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

In the Matter of
Amendment of Section 73.3555(e) of the Commission's Rules,
National Television Multiple Ownership Rule

MB Docket No. 17-318

Introduction

The following are the comments of Ryan Sweeney, a Master of Public Administration candidate at The George Washington University's Trachtenberg School of Public Policy and Public Administration. This comment addresses the Federal Communication Commission's proposed changes to the National Television Audience Reach Cap.

Background

The Federal Communications Commission first imposed limits on national television ownership in 1941 by restricting the number of television stations a single entity could own to three. It derived its authority from the Communications Act of 1934. In 1954, the Commission expanded the number to seven, and in 1984 further expanded it to twelve. In 1985, the Commission added a 25 percent nationwide audience reach cap for the purposes of preserving localism, competition and diversity of viewpoints. The 25 percent cap included a 50 percent "UHF discount." In the analog television broadcasting era, television stations would broadcast in either Very High Frequency (VHF) or Ultra High Frequency (UHF). Because UHF signals reach a smaller audience than VHF signals, stations broadcasting in UHF are only attributed with 50 percent of a Designated Market Area (DMA) when determining compliance with the national audience reach cap.[1]

In 1996, Congress passed the Telecommunications Act of 1996. Part of the law directed the Commission to increase the cap from 25 percent to 35 percent and eliminate the twelve station ownership cap. In the 2004 Consolidated Appropriations Act, Congress directed the Commission to increase the cap to 39 percent. The 2004 law also mandated a quadrennial review of the broadcast ownership rules instead of a biennial review. The law however excluded consideration of any rules relating to the 39 percent national audience reach cap.[2]

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[1] Federal Communications Commission, *Noticed of Proposed Rulemaking, Amendment of Section 73.3555(e) of the Commission's Rules, National Television Multiple Ownership Rule,* 18 December 2017 https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-169A1.pdf

[2] Idib.

In August 2016, the Commission eliminated the UHF discount, finding that UHF stations were no longer technically inferior to VHF stations following the digital television transition. In April 2017, the Commission reversed the decision, as it found the elimination of the discount effectively tightened the cap. In addition, the Commission found the UHF discount and the cap are inextricably linked and must be considered together. The Commission now seeks comment as to whether to modify or eliminate the 39% national audience reach cap.[3]

Localism

Part of the Commission's mission is to ensure broadcasters are responsive to "localism," or, the needs and interests of their local communities.[4] Critics of changes to the audience reach cap fear any relaxation of the cap will result in a decrease in broadcasters' responsiveness to local demand. This assumes the supply of local information is somehow disconnected from the demand. Under standard market theory, if a local market demands local information, someone will supply it if it is economical to do so. Were we to observe a decrease in the supply of local information, it would not be cause for concern if it corresponded to a decrease in the demand for local information.

Empirical evidence shows changes in ownership have little effect on localism. A study published by the Commission found market structure had little effect on diversity in local television news. The authors wrote "One view of policy interventions in media markets is that they are necessary to better match the available content to viewer preferences in an industry that is characterized by significant fixed cost and limited competition. In our data, we find little evidence in support of this view."[5] An earlier study in 2001 found concentration in the market did not reduce the amount of local information supplied by daily newspapers but in fact increased variety over a range of topics.[6] The Pew Research Center found in a recent study the number of hours local stations dedicate to local news has increased in the past decade despite consolidation in the industry. In 2003, local stations dedicated an average of 3.7 hours to local news. In 2016 they dedicated an average of 5.7 hours.[7]

There has been a decline in the demand for local TV news as new technology changes the market. The Pew Research Center found from 2007 to 2017, the average audience for late

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[3] Idib.

[4] Steven Waldman, "The Information Needs of Communities: The Changing Media Landscape in a Broadband Age," *Federal Communications Commission* July 2011 https://transition.fcc.gov/osp/inc-report/The_Information_Needs_of_Communities.pdf

[5] Lisa M. George and Felix Oberholzer-Gee, "Diversity in Local Television News," *Federal Communications Commission,* 27 May 2011 https://apps.fcc.gov/edocs_public/attachmatch/DOC-308604A1.pdf

[6] Lisa M. George, "What's Fit to Print: The Effect of Ownership Concentration On Product Variety In Daily Newspaper Markets," *Information Economics and Policy,* 1 August 2001 https://arxiv.org/ftp/cs/papers/0108/0108014.pdf

[7] "Local TV News Fact Sheet," *Pew Research Center*, 13 July 2017 http://www.journalism.org/fact-sheet/local-tv-news/

night newscasts declined 31%, morning audiences declined 12% and early evening audiences fell 19%. It also found the percentage of Americans who often rely on local TV for their news fell 9% from 2016 to 2017.[8] A similar study by Pew done in 2013 found the percentage of Americans who watch local news regularly dropped from 54% in 2006 to 48% in 2013. In both studies, the decline was more pronounced among the age 18-29 demographic, suggesting the trend will continue well into the future. Researchers attributed this to the rise of the internet and the fact that younger people tend to be more transient and thus take less interest in their locality.[9]

The rise of the internet has significantly expanded access to local information. Before the internet, many small communities lacked hyperlocal information because it simply was not economical for a broadcaster or other firm to provide it. The internet has dramatically reduced the cost of producing and providing this information. Executives of Patch, a network of hyperlocal websites owned by AOL, say a Patch site costs 4.1% of what a comparable print daily community newspaper does to operate.[10] In addition to Patch, many other new businesses have emerged focusing specifically on local information such as Topix, Outside.In, Placeblogger, and MSNBC's Everyblock.[11] This has forced local television stations to become more creative online as well. They have invested heavily in their websites and mobile apps, and often receive a high return for it. Salt Lake City's KSL-TV, which serves a market of over 3 million people, now draws more than 3 million unique visitors to its site each month and consistently ranks as one of the nation's top broadcast sites. These investments have benefitted consumers in tangible ways. For example, during severe weather events, most local stations now use viewer-submitted digital content to sharpen coverage.[12]

The Commission must understand local TV is only one segment of the broader market for local information, which includes newspaper, radio and now the internet. A decline in one segment does not signal a market failure, but rather that the market is simply changing. Market trends show the demand for localism in TV will continue to decline in the coming decades as the internet overtakes it. To adapt, broadcasters must be allowed to consolidate. The available research mentioned above suggests this would not result in an undue decrease in the supply of local information. Some observers even suggest further consolidation would allow broadcasters to achieve economies of scale and scope, allowing them to provide more robust local programming to the benefit of consumers.

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[8] Katerina Eva Matsa, "Fewer Americans Rely on TV News: What Type They Watch Varies by Who They Are," *Pew Research Center,* 5 January 2018 http://www.pewresearch.org/fact-tank/2018/01/05/fewer-americans-rely-on-tv-news-what-type-they-watch-varies-by-who-they-are/

[9] Idib.

[10] Joseph Tartakoff, "AOL's Patch Aims to Quintuple in Size by Year-End," *The Guardian,* 17 August 2017 http://www.guardian.co.uk/media/pda/2010/ aug/17/aol-patch-local-journalism

[11] Waldman, Pg. 121

[12] Waldman, Pg. 80

Competition

Of all the three stated justifications for the national audience reach cap, concentration of market power is certainly the one regulators should be most on guard for. The audience reach cap however is arbitrary and outdated. No other industry is subject to such an ownership cap. None of the other major American industries, such as energy, technology, banking, pharmaceuticals or automobiles are subject to such a cap, even though by some measures these industries are more concentrated and have higher barriers to entry. It is also important to keep in mind reaching 39% of the national audience is not the same as controlling 39% of the market.

In the days of analogue television, limited transmission capacity constrained the number of channels that could be broadcast. This meant broadcasting was essentially a zero-sum game. Every channel one company was able to transmit into a home meant one channel another company was not able to transmit into that home. Because of this fact, it made sense to limit how much of the national audience one broadcaster could reach. Digital compression changed this. Digital compression allows many more channels to be transmitted for a given bandwidth allocation. Digital satellite and cable platforms can now support hundreds of channels.[13]

Digitization has allowed broadcasters to expand their reach. Three broadcasters are effectively reaching more than 39% of the national audience, though the UHF discount keeps them in compliance. ION Media reaches about 65% of the national audience, while Univision and Tribune Media each reach a little over 40% of the national audience.[14] Now that this reach does not crowd out others, this is a good thing for consumers. The Commission's own 2018 Report on Cable Industry Prices found over the last five years the average price per channel has decreased 3.9% annually as consumers continue to enjoy more and more channel offerings.[15]

The American Cable Association raises a valid point in its comment on this issue. The concern it raises is that a larger audience reach increases a broadcaster's leverage when negotiating with multichannel video programming distributors, which may lead to higher prices for consumers.[16] While this may be true, the problem is that this is not the only factor to consider when determining if an expansion of a broadcaster's national audience reach is in the best interest of consumers. Larger broadcasters certainly provide benefits to consumers as well.

[13] Paul Seabright and Helen Weeds, "Competition and Market Power in Broadcasting: Where Are the Rents?" *The Economic Regulation of Broadcasting,* Cambridge University Press, 2007 http://repository.essex.ac.uk/5945/1/SeabrightWeeds_paper.pdf

[14] Todd Shields, "FCC to Review TV Station Ownership Cap," *Bloomberg,* 21 November 2017 https://www.bloomberg.com/news/articles/2017-11-21/u-s-tv-station-ownership-cap-said-to-be-raised-in-fcc-proposal

[15] Federal Communications Commission, Report on Cable Industry Prices, 8 February 2018 https://apps.fcc.gov/edocs_public/attachmatch/DA-17-71A1.pdf

[16] "MB Docket No. 17-318: Comments of the American Cable Association," *American Cable Association,* 19 March 2018 https://ecfsapi.fcc.gov/file/10319663619613/ACA%20National%20Cap%20Comments%20FINAL.pdf

Sinclair for example argues its merger with Tribune will allow it to build economies of scale, expedite the rollout of a new mobile video service, increase capital investments in rural markets, expand the number of investigative journalists at local affiliates and expand its public service initiatives to Tribune markets.[17] Because of this, each expansion of a broadcaster's national audience reach should be reviewed on its individual merits, as the Commission and the Department of Justice's Antitrust Division already do.

There is no conceivable reason the Commission must maintain a national audience reach cap on top of the checks it and the Antitrust Division already provide. The Antitrust Division regularly uses the Herfindahl–Hirschman Index (HHI) to quantify market power. HHI is calculated by squaring the market share of each party to the merger and then summing them. If the sum total results in an increase of more than 200, there is said to be a significant increase in market power. This is a widely accepted way of quantifying the effects of a merger or acquisition on a market the Antitrust Division already employs in its reviews of mergers and acquisitions.[18] To accurately assess the status of competition in the market, the Commission should begin tracking the HHI for each broadcaster.

The market trends of the 21st Century show the sector is moving towards becoming more competitive as a result of the rise of the internet, with new sources of information coming from internet television and online news. The Commission's 2017 Annual Assessment of the Status of Competition in the Market reports cable companies are losing subscribers as the market shifts towards new sources of information and entertainment.[19] While there may still be relatively high barriers to entry in the broadcast television market, the reality is broadcast television is only one part of the larger market for information and entertainment, and in that larger market, the barriers to entry are rapidly falling.

Diversity

Preserving diversity of views does not hold much merit as a justification for retaining the national audience reach cap in this day and age. In the past, there were only a handful of ways to express one's opinion to an audience, those being the opinion pages of a newspaper, a pundit-slot on a television network, or a gig at a radio station. The average person was generally limited to writing letters to the editor or calling in on a radio program. This was because there was a very limited capacity for transmitting opinions. There is only so much room in an opinion section or time available on evening talk shows, and thus editors and producers of

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[17] "MB Docket No. 17-179: Tribune Media Company and Sinclair Broadcast Group, Inc. Consolidated Applications for Consent to Transfer Control," *Sinclair Broadcast Group,* 19 July 2017 https://ecfsapi.fcc.gov/file/10719129230693/Tribune%20Redacted%20Form%20of%20HCI%20Transmittal%20Letter.pdf

[18] "Herfindahl-Hirschman Index," *Department of Justice, Antitrust Division,* https://www.justice.gov/atr/herfindahl-hirschman-index

[19] Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 17 January 2017 https://apps.fcc.gov/edocs_public/attachmatch/DA-17-71A1.pdf

those forms of media must select very carefully which opinions they choose to present to the national audience.[20] As with localism and competition, the rise of the internet has changed this.

Opinion is everywhere now. In the past decade, a wide range of news and opinion websites have emerged such as *The Daily Kos, The Drudge Report, The Daily Caller, The Daily Beast, The Huffington Post, Breitbart* and *The Blaze*, just to name a few. These websites have their own journalistic and editorial staffs and run the whole range of the ideological spectrum. The barriers to entry into this new market are virtually nonexistent. Markos Moulistas was a web developer when he created *The Daily Kos.* Matt Drudge was a simple telemarketer before he created *The Drudge Report.*[21]

More traditional media outlets have also been able to provide people with new ways to express their opinions. Through their websites, traditional newspapers like *The Wall Street Journal* and *The New York Times* are able to publish more opinion pieces online, even if not all of them make it into the print edition. *The Washington Post* in 2014 created *The Monkey Cage*, an online blog where academics of all stripes can contribute articles. This has allowed a much greater number of academics to share their knowledge with a mainstream readership compared to the small handful whose articles normally make it into the daily print edition.

The average person also has a greater level of engagement with media outlets now thanks to social media. Social media provides a limitless space and a near-zero cost-of-publication. Whereas a print newspaper publishes no more than a dozen letters to the editor on a given day, an article posted online can garner an infinite number of comments, which can be thought of as instantaneous letters to the editor.[22]

A study by the Pew Research Center of news outlets in Baltimore found a rise in the number and diversity of outlets. On the national level, the rise is even greater.[23] In 2009 for example, only 17% of *The Washington Post*'s print circulation went outside the Washington D.C. metro area, while 91% of the newspaper's online readership lived outside the metro area.[24] The internet has also allowed for greater personalization of information. It is possible for anyone to find news on any niche topic they desire. For fans of hardcore metal, *MetalSucks.net* has it all. Yacht enthusiasts can turn to *BoatInternational.com* to keep them informed.

There has been much attention recently on this issue after Sinclair Broadcast Group, which is in talks to acquire Tribune Media, pushed out a message about "fake news stories" through its local affiliates. The message was not very different from what many left-leaning

[20] Waldman, Pg. 119
[21] Waldman, pg. 120
[22] Waldman, Pg. 119
[23] "How News Happens: A Study of the News Ecosystems of One American City," *Pew Research Center,* 11 January 2010 www.journalism.org/2010/01/11/how-news-happens/
[24] Waldman, Pg. 119

outlets have said and much of the outcry is likely due to Sinclair's right-leaning affiliations.[25] Many commentators expressed concern that a single organization was able to push a single narrative through to such a wide audience, though they ignore the fact that national media does the same thing on a daily basis. The fact that it was through local affiliates just means the message reached a more fragmented audience. In addition, the swift reaction shows how much the internet has changed the media landscape. Almost immediately after the segments aired, sports news site *Deadspin* posted a video on their Twitter page showing a mash-up of Sinclair's local anchors reading the script. The *Deadspin* video was then shown repeatedly on national outlets.[26] Rather than being a tale of caution, this episode in fact demonstrates just how diverse the media landscape has become.

Conclusion

The National Audience Reach Cap is an arbitrary relic of a bygone era. Audience reach is a poor metric for measuring market power and using it as such results in poor policymaking. There are better ways to measure market power, such as the Herfindahl-Hirschman Index. The Commission along with the Department of Justice's Antitrust Division review all broadcast mergers. There is no evidence these two checks on market power are not sufficient. The rise of the internet and digitization have fundamentally changed the broadcasting industry. The Commission's policies should encourage innovation and efficiency in the marketplace while ensuring consumer demands are met at the best possible prices. Maintaining the cap runs counter to these goals as it restricts broadcasters' ability to adapt to the consolidating industry and build economies of scale.

There are serious questions surrounding the Commission's power to eliminate the cap that fall beyond this author's expertise. If the Commission concludes it does have the authority to eliminate it, it should not hesitate to act. If it determines it does not have the authority, then it must at the very least maintain the UHF discount, as even though the justification for the discount no longer holds merit as a technical matter, eliminating it would have the practical effect of tightening the cap. In this latter case, Congress must be called upon to eliminate the cap.

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[25] Joe Flint, "Sinclair Broadcast Faces Backlash For Requiring Anchors to Recite Segments," *The Wall Street Journal,* 2 April 2018 https://www.wsj.com/articles/sinclair-broadcast-faces-backlash-for-requiring-anchors-to-recite-segments-1522713940?mod=searchresults&page=1&pos=4

[26] Jacey Fortin and Jonah Engel Bromwich, "Sinclair Made Dozens of Local News Anchors Recite the Same Script," *The New York Times,* 2 April 2018 https://www.nytimes.com/2018/04/02/business/media/sinclair-news-anchors-script.html