quality of service.[104] Thus, although the public does not pay a subscription fee to receive over-the-air broadcast signals, we continue to have a public interest responsibility, distinct from our diversity and localism goals, to ensure that broadcasting markets remain competitive so that all the benefits of competition – including more innovation and improved service – are made available to the public.

68 Therefore, we conclude that our duty as an agency runs to consumers, not advertisers. In many cases, competitive market structures specifically designed to protect consumers also will protect advertisers, and vice versa. Nonetheless, in setting our local television and local radio ownership caps, we will rely, where possible, on measures other than shares of advertising markets in order to reflect the decreasing relevance of advertising market shares as a barometer of competition.

69 *Innovation.* In the *Notice* we sought comment on whether innovation should be an objective of our broadcast ownership policies.[105] The Information Policy Institute (IPI) contends that we should consider the effects of different market structures on innovation incentives.[106] IPI states that innovation theory premised on the need for scale does not automatically justify relaxed broadcast ownership limits because large firms are most likely to innovate only if they face sufficient competitive pressure With respect to media markets generally, IPI argues that relaxed ownership regulations are unlikely to increase innovation in media markets because, according to IPI, the affected industries are mature.[107] NAB/NASA also implies that innovation is a relevant policy objective in its arguments that the existing national television cap preserves independently-owned groups of affiliates that a proven record of programming and technological innovation.[108]

70 We agree with IPI and NAB/NASA that innovation should be a policy objective of our broadcast ownership regulations Consumers benefit from competitive markets in multiple ways, including lower prices, greater choice of sellers, and innovative products and services. Where a market such as broadcasting is characterized by a significant degree of non-price competition, it may be particularly important for us to focus on how our ownership rules affect innovation incentives. Innovation may be less measurable in the short term than other attributes of media market, such as price, total output, and number of firms in the market, but over longer periods of time, may represent a critical

[103] *See, e g , id* at 20603 ¶ 97. *See also* 47 U.S C § 151

[104] *See, e g , id* at 20559 ¶ 176.

[105] *Notice*, 17 FCC Rcd at 18525-26 ¶ 68.

[106] IPI Comments at 50

[107] *Id* at 52

[108] NAB/NASA Reply Comments at 23-27

driver of consumer welfare

71. The transition from analog to digital services by broadcasters represents a potentially significant enhancement to consumer welfare. Digital transmission of video and audio programming by television and radio stations may facilitate new services for consumers by permitting more efficient bandwidth utilization. With respect to local televisions stations, this additional bandwidth could be used to transmit high-definition programming; to transmit one or more additional program streams; or to deliver entirely new services.[109] NAB/NASA has argued that local television ownership structures are very likely to affect stations' ability to proceed with the ongoing digital transition. NAB contends that the fixed costs associated with digital television equipment upgrades fall disproportionately on stations in smaller markets and that station combinations will speed the transition.[110] In addition, the introduction of digital transmission by radio stations may permit greater competition and innovation in radio markets by facilitating improved signal quality and by permitting stations to deliver data along with audio to users' receivers.

72 In sum, we conclude that the Commission should seek to promote innovation through its broadcast ownership limits Consumer welfare is likely to be enhanced when, all else being equal, the Commission permits broadcast market structures that encourage innovation. We agree with IPI, however, that multiple factors influence the pace of innovation, only one of which is market structure.[111] We will therefore make ownership decisions that promote innovation in media markets based principally on evidence that particular market structures or firm characteristics tend to encourage innovation.

C. Localism

73 In the *Notice*, we sought comment on the extent to which localism should continue to be a policy goal in our regulation of broadcast ownership. We agree with NAB/NASA that localism continues to be an important policy objective. Localism is rooted in Congressional directives to this Commission and has been affirmed as a valid regulatory objective many times by the courts. We hereby reaffirm our commitment to promoting localism in the broadcast media.

74 Federal regulation of broadcasting has historically placed significant emphasis on ensuring that local television and radio stations are responsive to the needs and interests of their local communities. In the Communications Act of 1934, Congress directed the Commission to "make such distribution of licenses, frequencies, hours of operation, and power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[112] In the earliest government regulation of radio, the Commission embraced localism. In the Federal Radio Commission's 1927 Report to Congress, it wrote: "The Commission found it possible to reassign the allocated stations to frequencies which would serve as many communities as possible to ensure those communities had at least one station that would serve as a basis for the development of good broadcasting to all sections of the

[109] *See, e g* , NAB/NASA Comments at 26-27 (23 companies owning television stations formed iBlast to "explore, research, and develop new business relationships and new uses for the digital spectrum")

[110] NAB Comments at 71-72

[111] IPI Comments at 48 ("[T]he relationship of market structure, R&D spending, and technological progress . . . involves a myriad of ill-understood and understudied complex interactions.")

[112] 47 U S C. § 307(b)

country . New York and Chicago stations were not allowed to dominate the situation "[113]

75. When the Commission created the Table of Allotments in 1952 pursuant to the Communications Act, localism was the organizing principle of the plan. In announcing the allotments, the Commission explained that dispersed allotments "protect[] the interests of the public residing in smaller cities and rural areas more adequately than any other system "[114] In the legislative history of the 1996 Act, Congress strongly reaffirmed the importance of localism: "Localism is an expensive value. We believe it is a vitally important value, however [and] should be preserved and enhanced as we reform our laws for the next century."[115]

76. The courts too have long viewed localism as an important public interest objective of broadcast regulation. In *NBC v United States*, the Supreme Court wrote: "Local program service is a vital part of community life A station should be ready, able, and willing to serve the needs of the local community."[116] Last year the D.C. Circuit affirmed the legitimacy of Commission regulation to preserve localism, stating "[T]he public interest has historically embraced diversity (as well as localism) . . and nothing in § 202(h) signals a departure from that historic scope." [117]

77. *Measurement of localism* We remain firmly committed to the policy of promoting localism among broadcast outlets. Today we seek to promote localism to the greatest extent possible through market structures that take advantage of media companies' incentives to serve local communities. In addition, we seek to identify characteristics of those broadcasters that have demonstrated effective service to individual local communities and to encourage their entry into markets currently prohibited by our existing rules

78. To measure localism in broadcasting markets, we will rely on two measures: the selection of programming responsive to local needs and interests, and local news quantity and quality. The Commission decided long ago that local station licensees have a responsibility to air programming that is suited to the tastes and needs of their community and that the station licensee, not a network or any other party, must decide what programming will best serve those needs.[118] Program selection, then, is a means by which local stations respond to local community interests, and we will use it as one measure of localism.

79 A second measure of localism is the quantity and quality of local news and public affairs programming. Commenters have argued that news and public affairs goes to the core of the Commission's

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[113] SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30 (1928) at 8-9.

[114] *Sixth Report and Order*, 17 Fed. Reg 3905 (1952).

[115] H Rep. No 104-104 (1996) at 221

[116] *NBC v United States*, 319 U S. 190, 203 (1943).

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

[118] *See Deregulation of Radio*, 84 F C C 2d 968, 981 (citing *En Banc Programming Inquiry Statement*, 44 F C C. 2303, 2314 (1960))

policy objectives [119] We agree that the airing of local news and public affairs programming by local television stations can serve as a useful measure of a station's effectiveness in serving the needs of its community Our decision to consider local news attributes in our decisions is consistent with our 1984 evaluation of the national television cap. In that decision we analyzed record evidence regarding the amount and quality of local news produced by owners of different-sized television station groups.[120] As discussed below, this measure of service to local markets is relevant to our consideration of both the national television cap and our local broadcast rules

D. Regulatory Certainty

80 After defining our policy goals of diversity, competition and localism, we must determine the particular regulatory framework that would best achieve these goals. In the *Notice* and in the *Local Radio Ownership NPRM* we sought comment on whether to adopt a pure case-by-case analysis or bright line rules [121] Based on the record and our own experience administering structural ownership rules, we conclude that the adoption of bright line rules, on balance, continues to play a valuable role in implementing the Commission's goals We have also decided to retain our existing framework of targeted, outlet-specific, multiple ownership rules, that cover the various media and perceived areas of potential competition and diversity concerns rather than adopting a single rule to cover all media.[122]

81 The Commission is required to examine any proposed transfer of a broadcast license and must affirmatively find that the transfer is in the public interest. In the context of broadcast transactions, the Commission's analysis is simplified by the extensive body of structural rules we adopt herein. Thus, the extensive rulemaking proceeding used to develop these broadcast ownership rules takes full account of the Commission's public policy goals of diversity, competition, and localism. These rules squarely embody the Commission's public interest goals of limiting the effect of market power and promoting localism and viewpoint diversity.

82 As we stated in the *Notice*, bright line rules and case-by-case analysis both offer different advantages and disadvantages associated with predictability of outcome, administrative costs, flexibility in administering our rules, and application processing time. Many parties favor bright line rules and oppose case-by case analysis because bright line rules provide certainty to outcomes, conserve resources, reduce administrative delays, lower transaction costs, increase transparency of our process, and ensure consistency

[119] CFA Comments at 29 ("The primary purpose of ownership rules should be to ensure a diverse, antagonistic marketplace for news and information – not entertainment.").

[120] *1984 Multiple Ownership Report and Order*, 100 F.C C 2d at 37-38

[121] *Notice*, 17 FCC Rcd at 18538-39 ¶¶ 106-111, *Local Radio Ownership NPRM*, 16 FCC Rcd at 19886-87 ¶¶ 57-60.

[122] In the *Notice*, we asked whether we should adopt a single rule, instead of outlet-specific rules, in order to assure consistency We also asked whether such a rule could be focused on promoting viewpoint diversity and whether it might apply to cable systems. 17 FCC Rcd at 18538-39. CWA proposes that if we relax our local TV ownership rules, we should adopt a single, unified rule to cover all local media markets CWA Comments at 46-48 Our new Cross Media Limits are targeted to viewpoint diversity, but, as discussed below, it does not encompass cable systems.

in decisions [123] We believe that these factors weigh in favor of the bright line rule approach. Commenters who support adopting case-by-case instead of structural rules in the context of the local television ownership rule and radio/television ownership rule, argue that blind adherence to structural limits would not adequately reflect the true nature of a market, and that competition in local markets would be sufficiently safeguarded by case-by-case analysis.[124] As discussed below, we have taken into consideration the nature of markets and our responsibility to ensuring a competitive marketplace in designing the structural rules

83. Other commenters oppose case-by-case analysis, particularly in the context of radio transactions These commenters argue that the current case-by-case approach adopted in the interim policy has brought more uncertainty, administrative delays, greater transaction costs to the application process, and has invited abuse by competitors.[125] Moreover, UCC claims that the current approach has failed to protect against unreasonable consolidation in the radio industry [126] A case-by-case approach also makes business planning difficult on the industry side and is resource-intensive for the Commission, raising regulatory costs. We agree with the majority of commenters that favor bright line rules. The bright line rules we establish in this *Order* will protect diversity, competition, and localism while providing greater regulatory certainty for the affected companies than would a case-by-case review. Any benefit to precision of a case-by-case review is outweighed, in our view, by the harm caused by a lack of regulatory certainty to the affected firms and to the capital markets that fund the growth and innovation in the media industry. Companies seeking to enter or exit the media market or seeking to grow larger or smaller will all benefit from clear rules in making business plans and investment decisions. Clear structural rules permit planning of financial transactions, ease application processing, and minimize regulatory costs.[127]

84. We recognize that bright line rules preclude a certain amount of flexibility. A case-by-case analysis would allow the Commission to reach decisions by taking into account particular circumstances of every case. For instance, bright line rules may be over-inclusive, by preventing transactions that would result in increased efficiencies, or under-inclusive, by allowing transactions that would raise concerns, if the circumstances of the case were reviewed. However, our experience with the current case-by-case analysis used for radio transactions leads us to believe that this approach in the area of media ownership is fraught with administrative problems Currently, any radio transaction that proposes a radio station combination that would provide one station group with a 50% share of the

[123] NAB Comments at 48-49, Bonneville Comments at 8; NAB Comments in MM Docket No 01-317 at 47, 48-49, Eure Comments in MM Docket No 01-317 at 5, HBC Comments in MM Docket No. 01-317 at 13; MMTC Comments in MM Docket No 01-317 at 49

[124] Buckley Comments at 1, 5, Paxson Comments at 29-30, Pappas Comments at 14-15.

[125] NAB Comments in MM Docket No 01-317 at 47; NABC Comments in MM Docket No. 01-317 at 17; UCC Comments in MM Docket No. 01-317 at 24, Clear Channel Comments in MM Docket No. 01-317 at 25, n 81; Cumulus Comments in MM Docket No. 01-317 at 23; Idaho Wireless Comments in MM Docket No. 01-317 at 7; Mapleton Comments in MM Docket No 01-317 at 7; MBC Comments in MM Docket No. 01-317 at 10.

[126] UCC Comments in MM Docket No 01-317 at 20

[127] *Cf. Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests; Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry; Reexamination of the Commission's Cross-Interest Policy*, 14 FCC Rcd 12559, 12581-82 ¶¶ 43-44 (1999) ("*1999 Attribution Report and Order*") *on recon*, 16 FCC Rcd 1097 (2001)

advertising revenue in the local radio market, or the two station groups with a 70% advertising revenue, undergoes additional public interest analysis. For each of these transactions, the staff conducts an individual competitive analysis and may request additional information from the parties if it is necessary in order to reach a decision on a particular transaction. The administrative time and resources required for such an undertaking are considerable. Moreover, such an approach hinders business planning and industry investment for all radio firms falling within the ambit of our case-by-case review. We are not persuaded that this approach is necessary in order to administer our ownership rules effectively. Indeed, we eliminated the cross-interest policy in 1999, having held that the regulatory costs and chilling effects of that case-by-case approach to broadcast transactions, overlaid on top of our structural rules, and the benefits of applying a clear and discernable standard outweighed any risks of potential abuses in eliminating the policy.[128]

85. The bright line rules adopted today have been developed based upon our review of the media marketplace and our assessment of what ownership limits are necessary in order to promote our goals in applying ownership rules. We are confident that the modified rules will reduce the chances of precluding transactions that are in the public interest or, alternatively, permitting transactions that are not in the public interest [129] In addition, we have discretion to review particular cases, and we are obligated to give a hard look both to waiver requests,[130] where a bright line ownership limit would proscribe a particular transaction, as well as petitions to deny [131]

IV. MODERN MEDIA MARKETPLACE

A. Introduction – The Evolution of Media

86. Today's media marketplace is characterized by abundance. The public is better informed, better connected, and better entertained than they were just a decade ago. Traditional modes of media (e.g., newspapers, television, radio) have greatly evolved since the Commission first adopted media ownership

[128] *Id* at 12609-12611 ¶¶ 112-16

[129] Our decision is not inconsistent with our decision to modify the CMRS Spectrum Cap rule. *See 2000 Biennial Regulatory Review Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668 (2001) There, the Commission moved from prophylactic spectrum limits to a case-by-case approach, finding that in light of the growth of both competition and consumer demand in the CMRS market, spectrum caps were no longer necessary *Id.* at 22693. There, we determined that structural rules were no longer necessary because of the competitive nature of the marketplace, and that the current spectrum caps were interfering with the marketplace's creation of incentives regarding choice of technology. Our basis for choosing to move to a case-by-case analysis in that context, simply does not apply in the context of broadcast rules.

[130] *WAIT Radio v FCC*, 418 F.2d 1153, 1159 (D C Cir 1969) (setting out criteria for waivers of Commission rules), *See also* 47 C F R. § 1.3

[131] *See* 47 U.S C § 309(d) A petition must contain specific allegations of fact sufficient to show that (1) the petitioner is a party in interest, (2) a grant of the application would be prima facie inconsistent with the public interest, and (3) a substantial and material question is presented to be determined by the Commission. *Sanders Bros*, 309 U S. at 477; *Maumee Valley Broadcasting, Inc* , 12 FCC Rcd 3487, 3488-89 (1997), *as modified by, CHET-5 Broadcasting, L.P.*, 14 FCC Rcd 13041 (1999); *Citizens for Jazz on WRVR, Inc. v FCC*, 775 F 2d 392, 394-95 (D C Cir 1985); *Mobile Communications Corp of America v. FCC*, 77 F.3d 1399, 1409-10 (D C. Cir. 1996)

rules in 1941,[132] and new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history Today we can access news, information, and entertainment in many enhanced and non-traditional ways via: cable and satellite television, digital transmission, personal and portable recording and playback devices, handheld wireless devices, and perhaps the most extraordinary communications development, the Internet. In short, the number of outlets for national and local news, information, and entertainment is large and growing.[133]

87. Such abundance in the media was not always available, however. The modern media marketplace is dramatically different from the media world of sixty years ago.[134] In fact, the modern media marketplace is far different than just a decade ago. Ten years ago the world wide web was still nascent and was used primarily by technology enthusiasts. "Digital" was a term largely used to describe the abstract world of zeros and ones; DVD players had not yet hit the commercial market; and satellite television was available only via analog C-Band dishes that were almost eight feet in diameter. Cable television was also an analog transmission, resulting in 87% of cable systems offering fewer than 53 channels.[135] Video programming was available 24-hours a day, seven days a week, but there were far fewer choices for news and entertainment than there are today.[136]

88 This digital migration is having an effect on today's youth in a way that television had on the "baby boom" generation of the early fifties, and radio had on the youth of the Depression. Today's high school seniors are the first generation of Americans to have grown up with this extraordinary level of abundance in today's media marketplace. At home and at school, the majority of teens have access to cable television and high speed Internet access.[137] At home, many teens have access to as many as 100 to 200 channels of video programming.[138] The current generation of teens has always lived with 24-hour

[132] In 1941, based on the findings of the Chain Broadcasting Report, the Commission promulgated the first of its broadcast ownership rules restricting the development and commercial business practices of the broadcast radio networks The Chain Broadcasting Report found that the radio networks had behaved in a manner that was contrary to the competition and diversity goals defined by the Federal Radio Commission. *Report on Chain Broadcasting, Commission Order No 37*, Docket No 5060 (May 1941)

[133] *See e g*, NAB Comments at 10; *see* Appendix B

[134] Fox Comments at 1

[135] *Implementation of Section 19 of the 1992 Cable Act (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming)*, 9 FCC Rcd 7442, 7567 (1994) ("*1994 Video Competition Report*") (23% of cable systems offered fewer than 30 channels of programming)

[136] Today, there are more than 308 non-broadcast networks available for carriage by cable systems, whereas in 1993, there were only 106 non-broadcast programming services available for carriage *See 2002 Video Competition Report*, 17 FCC Rcd at 26907, *1994 Video Competition Report*, 9 FCC Rcd at 7522, 7589-92

[137] Approximately 81,000 public and private schools are served by cable in the classroom, reaching 78% of K-12 students In 2001, approximately 99% of public schools had Internet access, and about 85% of public schools had high-speed Internet access. Cable in the Classroom, *Overview*, at http://www.ciconline.com/PressRoom/PressKit/TheOrganization/overview (visited May 5, 2003), National Center for Education Statistics, *Internet Access in U.S. Public Schools and Classrooms. 1994-2001*, at http //nces.ed gov/pubs2002/internet/3.asp (visited May 5, 2003).

[138] DBS provides as many as 200 channels of video programming. Many cable systems also currently offer a digital tier of service which, in many cases, provides subscribers with a total of more than 100 channels of video (continued)

national and regional news networks, local television stations, and cable news channels,[139] and thus have come to expect immediate and continuous access to news, information, and entertainment Their world has never been different.

89. Section 202(h) requires the Commission to consider whether any of its broadcast ownership rules are "necessary in the public interest as *a result of competition*." This *Order* confronts that challenge by determining the appropriate regulatory framework for broadcast ownership in a world characterized not by information scarcity, but by media abundance. This section tracks the history of the modern media marketplace to illustrate the rapid evolution of media outlets over the past sixty years.

B. History of the Modern Media Marketplace

1. The Age of Radio

90 At the time commercial broadcast radio was introduced during the early 1920s, newspapers were the primary source of news and information, with circulation reaching nearly 28 million readers [140] The advent of commercial broadcast radio offered the public a far more accessible and immediate mode of receiving information and entertainment than print. It also gave the public additional choices and additional viewpoints.[141] Initially, the entertainment community was fearful of competition from this new medium, but they soon embraced radio for the new opportunities it offered.[142]

91. On November 2, 1920, KDKA, the first licensed commercial radio station, reported the results of the Harding-Cox presidential race.[143] This broadcast marked a significant turning point in the timely dissemination of news; people with radio could hear the results of the election before they could read about it in the newspapers.

(Continued from previous page)
programming OPP Working Paper No 37, Broadcast Television Survivor in a Sea of Competition by Jonathan Levy, Marcelino Ford-Livene, and Anne Levine (Sept. 2002) at 43, 48, 54 ("OPP Working Paper No. 37")

[139] CST Comments at 4.

[140] *Historical Statistics of the United States. Colonial Times to 1957, A Statistical Abstract* Supplement, US Department of Commerce, Bureau of the Census at R 169-72.

[141] Alfred D. Chandler, Jr and James W. Cortada, Eds., A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE US FROM COLONIAL TIMES TO THE PRESENT (Oxford University Press, New York, NY, 2000) at 149.

[142] Vaudeville theatre owners and booking agents discouraged their acts from performing over radio, fearing competition from the new medium Similarly, the musical community feared that frequent airplay of songs would render the songs valueless in the sales market Phyllis Stark, *A History of Radio Broadcasting*, BILLBOARD (Nov. 1, 1994) at http://www.kcmetro.cc mo us/pennvalley/biology/lewis/Crosby/billboard.htm (visited Jan. 27, 2003).

[143] Reed Bunzel, B'CASTING (Dec 9, 1991, Supp) at 27; *People and Discoveries. KDKA Begins to Broadcast*, WGHB Educational Foundation, at http://www pbs.org/wgbh/aso/databank/ entries/dt20ra html (visited Jan.28, 2003), Elizabeth McLeod, *Which Was the First U.S. Radio Station?*, (July 8, 1998) at http //members/aol/com/jeff99500/first html (visited Feb. 3, 2003). Rich Brown, B'CASTING (Dec 9, 1991, Supp) at 6, Jeff Miller, *A Chronology of AM Radio Broadcasting Part 1. 1900-1922* (Nov 11, 2002) at http //members/aol/com/jeff560/chrono1 html (visited Jan 31, 2003).

92 *Although the initial audience for commercial radio was small, there continued to be* significant advances in the early years. [144] On August 5, 1921, a major league baseball game was broadcast, providing the first sports broadcast for a mass audience [145] A year later, Warren G. Harding became the first President to have his voice broadcast by radio.[146] Also that year, the first radio advertisement was aired in New York City [147] Originally, radio broadcasts were operated by those wishing to promote their own businesses and by radio manufacturers as a means to promote and sell radios themselves. As relevant content grew, so did acceptance of radio by the public and by advertisers, eventually leading to advertising-financed operations.[148] By 1926, just six years after the first official commercial broadcasts, there were 528 stations and 5.7 million radio sets, generating a weekly radio audience of 23 million listeners.[149]

93. In only a decade, radio became important in the daily lives of Americans. By 1931, there were more than 600 radio stations and 12 million radio sets.[150] Unlike today's targeted, niche programming, however, a typical radio station's programming in the early 1930's was largely "variety" format, including a small amount of many different types of programming.[151] Notable and newsworthy events were, of course, the exception to the variety format. In 1932, for example, several New York area radio stations provided continuous coverage of the Lindbergh kidnapping, the first such reporting of its time [152] The following year, President Roosevelt began delivering his now famous "Fireside Chats." The first of Roosevelt's thirty Fireside Chats occurred on Sunday, March 12, 1933, the nadir of the Great Depression. Those who listened to Roosevelt's broadcast on March 12th heard the President deliver a reassuring message in a calm voice, an impossible conveyance for print media [153] Roosevelt's voice brought hope to many Americans, who were at the time in need of a direct, personal message from their president Radio also provided Americans with levity and diversion during the economic hard times of the

[144] A year after the first licensed commercial broadcast, there were only 100,000 homes with radio, representing only 0.2% of the population SCHRODERS INT'L MEDIA AND ENT. RPT 2000 (Schroders & Co., 2000) at 257 ("SCHRODERS MEDIA REPORT 2000")

[145] Miller, *supra* note 146 (citing, Joseph Narhan Kane, Steven Anzovin, and Janet Podell, FAMOUS FIRST FACTS (HW Wilson Company, 1998); Bunzel, *supra* note 146

[146] Miller, *supra*, (citing Kane, Anzovin, and Podell, *supra*).

[147] SCHRODERS MEDIA REPORT 2000, *supra* note 147 at 257

[148] *Id*

[149] Bunzel, *supra* note 146 at 27

[150] Brown, *supra* note 146 at 6

[151] Programming was made up of about 63 percent music, 21 percent educational, 12 percent literature, three percent religion, and one percent "novelties " Stark, *supra* note 145.

[152] Brown, *supra* note 146 at 10

[153] Robert A Wilson and Stanley Marcus, *American Greats* (Public Affairs Press) at www kevinbaker.info/e_ag_fr fc html (visited Jan 24, 2003)

Depression Shows like Amos and Andy (1928-1960), Rin-Tin-Tin (1930-1955) and Little Orphan Annie (1931-1942) provided accessible entertainment to a mass audience.[154]

94 Much the same way Roosevelt's direct messages provided instant reassurance during the Depression, contemporaneous broadcasts and on-location reporting provided Americans with a new sense of connectedness and authenticity. Direct reports allowed the listening public to hear events for themselves as they unfolded, as opposed to their waiting for the newspapers to provide written, second-hand accounts The on-location radio broadcast of the explosion of the zeppelin Hindenberg in 1937, was the first coverage of its kind [155] Similarly, Americans were notified instantly of the Japanese attack on Pearl Harbor via "breaking news bulletins."[156] But it was President Roosevelt's address to the nation, broadcast on December 9, 1941, the day after war was declared, that attained the largest single audience in radio history to date – an estimated 90 million listeners.[157] During World War II, radio proved a vital asset in the dissemination of news and public-service messages, and it boosted the morale of those remaining on the home-front.

2. The Introduction of Television

95 Although General Electric ("GE") began regular television broadcasting from a station in Schenectady, New York, in 1928, it was not until 1941 that the first commercial television station was introduced.[158] By 1945 there were still fewer than 7,000 television sets in the U.S. and only nine stations on the air: three in New York, two in Chicago and Los Angeles, and one in Philadelphia and Schenectady. By 1947, television had begun to gain popular momentum The children's series Howdy Doody premiered that year as a one-hour Saturday program. Howdy Doody was significant because of its focus on programming for children, marking the first generation of Americans to be raised with television programming [159] Meet the Press, the first network television news series, also debuted in 1947.[160] Meet the Press is still aired today and remains the longest running series of any kind on network television.[161] In addition to new programming, many radio stars, like George Burns and Gracie Allen, began to move their

[154] Louis V Genco, *Old-Time Radio. The Golden Years, The Original Old Time Radio WWW* Pages (2003) at http.//www.old-time com/golden_age/index.html (visited Jan 31, 2003).

[155] A Chicago recording team on a routine assignment recorded the Hindenberg explosion. Because of the event, NBC broke its rigid programming rules and put it on the air Brown, *supra* note 146 at 10.

[156] James F Widner, *The Bombing of Pearl Harbor* (2000) at http.//www/otr com/r-a-i-new_pearl.html (visited Jan 31, 2003)

[157] Brown, *supra* note 146 at 11. Between 1981 and 1998, the number of listeners in the average quarter-hour was approximately 24,000 listeners, compared with the estimated 90 million listeners who tuned in to hear Roosevelt's speech SCHRODERS MEDIA REPORT 2000, *supra* note 147 at 256.

[158] Steven E. Schoenherr, *History of Television* (Dept. of History: U. of San Diego) at http://history.acusd.edu/gen/recording/television1.html (visited Jan 27, 2003).

[159] Nielsen Media Research, 2000 RPT ON TV: THE FIRST FIFTY YEARS (2000) at 13 ("THE FIRST FIFTY YEARS").

[160] *Id.*

[161] *Id.*

acts to television in the late 1940's. With World War II over, and the Depression behind them, Americans began to accept television as a cogent means of receiving information and entertainment.

96. It was during the 1950's, that television first became integrated into the daily lives of Americans. In 1951, just ten years after television's introduction to the public, there were more than 108 stations on the air and more than 15 million households with television sets.[162] Additional validation of the still-new technology was evidenced by the mass exodus of advertisers from radio to television.[163] Furthermore, the production of popular programming escalated during the 1950's In 1951, CBS broadcast the first color television program, and I Love Lucy, one of television's first filmed situation-comedies, debuted, remaining one of the most well-known entertainment programs in television history. In 1952, the Today Show debuted.[164] It was the first, and remains the longest running early-morning network show to date.

3. The Multimedia Landscape I – 1960's

97 By 1960, a multi-media landscape began to form, though media at that time was still dominated by broadcast radio and television. Forty years after the introduction of commercial broadcast radio, and 19 years after the introduction of commercial broadcast television, there were 4,086 radio stations and 573 television stations. [165] Approximately 45 million homes had a television in 1960, and about six million of those had more than one television.[166] Relatively few markets had cable systems in 1960, and nationwide there were only about 750,000 cable subscribers.[167] There were approximately 1,700 daily newspapers in 1960 with a total circulation of about 58 million readers.[168]

98 As the chart below reflects, the number of outlets per market[169] in 1960 varied largely by size of the market. The smallest markets had few choices, while large markets had comparatively more outlets for news, information, and entertainment

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[162] *Stations on the Air 1946-65*, TV FACTBOOK (1965 Ed) (Warren Publishing, 1965) at 45-a; *Statistical Analysis, 1946-64. The Television Industry*, TV FACTBOOK NO 35 (Warren Publishing, 1965) at 44-a.

[163] *The History of Film & Television* (High-Tech Productions) at http://www.high-techproductions.com/historyoftelevision htm (visited Jan. 27, 2003) Variety Magazine describes the exodus of advertisers from Radio to television as "the greatest exhibition of mass hysteria in biz annals " *Id*

[164] THE FIRST FIFTY YEARS, *supra* note 162 at 13.

[165] B'CASTING & CABLE YEARBOOK 2000 (R R Bowker, 2000) at B-250, D-718.

[166] *Statistical Analysis*, TV FACTBOOK NO 47 (1987 Ed.) at 67-a; *1946-64: The Television Industry, supra* note 165 at 44-a

[167] MOWG Study No 1, A Comparison of Media Outlets and Owners for Ten Selected Radio Markets by Scott Roberts, Jane Frenette, and Dione Stearns (Sept. 2002) at Table 2 ("MOWG Study No 1"), Kagan World Media, CABLE TV INVESTOR (May 24, 2002) at 8.

[168] *Historical Statistics of the United States Colonial Times to 1957, supra* note 143 at R 169-72.

[169] This study compared the availability and ownership of media in ten different radio markets. The radio market represents a core geographic area where most consumers reside. Virtually all media is available from the (continued...)

Selected Media Outlet Counts for Ten Radio Markets – 1960

Radio Market	Radio Mkt Rank	Radio Total Stations	Radio Total owners	TV Total station s	TV Total owners	Newspapers daily	Newspapers owners
New York NY	1	74	52	7	7	8	8
Kansas City MO	29	18	15	3	3	1	1
Birmingham AL	57	22	19	4	3	2	1
Little Rock AR	85	12	12	3	3	2	2
Lancaster PA	113	7	5	5	5	2	1
Burlington VT/ Plattsburgh NY	141	10	9	2	2	2	2
Myrtle Beach SC	169	4	4	1	1	1	1
Terre Haute IN	197	9	7	1	1	2	1
Charlottesville VA	225	7	4	0	0	1	1
Altoona PA	253	6	5	3	3	1	1

Source MOWG Study No. 1, selected information from Tables 1, 2, and 3.

99. An informal analysis of the news and public interest programming available to the public over television in 1960,[170] revealed that in selected sample markets, local news programming in 1960 was limited to approximately one or two hours per-station, per-day (or a total of three to five hours of local news programming produced daily by all television stations combined in a given market).[171] National news programming in 1960 was in most cases limited to anywhere from five minutes per-station, per-day, to one hour per-station, per-day. As a result, in most markets, there was less than one-hour of national news programming broadcast daily by all the stations combined in a given market.[172] Programming

(Continued from previous page)
perspective of these residents MOWG Study No. 1, Executive Summary, n.1. This market definition is not necessarily consistent with the market definition in our rules

[170] In this analysis, Commission staff examined current and historic *TV Guide* magazines to determine the amount of differing types of programming (local news, national news and public interest programming) provided by stations in markets of differing sizes. The study examined the amount of programming available in a sample day in three cities, New York, Little Rock, and Terre Haute, selected from the larger group of ten cities represented in MOWG Study No. 1. The three cities chosen for this particular informal study were each chosen to respectively represent small, medium, and large television markets. Programming schedules for between the hours of 6am and midnight on July 1st of the given year were examined for each city to determine how much of each type of programming was available to consumers in the selected market. ("Three City Study")

[171] *Id* Since consumers can only watch one program at a time, the figures represented in this summary are greater than the actual amount of programming that was potentially available to the average consumer.

[172] *Id.*

characterized as "public interest programming"[173] on average was aired for about two to three hours per-station, per-day (or approximately six to nine hours of public interest programming produced per-day by all stations combined in the markets we reviewed) [174] Faced with this set of facts, FCC Chairman Newt Minow denounced television programming, a "vast wasteland," and urged television broadcasters to program more responsibly.[175] That same day, however, Senator Hubert Humphrey called television "the greatest single achievement in communication that anybody or any area of the world has ever known "[176] As a communication medium, television held great potential, but whether or not television provided a valuable service to the American people was still a point of contention.

4. *Television Evolves*

100. Just a few years later, few could argue with the notion that television had become a vital tool for the timely dissemination of news and information.[177] Between 1960 and 1963, several historical events were broadcast over television, changing the very medium itself and its role in society. On September 26, 1960, the first of four debates between presidential candidates Richard M. Nixon and John F. Kennedy was televised to an audience of more than 28 million homes.[178] Prior presidential debates had only been broadcast over radio. Historians note that those listening to the debate on radio thought Nixon had won, while those viewing the debate on television thought Kennedy had won.[179] The use of television by political candidates, and the subsequent need for them to adopt a "television persona," thus ushered in a new era in American politics and a new era for television as an important medium of communications.

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[173] Public Interest Programming is defined for these purposes as programming of cultural, civic, children's, family, public affairs and educational interest. *Id*

[174] *Id*

[175] On May 9, 1961, FCC Chairman Newton N. Minow said before a meeting of television executives "I invite each of you to sit down in front of your own television set when your station goes on the air and stay there for the day I can assure you that what you will observe is a vast wasteland." Minow went on to say that: "It is not enough to cater to the nation's whims; you must also serve the nation's needs " *Speeches*, The History Channel Com at http://www.historychannel.com/cgi-bin/frameit cgi?p=http%3A//www historychannel.com/speeches/archive/ speech_194.html (visited Apr. 23, 2003).

[176] *Media Literacy Timeline of Broadcast Television*, University of California at Santa Barbara at http //www uweb.ucsb edu/~rena/ttv.html (visited Apr. 23, 2003). In an article run in THE NEW YORK TIMES MAGAZINE in 1966 industry analysts contended that "TV is not an art form or a cultural channel; it is an advertising medium ..it seems a bit churlish of people who watch television to complain that their shows are lousy They are not supposed to be any good They are supposed to make money." *Id* This perspective is still prevalent today. Bob Thompson, *Lust-See TV*, THE NEW YORK TIMES MAGAZINE (Jan. 26, 2003) at W13.

[177] Today, "television dominates in political news and political advertising, provides breaking news, and conveys the immediacy and emotional impact of its visual images." AFL-CIO Comments at 35

[178] THE FIRST FIFTY YEARS, *supra* note 162 at 30.

[179] John F. Kennedy's composed disposition and visual charm contrasted sharply on camera with a seemingly nervous and shifty-eyed Richard Nixon Steve McClellan and John Eggerton, *Getting the Picture· TV Takes The Stage*, B'CASTING (Dec 9, 1001) at 33.

101. In 1963, television provided live coverage of Martin Luther King Jr.'s "I Have a Dream" speech "[180] Dr. King's speech was not the first act of the civil rights movement, but its broadcast on national television provided activists nationwide the information and the inspiration on which to mobilize America into one of the most turbulent and progressive eras in its history. Later that year, television unified Americans in mourning when word of President Kennedy's assassination was announced in a breaking news bulletin at 1:40pm EST, November 22, 1963. An estimated 180 million Americans watched their television sets almost continuously for four days, including the reporters themselves, who in many cases knew no more than the viewers.[181] For the first time, the nation was witnessing the same tragic event in unison. Television had become the "window of the world."[182]

5. The Introduction of Non-Broadcast Networks

102. From its beginnings in 1948, through the late 1960's, cable television extended the reach of broadcast television to a few more than one million subscribers [183] These early cable systems (originally known as "community antenna TV systems") were born out of the need to carry television signals into areas where over-the-air reception was either non-existent or of poor quality because of interference In some cases, cable provided limited amounts of locally distributed non-broadcast programming, but it wasn't until the creation of nationally distributed, non-broadcast cable programming that cable became a competitive medium for the dissemination of news, information, and entertainment. Initially, cable operators provided non-broadcast programming for a fee in order to boost revenue. Such programming was called "premium" or "pay-TV " By doing so, however, they increased consumer interest in cable service, thus boosting subscribership. HBO debuted in 1972 as a regional pay-TV network. In 1975, it became the first major national pay-TV network, distributing its service via satellite technology.[184] Satellite distribution gave HBO the ability to reach all cable subscribers nationwide. The launch of HBO over satellite was closely followed by the launch of the pay-TV network Showtime in 1976 By 1977, pay-TV households surpassed the one million subscriber mark, and total cable subscribership reached 12 2 million subscribers [185]

103. Other satellite-distributed networks soon followed HBO and Showtime In 1976, Turner Broadcasting Company launched the first "basic" cable network, TBS by nationally distributing its Atlanta-based broadcast station. Unlike HBO, TBS did not derive its proceeds from subscription fees, but rather all of its revenue derived from the sale of advertising.[186] Following TBS, numerous other basic

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[180] Chandler and Cortada, *supra* note 144 at vi.

[181] *America's Long Vigil*, TV GUIDE (Jan 25, 1964) at http://members.aol com/jeff570/tvgjfk html (visited Jan. 27, 2003)

[182] Ron Cochran of ABC news is reported to have said: "Television had actually become the window of the world so many had hoped it might be one day." *Id*

[183] *Supra* note 170 at 8

[184] Brown, *supra* note 146 at 19-21; Matt Stump and Harry Jessell, *Cable, The First Forty Years*, BROADCASTING (Nov. 21, 1988) at 42. Earlier attempts at pay-TV in certain cable systems in the late fifties were short-lived. *Id*

[185] Brown, *supra*, *see also* CABLE TV INVESTOR, *supra* note 170 at 9.

[186] Years later, TBS received revenues from subscriptions fees charged to cable operators, in addition to the revenue it derived from advertising.

cable networks developed, many providing non-broadcast niche programming; increased competition had resulted in the increased segmentation of the available audience.[187] Unlike the general interest, "variety" programming of the broadcast television networks, many non-broadcast basic cable networks provided highly specialized programming and provided it on a 24-hour basis. Thus, the inclusion of non-broadcast networks in the array of media choices gave the public continuous access to national news, information, and entertainment [e.g., all-sports network, ESPN (1979), children's and family programming network, Nickelodeon (1979), all-news network, CNN (1980), black-entertainment network, BET (1980), and all-weather network, The Weather Channel (1982)].

104 Cable operators subsequently found a market for their services in heavily populated urban areas as well as the predominately small-market rural areas they first served At the time of HBO's initial national distribution in 1975, total cable subscribership nationwide was approximately 9.8 million.[188] Only five years later in 1980, with the addition of numerous pay-TV and basic cable networks, there were more than 19.2 million subscribers, an increase of 95.3 %.[189] But as a competitor to broadcast radio and television, cable's appeal was primarily national in orientation. Although some regional and local non-broadcast networks were distributed during the 1970's and 1980's, the banner offerings of cable systems during that period were nationally-distributed networks

6. The Introduction of Home-Use Satellite Television Technology

105. Home satellite dish ("HSD") technology was developed not long after satellite distribution technologies were introduced. HSD technology is based on the same system used by cable operators to receive network signals from satellites for delivery over their terrestrial cable systems; HSD is essentially the home reception of signals transmitted by satellites operating in the C-Band frequency.[190] First developed in 1976, HSD technology was commercialized around 1979.[191] At its inception, HSD owners used an eight foot dish to receive unscrambled "feed" programming for free, and scrambled programming purchased in a secondary market from licensed program packagers. Owners of HSD systems could gain access to hundreds of channels of programming placed on C-Band satellites by programmers for national cable distribution [192] HSD enhanced consumer access to non-broadcast television programming, much the same way cable served to enhance broadcast television service in its early years.[193]

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[187] *See* CST Comments at 3

[188] Kagan World Media, BROADBAND CABLE FINANCIAL DATABOOK (July 2002) at 7, 10

[189] CABLE TV INVESTOR, *supra* note 170 at 9.

[190] Satellites in the C-Band frequency are also used to transmit programming to cable operators via C-Band receiving dishes at the cable central office or "headend."

[191] *Media Business Corp , History of DTH*, SKY RPT, at http //www.skyreport.com/dth_his.cfm (visited May 19, 2003)

[192] *How Many DTH Households Are Out There Anyway?*, SKY RPT (Oct. 1994) at 1. Much of the decline in HSD subscribership results from owners switching to DBS services Not only are DBS dishes smaller in size and easier to maintain, but they are also less expensive than typical HSD equipment

[193] At its peak of popularity in 1994, there were an estimated 4 5 million active HSD users, roughly half of whom subscribed to one or more programming services

7. The Multimedia Landscape II – 1980's

106. By 1980, traditional media (i e., broadcast radio and television) still dominated mainstream use, but the public did have other options Many could now choose among both broadcast and non-broadcast television programming to access news, information and entertainment. There were more than 9,278 radio stations in 1980, and 1,011 broadcast television stations.[194] Approximately 77.8 million homes had a television in 1980 and about 39.7 million of those had more than one television.[195] There were about 19.2 million cable subscribers and HSD was added to the marketplace in 1980.[196] There were also about 1,745 daily newspapers in 1980 with a total circulation of 62.2 million readers.[197] In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were also approximately 20 nationally-distributed non-broadcast networks available to the public nationwide and an unknown number of regionally distributed non-broadcast networks.[198]

107 The number of media outlets per market varied in 1980 based on market size, as they had in 1960. Overall, however, as the chart below indicates, most markets seemed to have at least doubled the number of television stations and station owners that they had in 1960.[199]

Selected Media Outlet Counts for Ten Radio Markets – 1980

Radio Market	Radio Mkt Rank	Radio Total stations	Radio Total owners	TV Total Stations	TV Total owners	Newspapers daily	Newspapers Owners
New York NY	1	128	100	17	15	8	8
Kansas City MO	29	36	27	6	6	1	1
Birmingham AL	57	35	27	7	6	1	1
Little Rock AR	85	26	23	6	4	2	2
Lancaster PA	113	11	7	7	7	2	1
Burlington VT/ Plattsburgh NY	141	24	19	10	7	2	2
Myrtle Beach SC	169	16	11	4	3	1	1
Terre Haute IN	197	18	13	5	5	2	1
Charlottesville VA	225	10	7	1	1	1	1
Altoona PA	253	12	7	5	5	1	1

[194] Cable and Services Vol 52, TV & CABLE FACTBOOK (1984 ed.) at 17

[195] Nielsen Report on Television (1982) at 3.

[196] CABLE TV INVESTOR *supra* note 168 at 9

[197] NAA, FACTS ABOUT NEWSPAPERS (2002) at 4, 12, 14

[198] *1994 Video Competition Report*, 9 FCC Rcd at 7589-92; *see also 2002 Video Competition Report*, 17 FCC Rcd at 26989-91.

[199] MOWG Study No. 1.

Source: MOWG Study No 1, selected information from Tables 1, 2, and 3.

108 Our informal analysis of the news and public interest programming available to the public via television[200] revealed that, on average, most television stations in the markets we reviewed were airing more local news programming in 1980 than they did in 1960, though some small market stations were airing less local news programming.[201] In addition, in the large market that we studied, New York, there were more television broadcast stations available to the public than there were in 1960, resulting in a greater total amount of local news produced in these markets, on a given day.[202] National news was aired over television broadcast stations for about thirty or forty-five minutes per station per day, an increase over 1960 when many stations aired little or no national news programming.[203] In addition, a non-broadcast television network, CNN, aired national news programming for 24-hours per day, and was available to all those with access to cable or HSD systems, marking a significant shift in viewing habits from the sixties when news and coverage of significant events like the Vietnam War were available only during regularly-scheduled news programming.[204] More broadcast television stations aired public interest programming in 1980 than in 1960, particularly in large and medium-sized markets In addition, there were several new non-broadcast television networks providing public interest programming on a 24-hour basis.[205] In short, the addition of nationally distributed non-broadcast television networks, an increase in the number independent and affiliate broadcast television stations and in the number of hours broadcast per station, resulted in an increase in the news and public interest programming available in markets of all sizes between 1960 and 1980.

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[200] Three City Study, *supra* note 173.

[201] In New York and Little Rock, most television stations aired more hours of local news programming in 1980 than they aired in 1960 Thus, on average, the total number of hours of local news programming aired in a given day was greater than in 1960 In Terre Haute, some television stations aired more hours of local news programming that they aired in 1960, while others aired fewer hours of local news programming than they aired in 1960. Thus, on average, the total number of hours of local news programming aired in Terre Haute on a given day was less than in 1960. Since consumers can only watch one program at a time, the figures represented in this summary of programming available in 1980 are greater than the actual amount of programming that was potentially available to the average consumer, but are relative to the figures in the summary of programming aired in 1960. This does not necessarily hold true for increases resulting from the addition of stations The additional television stations in the market could be airing programming simultaneously with other stations in the market. Thus these figures would not represent a greater number of hours of programming available to a given consumer, but would represent a greater number of voices in a given market.

[202] In New York there were five more television broadcast stations available in 1980 than there were in 1960, each airing as much as one to two hours of local news content daily. In Little Rock and Terre Haute, there were the same number of television stations with local news programming in 1980 as there was in 1960. *Id*

[203] Three City Study.

[204] Brown, supra note 146 at 24; Robert J Thompson, *500 Channels But No Clear Picture of What We Want*, THE WASHINGTON POST (May 23, 2003) at B3.

[205] Among the non-broadcast television networks providing public interest programming were C-SPAN, launched in 1979, Bravo, launched in 1980, The Family Channel launched in 1977; Nickelodeon, launched in 1979, and The Learning Channel, launched in 1980.

8. Competitive Pressure Builds: A Crowded Programming Market

109. The amount of competitive programming available on cable continued to increase during the eighties and into the nineties. CNN was the first non-broadcast news network considered formidable competition to the news provided by the well-established broadcast networks in the 1980s.[206] In addition to providing direct competition, CNN provided consumers access to 24-hour news coverage.[207] The concise format of a majority of non-broadcast programming networks (e.g., MTV, which provided music videos; the Weather Channel which provided successive national, regional, and local forecasts; CNN's Headline News, which provided cycling national news briefs), was attractive to audiences who were developing a preference for scanning quickly through the many new channel offerings available to them. While some non-broadcast networks were providing general interest fare in the mold of the traditional broadcast networks (e.g , USA Network, Turner Network Television, TBS), many provided programming geared towards a particular audience interest (e.g., children, young adults, sports, weather, news). Regionally distributed non-broadcast networks also flourished in the 1980's through the 1990's. More than 25 regional networks commenced service in the eighties and more than 51 regional networks commenced service in the nineties. Some of these networks provide regional sports (e g., Fox Sports Northwest, Fox Sports Cincinnati, SportsChannel Florida), regional and local news (e.g., News 12 Long Island, County Television Network San Diego, Pittsburgh Cable News Channel), or regional-interest programming (Sunshine Network, Nippon Golden Network, California Channel).

110 When the Fox broadcast network launched as a challenger to the "Big Three" networks in 1985, it entered the market building on the niche concept employed by the non-broadcast networks. Fox provided general interest fare, like its broadcast competitors, but targeted its programming to the teenage demographic [208] Later, in January 1995, Paramount and Warner Brothers launched the UPN and WB networks, respectively, both building on similar demographics on which Fox had initially entered the market [209]

9. Significant Technological Advances: Recorded Media, Digital Compression, and the Internet

111 Several significant advances in technology during the 1980's and 1990's supplied the footing for increased competitive pressure on the media marketplace. Record-and-playback devices and digital technologies transformed traditional and new media into high-capacity, high-quality, interactive outlets for accessing content. The Internet, as an entirely new medium, composed of an amalgam of all the technologies that preceded it, completely transformed the way in which we communicate in unimaginable ways. These advances not only enabled the provision of vast amounts of content they also

[206] Brown, *supra* note 146 at 21 Later, in 1991, CNN captured large audiences with its 24-hour coverage of the Persian Gulf War.

[207] In 1968, coverage of the Vietnam War amounted to the evening newscasts on the broadcast networks. Today, coverage of the War in Iraq is available over the broadcast networks and on three separate "round-the-clock" cable news channels – "72/7 " Thompson, *supra* note 207.

[208] Brown, *supra* note 146 at 21.

[209] United Paramount Network, *The Facts* at http://www.viacom.com/prodbyunit1.tin?ixBusUnit=30; WTTA–Tampa Bay, Fl, *Warner Bros. Network* at http://wtta38 com/ads/history.htm (visited May 22, 2003).

put more control in the hands of the public, allowing them to control what, when, and how they receive information.

112. The video-cassette recorder ("VCR"), first introduced in the United States in the mid-1970s, was the first of such empowering technologies. Not until 1982 did the VCR become inexpensive enough to spur widespread adoption by the public.[210] By 1986, more than 13 million VCRs had been sold in the United States.[211] The VCR empowered the public with the ability to stray from the pre-set video programming schedule inherent in broadcast television content. Furthermore, content not available over other video media, or content which had been previously available over broadcast television was created specifically for VCR consumption.

113. More significant than record-and-playback devices, digital technology was used in the development of advanced satellite distribution systems. Prior consumer satellite systems were wholly analog and because of their size, were impossible to deploy in urban areas. Direct broadcast satellite systems ("DBS") provided an all-digital transmission of video programming, employing a small satellite dish, practical for both rural and urban deployment. The public has adopted DBS service at one of the fastest rates of any consumer good in history. At the end of 1994, DBS services had approximately 600,000 subscribers.[212] By 1995, there were more than 2.2 million subscribers, and by 2000, DBS providers had nearly 14.8 million subscribers.[213] Today, DBS is a significant competitor in the market for the delivery of multichannel video programming distribution services ("MVPD"), with more than 18 million subscribers.[214] In fact, between June 2001 and June 2002, growth in the number of cable subscriptions leveled off to less than one-half of one percent (0.4%), while DBS's growth rate was 14% for the same time period. [215] Overall, from 1994 until today, DBS subscribership has grown by an average of about 70% each year.[216]

114 DBS provides a much higher channel capacity than most, if not all, cable systems choose to provide. From its inception, DBS operators have been able to transmit over 200 channels of video programming to their subscribers. The presence of DBS in the market for the delivery of subscription video programming has expanded the market, such that now almost all televisions households have access to subscription video. In addition, the competitive presence of DBS has forced cable television services to expand channel capacity and service options.

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[210] *See Important Events in VCR History* at http://www.sit.wisc.edu/~mklathro/TimIine%20of%20Important%20Events html (visited Feb. 6, 2003)

[211] *Id.*

[212] Kagan World Media, THE STATE OF DBS 2002 (July 2002) at 4

[213] Kagan World Media, ECON OF BASIC CABLE NETWORKS 2002 (Sept. 2001) at 23-27.

[214] *2002 Video Competition Report*, 17 FCC Rcd at 26975.

[215] *Id* 26905.

[216] *See supra* note 215; *see also* Hughes Electronics Corp., *SEC Form 10-K405 for the Year Ended December 31, 2001* at 3-4, *Hughes Electronics Corp , SEC Form 10-K for the Year Ended December 31, 2002* at 3; EchoStar Communications Corp., *SEC Form 10-K for the Year Ended December 31, 2002* at 10.

[216] *Supra* note 216

115 As a result of the introduction of the all-digital DBS technology and its widespread acceptance by the public, cable television operators began replacing much of their original coaxial cable infrastructure with hybrid fiber and coaxial cable ("HFC") networks. By doing so, cable operators were able to employ digital technology to transmit high-quality video signals to their customers. In addition, digital technology expanded the channel capacity of the networks, enabling cable operators to provide vastly more channels of video programming. Many cable operators began offering a "digital tier" of service. First introduced commercially in 1996, "digital cable" does not actually provide digital video to the consumer; rather it uses digital compression technology to provide additional channels of basic and premium services for an additional fee.[217] At year-end 1996, there were approximately 100,000 digital video subscribers.[218] By year-end 2001 there were approximately 16.7 million digital video subscribers [219] Digital technology also furthered the ability of cable operators to implement advanced two-way services.[220]

116 Several digital record-and-playback technologies were also introduced in the 1990s. Digital versatile disc ("DVD") players were first introduced in the United States in 1997, and have quickly become popular [221] The personal video recorder ("PVR"), introduced in 1999, is a device connected to a television set, either embedded in an STB or as a stand-alone device, which uses a hard disk drive, software, and other technology to digitally record and access programming. PVR technology allows a consumer to pause, replay, rewind, fast-forward and otherwise time-shift television programs similar to the VCR.[222]

117 In addition to these other significant technological advancements of the 1980's and 1990's, the Internet has spawned an entirely new way of looking at media. The first graphical Interface for the Internet was proposed in 1989 (later to be called the World Wide Web or the "Web").[223] In 1992,

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[217] *See* Paul Kagan Assocs , Inc., *Paul Kagan's 10-Year Cable TV Industry* Projections, THE CABLE TV FINANCIAL DATABOOK (July 1996) at 11; *see also* Paul Kagan Assocs., Inc , *Paul Kagan's 10-Year Cable TV Industry* Projections, THE CABLE TV FINANCIAL DATABOOK (July 1997) at 10 In some cases, the video programming offered on cable's digital tier is offered at a higher quality than standard analog video In other cases, the digital tier is used simply to compress more analog-quality channels into the same bandwidth.

[218] *1997 DATABOOK, supra at 10.*

[219] BROADBAND DATABOOK, *supra* note 191 at 10.

[220] The advanced broadband services discussed here include cable telephony and Internet Protocol ("IP") telephony, Internet access through cable modems, digital video, video-on-demand ("VOD") and near-video-on-demand ("NVOD"), and interactive guides/interactive programming *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 16 FCC Rcd 6005, 6015, n 11 (2001) ("*2000 Video Competition Report*")

[221] Steven Schoenherr, *Recording Technology History* (Oct. 30, 2002) at http.//history.acusd.edu/gen/recording/notes.html (visited Feb. 6, 2003)

[222] TiVo Inc , SEC Form 10-K405 (Mar 30, 2000); ReplayTV Inc , SEC Form S-1/A (May 1, 2000) While PVRs cannot play prerecorded videocassettes or DVDs, they make it relatively simple to record broadcast, cable or DBS television signals and provide the user with the same level of control over the playback of a movie as home video provides

[223] Prior to this time, the Internet consisted of computers linked in a large-scale network for the purpose of file sharing based on text-only protocols Shahrooz Feizabadi, *History of the World Wide Web* at (continued .)

there were only 50 Web sites in the world; a year later there were still no more than 150 Web sites[224] Then, in late 1993, Mosaic was launched, providing an easy-to-install, easy-to-use program for accessing the Web.[225] By 1994, commercial Web sites proliferated so that by year-end, there were as many as 3,000 Web sites.[226] A year later, there were more than 25,000 Web sites in use.[227] By year-end 2000, there were more than 30 million web sites.[228]

118 Today the Internet affects every aspect of media, from video and audio, to print and personal communications.[229] Whereas other forms of media allow for only a finite number of voices and editorially-controlled viewpoints, the Internet provides the forum for an unlimited number of voices, independently administered. Furthermore, content on the Web is multi-media; it can be read, viewed, and heard simultaneously. Since Web pages are stored on Web-hosting file servers, accessing Web content is a highly individualized activity, and any individual with access to a Web browser can access all available Web content 24-hours a day throughout the world

119. Virtually every major media company has a corresponding Web site, today, and any individual with access to a Web-hosting file server can create a Web site for public access As such, the Web provides an unrestrained forum for the dissemination and consumption of ideas. News and Information are available on the Internet like they have never been available to the public before. Internet users can view the news source of their own choosing, such as CNN or The New York Times, or can use a news gathering service like Google News which presents information culled from approximately 4,500 news sources worldwide.[230] Furthermore, Internet users can access content that may have appeared in print or on broadcast television at an earlier time, giving them greater control over traditionally available content.

(Continued from previous page) ——————————
http //ei cs vt.edu/~wwwbtb/book/chap1/ web_hist html (visited Feb 6, 2003); Walt Howe, *A Brief History of the Internet* (Apr. 2002) at http //www.walthowe com/navnet/history.html (visited Feb. 6, 2003)

[224] Richard Griffiths, *Chapter Two From ARPANET to World Wide Web* at http.//www.leidenuniv nl/ history/ivh/chap2 htm (visited Feb 6, 2003)

[225] *Id*, Walt Howe, *A Brief History of the Internet* (Apr. 2002) at http·//www.walthowe.com/navnet/ history html (visited Feb 6, 2003), Robert H Zakon, *Hobbes' Internet Timeline v6 0, 2003* at http //www. zakon.org/Robert/ internet/timeline/ (visited Feb. 6, 2003)

[226] *Supra* note 227.

[227] *Id*

[228] *Id.* While most of the information currently on the Web is "still-graphics," real-time and downloadable video available over the Web has become more commonplace

[229] Fox Comments at iii.

[230] *A Novel Approach to News*, Google News (BETA) at http://www.google com/help/about_news_search.html (visited May 27, 2003). The headlines that appear on Google news are selected entirely by computer algorithms, based on how and where the stories appear elsewhere on the web. There are no human editors at Google selecting or grouping the headlines and no individual decides which stories get top placement

10. The Multimedia Landscape III – 2000

120 Since the 1960's, there has been tremendous growth in the media market.[231] By 2000, American consumers had access to a multitude of media outlets, hundreds of channels of video programming, and enormous amounts of content not available just twenty, or even ten years earlier. There were more than 12,615 radio stations in 2000, and 1,616 broadcast television stations.[232] Approximately 100.8 million homes had a television in 2000 and 76.2 million of those had more than one television.[233] There were 68.5 million cable subscribers in 2000, approximately 14.8 million DBS subscribers and 1 2 million HSD subscribers.[234] There also were 1,480 daily newspapers in 2000 with a total circulation of 55.8 million readers.[235] In addition to the traditional broadcast television stations offered over-the-air and via cable systems, there were 281 nationally-distributed non-broadcast networks available in 2000 and 80 regional non-broadcast networks.[236] Approximately 42.5 million households subscribed to an Internet access provider in 2000.[237]

121. The number of outlets per market also grew significantly between 1980 and 2000. As the chart below indicates the number of radio outlets grew by 142% from 1960 to 2000 and the number of independent radio station owners grew by 74% in that same time period. The number of television outlets grew by 217% from 1960 to 2000 and the number of independent television station owners grew by 150% in that same time period. The number of newspapers declined by 9% from 1960 to 2000 and the number of newspaper owners was the same in 2000 as it was in 1960.

[231] NAB Comments at 8-9.

[232] B'CASTING & CABLE YEARBOOK 2002-2003 at B-241, D-739

[233] Nielsen Media Research

[234] *2002 Video Competition Report*, 17 FCC Rcd at 26911, Table 1; *see supra* note 216.

[235] NAA, *supra* note 200 at 4, 12, 14.

[236] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1249-1253 (2002) ("*2001 Video Competition Report*")

[237] ECONOMICS OF BASIC CABLE NETWORKS 2002, *supra* 216 at 23-27; Veronis Suhler Stevenson-Media Merchant Bank, *Internet Households and Household Penetration*, COMMUNICATIONS INDUSTRY FORECAST (July 2002) at 267

Selected Media Outlet Counts for Ten Radio Markets – 1960,1980, 2000

Radio Market	Radio Mkt Rank	Year	Radio Total stations	Radio Total owners	TV Total stations	TV Total owners	Newspapers daily	Newspapers owners
New York NY	1	2000	148	84	24	22	9	9
		1980	128	100	17	15	8	8
		1960	74	52	7	7	8	8
Kansas City MO	29	2000	40	22	9	7	1	1
		1980	36	27	6	6	1	1
		1960	18	15	3	3	1	1
Birmingham AL	57	2000	45	25	9	8	2	2
		1980	35	27	7	6	1	1
		1960	22	19	4	3	2	1
Little Rock AR	85	2000	42	21	13	8	2	2
		1980	26	23	6	4	2	2
		1960	12	12	3	3	2	2
Lancaster PA	113	2000	13	11	7	2	2	1
		1980	11	7	7	7	2	1
		1960	7	5	5	5	2	1
Burlington VT/ Plattsburgh NY	141	2000	37	22	11	7	2	2
		1980	24	19	10	7	2	2
		1960	10	9	2	2	2	2
Myrtle Beach SC	169	2000	29	16	6	4	0	0
		1980	16	11	4	3	1	1
		1960	4	4	1	1	1	1
Terre Haute IN	197	2000	24	14	5	5	1	1

		1980	18	13	5	5	2	1
		1960	9	7	1	1	2	1
Charlottesville VA	225	2000	17	8	2	2	1	1
		1980	10	7	1	1	1	1
		1960	7	4	0	0	1	1
Altoona PA	253	2000	14	7	6	5	0	0
		1980	12	7	5	5	1	1
		1960	6	5	3	3	1	1

Source. MOWG Study No. 1, selected information from Tables 1, 2, and 3.

122. The number of hours of news and public interest programming has also grown significantly since 1980. Whereas in 1960 and 1980, there was on average only about one or two hours of local news programming per-station, per-day in the markets we reviewed, local news programming expanded to about two to four hours per station per day by 2003.[238] In addition, several regional and local news networks were launched between 1980 and 2003, providing local news on a 24-hour basis in numerous markets throughout the country [239] Although in most markets, only a few stations increased the amount of national news programming available from 1980, when national news was aired for about thirty to forty five minutes per station per day, there were more broadcast stations airing national news in 2003, and several non-broadcast news networks airing national news programming on a 24-hour a day basis.[240] Public interest programming also has proliferated. Although television broadcast stations in various markets were airing about the same amount of public interest programming per-station in 2003 as they were in 1980, in 2003, there are more television broadcast stations per-market and numerous new non-broadcast networks providing such programming.[241]

11. The Current Competitive Landscape and Developments Since 2000.

123. Non-broadcast television programming continue to proliferate. Today, there are more than 308 satellite-delivered national non-broadcast television networks available for carriage over cable, DBS and other multichannel video program distribution ("MVPD") systems.[242] In 2002, the Commission also

[238] Three City Study, *supra* note 173

[239] Regional news networks available over cable and DBS include: San Diego's News Channel 15, NorthWest Cable News, Ohio News Network, Pittsburgh Cable News Channel; News 12 Connecticut, News 12 Long Island, News 12, New Jersey, New England Cable News, Las Vegas One News, News 8 Austin, etc.

[240] *E g.*, Fox News, MSNBC, and CNBC.

[241] *E g*, Disney, Discovery, History Channel, etc.

[242] *2002 Video Competition Report*, 17 FCC Rcd at 26905.

identified at least 86 regional non-broadcast networks, including 31 sports channels, and 32 regional and local news networks.[243] We are moving to a system served by literally hundreds of networks serving all conceivable interests. Programming in particular abundance are sports, entertainment, and informational in nature.[244] The four largest broadcast networks own both broadcast and cable channels. Their share of viewership is far greater than their share of the channels received by the typical American household.[245] Of the 102 channels received by the average viewing home, the four largest broadcast networks have an ownership interest in approximately 25% of those channels.[246]

124 Since its inception, non-broadcast programming has gained significantly in popularity as compared with broadcast programming. In 2002, for the first time, cable television collectively had more primetime viewers on average over the course of the year than broadcast programming (48% share for cable programming versus 46% share for broadcast programming).[247] In June 2002, cable networks for the very first time collectively exceeded a 50% share for the month (54% primetime share), while the broadcast networks collectively registered a 38% primetime share.[248] The September 2002 season premier of "The Sopranos" on HBO was the most watched original program in HBO history and was the week's most watched program among adults 18-34.[249] The season finale in December was the top-rated program that night with 12 5 million viewers, besting the 12.2 million viewers for the top-rated network broadcast program. [250] Furthermore, HBO had more 2002 Golden Globe nominations than any other network (broadcast and non-broadcast alike), and went on to win twice as many awards as any other network.[251] At the 2002 Primetime Emmys, HBO won 24 Emmys, tying NBC for the most awards given to a single network [252]

125 As television broadcasters face intense competitive pressure from alternative video programming, they are entering a new era themselves. Broadcasters are currently experimenting with, and beginning to commercially deploy, digital and high-definition television ("DTV" and "HDTV").

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[243] *Id* at 26907-8

[244] CST Comments at 3-4

[245] Nielsen Galaxy Explorer, *Nielsen Ratings*, B'CASTING & CABLE (Mar. 24, 2003) at 14, *2002 Video Competition Report*, 17 FCC Rcd at 26995-97, *Who Owns What*, Columbia University Law School at www cjr org

[246] Opening Statement of David F. Poltrack, Executive Vice President, CBS Television, before the Forum on Media Ownership Rules, Columbia University Law School, New York, NY (Jan. 16, 2003) ("Poltrack Statement")

[247] Mike Reynolds, *2002· Cable's Breakout Nielsen Year*, MULTICHANNEL NEWS (Jan. 6, 2003) at 3.

[248] Allison Romano, *Cable Breaks 50-Share Mark in Primetime*, B'CASTING & CABLE (July 8, 2002) at 12.

[249] AOL Time Warner, *Home Box Office· Key Company Facts* at http·//www/aoltw com/companies/hbo_ index.adp (visited May 21, 2003).

[250] *Id*

[251] *Id*

[252] *Id*

Commenters in this proceeding have said that Federal policy should have as one of its main objectives, the encouragement of digital conversion and expansion of transmission plants.[253] The Commission anticipates the full transition of broadcast signals such that broadcast television signal distribution will be either DTV or HDTV, replacing the NTSC analog standard. Digital television offers improved picture quality over standard analog television, and the ability for broadcasters to provide such additional enhancements as HTDV (superior quality to analog television), multicasting (the ability to offer multiple channels in a spectrum band that today would allow only a single transmission stream), and interactivity (two-way communication abilities between the broadcaster and the consumer). Cable operators and DBS service providers are also beginning to provide DTV and HDTV options.

126. While the surge of media availability in the last several years has led to an increase in the quantity and quality of programming available, the competitiveness between different video media has also led to increased individual choice. Today's media marketplace provides choices to the public on an entirely new, personal level. In addition to the Web, for example, video-on-demand ("VOD") is the newest video technology being developed and deployed by cable and DBS operators. VOD services provide advertising-free material on a program-by-program basis, similar to the pay-per-view services that preceded it. VOD, however, provides a much wider array of programming and choice of viewing time than its pay-per-view predecessor VOD also provides VCR-like pause and rewind capabilities, unlike pay-per-view which is cablecast from beginning to end, the same to each home Some cable operators are opting to offer video-on-demand via the subscription model ("SVOD"). In the SVOD model, the subscriber pays one monthly fee for unlimited access to a finite library of select programming. This model more closely resembles the premium service (or pay-TV) tier.

127 In addition, satellite radio became available in 2001, providing subscribers over 100 channels of commercial-free, digital audio.[254] As of April 2003, there were over 500,000 subscribers to satellite radio [255]

128. In short, there are far more types of media available today, far more outlets per-type of media today, and far more news and public interest programming options available to the public today than ever before. Although many of these new outlets are subscription-based (e.g., non-broadcast networks available over cable and DBS, Web content available via a subscription Internet connection), the competitive pressure placed upon free, over-the-air media has led to better quality and in some cases, an increase in the quantity of some types of content. In the next five to ten years, we expect more free, over-the-air content to become available as new technologies (i.e., digital transmission) are applied to these traditional media (i.e., broadcast television).

V. LOCAL AND NATIONAL FRAMEWORK

129. We adopt herein limits both for local radio and local television station ownership. Both of these rules are premised on well-established competition theory and are intended to preserve a healthy and robust competition among broadcasters in each service. As explained below, however, because markets defined for competition purposes (*i.e.*, defined in terms of which entities compete with each other

[253] CST Comments at 4

[254] XM Satellite Radio, Inc., *XM Tops One-Half Million Subscriber Mark*, (press release) (Apr. 14, 2002); Sirius Satellite Radio, *Overview*, at http.//www siriusradio.com (visited May 1, 2003).

[255] XM Satellite Radio, Inc , *supra.*

in economic terms) are generally more narrow than markets defined for diversity purposes (*i e* , defined in terms of which entities compete in the dissemination of ideas), our ownership limits on radio and television ownership also serve our diversity goal. By ensuring that several competitors remain within each of the radio and television services, we also ensure that a number of independent outlets for viewpoint will remain in every local market, thereby ensuring that our diversity goal will be promoted. Further, though, because local television and radio ownership limits cannot protect against losses in diversity that might result from combinations of different types of media within a local market, we adopt below a set of specific cross-media limits.

130 Similarly, by virtue of the staff's extensive information gathering efforts and the voluminous record assembled in this rulemaking docket, we have for the first time substantial evidence regarding the localism effects of our national broadcast ownership rules We can, therefore, with more confidence than ever, establish a reasonable limit on the national station ownership reach of broadcast networks We continue to prohibit a combination between two of the largest four networks primarily on competition grounds, but the beneficial effects of this restriction also protect our interest in preserving localism In combination, our new national broadcast ownership reach cap and our "dual network" prohibition will ensure that local television stations remain responsive to their local communities

131. In sum, the modified broadcast ownership structure we adopt today will serve our traditional goals of promoting competition, diversity, and localism in broadcast services. The new rules are not blind to the world around them, but reflective of it; they are, to borrow from our governing statute, necessary in the public interest.

VI. LOCAL OWNERSHIP RULES

A. Local TV Multiple Ownership Rule

132. The current local TV ownership rule allows an entity to own two television stations in the same DMA, provided. (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination ("top four-ranked/eight voices test") [256] Only those stations whose Grade B signal contours overlap with the Grade B contour of at least one of the stations in the proposed combination are counted as voices under the rule.[257]

133. Having examined the competitive impact of other video programming outlets on television broadcast stations, we conclude, in light of the myriad sources of competition to local television broadcast stations, that our current local TV ownership rule is not necessary in the public interest to promote competition. We also conclude from our review of the record that media other than television broadcast stations contribute to viewpoint diversity in local markets. Because our current local TV ownership rule is premised on the notion that only local TV stations contribute to viewpoint diversity and does not account for the contributions of other media, we conclude the current rule is not the best means to promote our diversity goal. Moreover, we conclude that retaining our current rule does not promote, and may even hinder, program diversity and localism. However, we find that some limitations on local

[256] 47 C F R § 73 3555(b); *Local TV Ownership Report and Order,* 14 FCC Rcd at 12907-08 ¶ 8

[257] *Local TV Ownership Recon Order,* 16 FCC Rcd at 1072-73 ¶¶ 16-18.