outlet diversity, and the impact of mergers among TV stations on the local level on such diversity. All services are not equally available to the general population. For example, consumers can receive broadcast television for "free."[141] Access to cable (or, for that matter, to any of the other video services), requires the direct payment of a subscription fee (plus, in the case of some alternate video media, the purchase of equipment), which some consumers might not be able to afford or wish to pay for. Thus, we must take into account that the apparent level of outlet diversity may not reflect what is, in fact, available to, or obtainable by, many consumers.[142] If we decide to relax our local ownership regulations on the premise that if local television markets become more consolidated other media, including cable and newspapers, will provide sufficient diversity, how should we take account of the fact that some viewers are unable to subscribe or to acquire special equipment? How, if at all, should the portion of viewers that chooses not to subscribe affect our analysis of available programming outlets? Is an outlet of opinion less available simply because it is not popular or is more costly? We note that when analyzing local diversity in specific cases, we have often cited the number of area newspapers; their subscriber levels have not played a role in our analysis -- only whether they exist.[143] Accordingly, we seek further comment on the degree to which such fee-based sources and outlets for video programming provide true alternatives to over-the-air television for purposes of ensuring viewpoint diversity.

F. Tentative Proposals

116. The current rule prohibits common ownership of broadcast television stations with overlapping Grade B contours.[144] Because the delivery of video programming by broadcast television stations is local in nature, we are more concerned about the effects of relaxing the local ownership rule, than the national ownership rule, on our competitive and diversity concerns. As discussed below, however, we believe that the record already established is sufficient to justify proposing to relax the rule by decreasing its prohibited contour overlap from Grade B to Grade A. We also seek comment on other possible ways in which the rule could be modified.

117. In the NPRM, we asked whether we should modify the contour overlap rule,

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[141] Although, as discussed above at footnote 91, the consumer does pay, indirectly, some of the costs for "free" broadcast television.

[142] For example, one-third of households that are wired for cable elect not to subscribe. Cable Competition Report, supra at ¶97. Furthermore, the availability of home satellite dishes may be limited by zoning regulations and homeowner association rules. Id. at ¶76.

[143] See, e.g., Fox Television Stations, Inc., 8 FCC Rcd 5341, 5351 (1993), recon. denied, 8 FCC Rcd 8744 (1993).

[144] The Grade B encompasses approximately a 50 to 70 mile radius around the television station's transmitter; the Grade A encompasses approximately a 30 to 45 mile radius.

balancing the greater flexibility afforded broadcasters against the potential harm to our underlying competition and diversity concerns. We invited comment on whether the predicted Grade B contour should continue to determine prohibited overlap, or whether we should change it to the Grade A contour. This change would narrow the geographic area in which common ownership of television stations would trigger our rules to an area that more accurately reflects a station's core market. The vast majority of commenters agreed that a Grade A contour standard provides a substantially more realistic and accurate measure of a station's core market than the existing Grade B contour rule. The commenters also stated that the switch from a Grade B standard to a Grade A standard will increase broadcasters' long-term viability by enabling them to reap the benefits provided by "economies of scale" -- without any commensurate loss in program diversity. In fact, several commenters indicated that the savings allowed by streamlining management, marketing, and station administration will actually increase broadcasters' ability to provide program diversity, variety and quality. In light of the support for this concept in the record of this proceeding, we propose to modify this rule so that joint ownership will be precluded only where there is overlap of the Grade A contour. We seek further comment on this proposal in light of our competitive and diversity analyses of the television broadcasting industry. We also request comment on what the impact would be of moving from a Grade B to a Grade A contour rule on particular markets. Further, how many cases would occur in which relaxing the rule to a Grade A contour would allow an entity to own two stations within a single designated market area or within a single metropolitan statistical area?

118. As a separate matter from whichever contour test we ultimately decide to use, the issue arises as to whether, in at least some situations, we should allow a company to acquire stations with overlapping contours. We ask for comment on whether we should permit common ownership in local markets, such as UHF/UHF combinations or UHF/VHF combinations, or maintain the current prohibition against contour overlap and allow waivers either under a presumptive guideline or a case-by-case basis.

119. In the NPRM, we asked whether or not an entity should be permitted to own two UHF stations with overlapping contours. In making this proposal, we recognized the historical handicap of UHF stations relative to VHF stations in terms of signal coverage and operating expenses. We also sought comment on whether we should permit a UHF station to merge with a VHF station as a more effective way of preserving or improving the service of UHF stations.[145] We also inquired whether it would be appropriate to consider such consolidations only where a minimum number of separately owned television stations would remain after the proposed combination (e.g., a minimum of six independently owned stations). These proposals were specifically targeted to provide competitive enhancements to the weaker segments of the broadcast television industry. Commenters were very divided as to whether

[145] The NPRM noted that as the television broadcast industry makes a transition to ATV technology, this distinction may no longer be relevant and requested commenters to consider the possible impact of ATV on the proposed rule.

the economic benefits to licensees outweighed the potential harm to competition and diversity. Commenters are invited to submit further analyses of these proposals with reference to a Grade A contour definition of the relevant local geographic market for purposes of establishing local television ownership limits. However, commenters arguing that the economic benefits outweigh the potential harm to competition and diversity need to provide more specific evidence of the projected economic benefits as weighed against the potential harm to competition and diversity.

120. If we were to maintain the existing prohibition against common ownership of broadcast television stations with contour overlap but allow waivers, then we must determine whether to follow a case-by-case approach.[146] Parties may wish to address the factors we currently consider in our one-to-a-market waiver, which include the financial condition of the station to be purchased, the competitive and diversity characteristics of the market, and potential public interest benefits.[147]

121. Whether we relax the rule or adopt a waiver standard, we feel it necessary to consider the number of independent suppliers serving the market. In other words, in deciding upon whether to allow certain broadcast television station mergers, we seek to determine whether we should indicate how many independent suppliers must remain in a given region after the mergers and who should be considered alternative suppliers. In a number of our past ownership proceedings, we described and generally took into account the growth of new media that provide competitive and diversity enhancing alternatives to over-the-air television (or radio). However, with the exception of our one-to-a-market rule, when it came to the actual rule itself, we fashioned a rule that counted only television stations or only radio stations in the local or in the national market. Hence, we did not take explicit account of other alternative or competitive media outlets. In Sections III and IV above, we arrive at different conclusions about who are the relevant alternative suppliers, depending upon the market we were discussing (e.g., market for delivered home video programming, advertising market, and video program production market) and the kind of analysis we were concerned with (e.g., competitive analysis versus diversity analysis). This raises the issue of which market or analysis should control the determination of who are the independent suppliers that we count for purposes of setting local ownership limits. We solicit comment on this issue.

122. In determining the number of independent suppliers for either competitive or

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[146] Currently we consider waivers on a case-by-case basis and consider the degree of contour overlap , effect on service to unserved or underserved areas, and whether one of the stations is failing. See, e.g., Iowa State University, 9 FCC Rcd 481 (1993); Pegasus Broadcasting, 7 FCC Rcd 8625 (1992).

[147] See 4 FCC Rcd 6489 (1989) (one-to-a-market waiver); cf Satellite Television Stations, 6 FCC Rcd 4212 (1991), petitions for recon. pending; Second Further Notice of Proposed Rulemaking, 6 FCC Rcd 5010 (1991).

diversity analysis of a relaxation to the contour overlap rule, we must define the region in which we perform the count. One proposal is to treat the overlap area as the relevant region. In other words, we might possibly allow a company to own two broadcast television stations with contour overlap as long as there are a sufficient number of independent suppliers serving the same area (within their contour overlap). Another proposal would be to treat the relevant region as the DMA within which the two broadcast television stations operate.[148] This second alternative is motivated by the economic and diversity analysis which suggests that the DMA region definition may be more descriptive of a broadcast television station's potential market. Thus this proposal might allow joint ownership of two broadcast television stations with contour overlap when such joint ownership does not reduce the number of independent suppliers in their DMA below some critical level. We solicit comment on both these proposals.

123. Finally, should we decide to designate a minimum number of independent suppliers that should remain in a local market, we must address whether we should choose a number which allows everyone in the market currently to acquire another station or whether we should allow firms to be acquired on a first-come first-served basis until some minimum number of independent broadcast television stations remain. The first approach might be to permit joint ownership of <u>any</u> two television stations in large television markets, even where there is contour overlap. If we were to adopt such a rule, the number of competitors, or independent voices, in each of these local markets could be reduced by as much as one-half, if all those entities that were now permitted to merge, did. Our initial analysis of this rule proposal is that since only the the largest television markets have more than 15 commercial broadcast television stations, and most other markets do not have many other separate video outlets, competition as well as diversity could be seriously harmed if all licensees in these markets, including larger markets, were permitted to purchase a second television station. The second approach, allowing companies to acquire broadcast television stations with contour overlaps on a first-come-first-served basis until the number of remaining independent suppliers reaches some lower bound, raises the issue of how many independent suppliers are enough to ensure workable competition and sufficient diversity in those markets. One approach to answering this question would be to focus upon the DOJ/FTC merger guidelines in deciding upon the minimal number of independent suppliers we would allow.[149] However, we are concerned that, given our diversity requirements, a merger guideline based standard might be too low. The purpose of the merger guidelines is to define the point at which heightened antitrust scrutiny is required. Our purpose in encouraging diversity in broadcast

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[148] We note that in revising the radio ownership rules, we relaxed the contour overlap standard for all radio stations, and also adopted a market-based standard to permit a limited degree of joint ownership in certain markets in spite of the prohibited contour overlap.

[149] Roughly these DOJ guidelines would suggest a lower bound of 10 independent suppliers of home delivered video programming before traditional antitrust concerns are raised.

services is not to merely meet a minimum acceptable benchmark, but rather, to encourage a wide array of voices and viewpoints. Consequently, we seek guidance on which threshold number, if any, of remaining independent suppliers would satisfy both our competition and diversity concerns. Further, we ask for comment on whether simply counting outlets is preferable to examining audience share for addressing the impact of an outlet on our competitive and diversity concerns. Finally, we seek guidance on which of the above approaches is the preferred approach with respect to these concerns.

VII. THE RADIO-TELEVISION CROSS-OWNERSHIP RULE

124. The radio-television cross-ownership rule, or the one-to-a-market rule, basically provides that a company cannot own both a radio station and a television station located in a given "local" market.[150] This rule was adopted to limit any potential market power in the media market, and to ensure a sufficient diversity of broadcast outlets. The Commission amended this rule in 1989 to permit, on a waiver basis, radio-television mergers as long as the combination occurred in one of the top 25 television markets and 30 separately owned broadcast licensees remained after the combination, or if the waiver request involved a "failed" station, or if the waiver request satisfactorily addressed five criteria which relate to public interest concerns.[151] Whether this limit is still needed to promote these ends will be considered in the following discussion.

A. Effects on the Market for Delivered Programming

125. In Section III A above, we tentatively concluded that delivered video programming and delivered audio programming were sufficiently distinct products so as to represent different product markets for competitive analysis purposes. Thus, since television and radio stations do not operate in the same relevant markets for delivered programming, allowing cross-ownership between them in a local market would not appear to harm competition in either. Commenters are asked to provide information on the nature and extent of harm, if any, from relaxing this rule on these markets.

B. Effects on the Market for Advertising

126. The main potential economic cost of permitting the owner of a broadcast TV station to own a broadcast radio station in a local market, or vice versa, appears to be that it

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[150] All licensees are permitted to own one AM radio station and one FM radio station in the same market (i.e., an AM-FM combination).

[151] These criteria or factors include the types of facilities involved, the number of stations already owned by the applicant, the financial situation of the station(s), and the nature of the market in light of our diversity and competition concerns.

might give the company the market power to raise local radio and/or television advertising rates. The above discussion does not speak to this point because people may listen to radio and watch television at different times, but advertisers might view either means as an acceptable substitute for getting their message to the same people. On the other hand, some advertising messages may be more effective on television; others on radio. However, as our earlier discussion indicated, we do not have sufficient evidence on this issue to address the effects of relaxing the one-to-a-market rule on the local advertising market. Assuming for the purposes of soliciting comments, that they are economically relevant substitutes, then the issue arises as to how many independent suppliers of local advertising are necessary to ensure that these markets are workably competitive. We invite comment and evidence on both these issues.

C. Effects on the Video and Audio Program Production Markets

127. In Section III C above, we tentatively concluded that video programs are sufficiently distinct products that the market for video program production should be considered a separate product market. By this logic, the markets for video program production and audio program production are arguably distinct markets. Consequently market power in the video program production market should not translate into market power in the audio program production market, unless the company already has such market power. However, these program production markets are national markets and presumably the national ownership limits for either broadcasting station type should prevent a company from acquiring such market power. Thus we see no reason why relaxing the one-to-a-market rule should harm competition in either of these supply markets, but seek comment on this tentative conclusion.

D. Other Economic Effects

128. The benefits of permitting the owner of a broadcast TV station to own a broadcast radio station in the same local market, or vice versa, are similar to the benefits of permitting joint ownership of two local television stations and were documented in our recent proceeding to adopt a waiver standard to approve such radio-TV combinations.[152] The company can reduce its video and audio programming costs through a reduction in personnel and overhead expenses. Further, the company could use one advertising sales force instead of two for the two stations. This reduction in expense could make the joint enterprise more economically viable than the separate operations were before the combination took place. It would be important for commenters to provide evidence on the size of such efficiency gains so the Commission could weigh them against any potential costs of relaxing the one-to-a-market rule.

E. Effects on Diversity

[152] 4 FCC Rcd 6489 (1989).

129. The radio-television ("one to a market") rule is intended to foster outlet and viewpoint diversity on the local level.[153] That is, it is designed to assure that no individual or entity can have control over outlets in different media in the same location unless the area is so rich with competitive media outlets that a radio-television combination will not undermine diversity or where the combination is necessary to preserve a failing station, the failure of which would reduce diversity in the market in any case. The rule appears to be achieving the diversity goals for which it was adopted, but may not be necessary in its current form to ensure competitive and diverse radio and television markets. We have previously noted that even smaller markets have a considerable number of television, radio and other programming sources available. In markets ranked between 126 and 150 on the basis of their ADIs, we noted, there are on the average six broadcast television signals and 18 radio signals.[154] Additionally, most such markets have access to cable.[155] Nevertheless, as we noted above, diversity has the most impact in the local context and we must be cautious in taking any action that could serve to reduce that diversity, particularly in smaller markets.

F. Tentative Proposals

130. The NPRM in this proceeding sought comment on a variety of proposed relaxations to the one-to-a-market rule, including: (1) elimination of the rule -- using local limits of each service to prevent undue concentration; (2) allowing common ownership of one AM, one FM and one TV station per market; (3) allowing TV-AM combinations only; and, (4) codifying current waiver criteria and applying them to all markets, and not just the top 25 markets, where 30 independently owned voices remain. Commenters were generally in favor of elimination or relaxation of the current rule, arguing that the economies from joint operations would allow more stations to remain on the air and would also permit licensees to provide better service to the public.

131. In light of our earlier competitive and diversity analyses, we tentatively conclude that there are two alternative approaches towards modifying the one-to-a-market rule. If we conclude, after review of the comments and our own analysis, that radio stations and television stations do not compete in the same local advertising, program delivery, or diversity markets, we propose to eliminate this rule entirely and rely on our local ownership rules to ensure competition and diversity at the local level, i.e., proposal number 1 above. This would mean that we would allow entities to own one AM, one FM, and one TV station in even the smallest markets. In large markets, one entity would be allowed to own up to two AMs, two

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[153] Of course, what is considered "local" is subject to comment (and amendment) in this proceeding. Nevertheless, the rule depends on signal contour overlap so, clearly, the geographic market for diversity is a local market.

[154] NPRM, supra at 4116.

[155] As previously indicated, over 96 percent of all television households in the United States are passed by a cable system. Cable Competition Report, supra at para. 18.

FMs, and one TV station.

132. If, on the other hand, we conclude that radio and television do compete in some or all of the same local markets, then we must address how to modify the one-to-a-market rule, if at all. In this case, we propose a modified form of proposal number 4 above. Specifically, we propose to allow radio-television combinations (AM-TV, FM-TV, or AM-FM-TV) in those markets that have a sufficient number of remaining alternative suppliers/outlets as to ensure sufficient diversity and workable competition. In this regard, we seek comment on whether "30 separately owned, operated and controlled broadcast licensees"[156] continues to represent the appropriate minimum requirement, or whether our diversity and competition concerns can be satisfied if a lesser number of licensees remain, such as 20. This lesser number may be justified by the increased role of cable and the future role of DBS and video dialtone offerings in providing areas with alternatives to broadcast media. Under this proposal such combinations would be automatically allowable by rule; it would not be necessary for applicants to seek a waiver. Further, we seek comment on whether this count should be for independent suppliers/outlets within a DMA or some other geographic market delineation. Finally, we note that if we were to adopt this modified version of proposal 4 above, we also propose to continue accepting waivers for "failed" broadcast stations as currently provided for in note 7 of §73.3555 of the Commission's Rules, and to continue evaluating other waiver requests on the basis of the five considerations set forth in the Second Report and Order[157] and the Memorandum and Order[158] in MM Docket No. 87-7.

VIII. LOCAL MARKETING AGREEMENTS

A. Description

133. We now turn our attention to the issue of Local Marketing Agreements (LMAs). As stated above, an LMA is a type of joint venture that generally involves the sale by a licensee of discrete blocks of time to a broker who then supplies the programming to fill that time and sells the commercial spot announcements to support it.[159] Such agreements enable

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[156] 47 CFR §73.3555, note 7.

[157] 4 FCC Rcd 1741 (1989).

[158] 4 FCC Rcd 6489 (1989).

[159] Revision of Radio Rules and Policies, 7 FCC Rcd 2755, 2784 (1992). Network affiliation agreements are a variant of time brokerage whereby the local affiliate sells time to the network in exchange for desirable programming, station compensation, and the opportunity to place local commercials within popular national programs. Id. at 2784-85, n.113 (1992). Despite the fact that a network affiliate may broadcast a significant portion of

separately owned stations to function cooperatively via joint advertising, shared technical facilities, and joint programming arrangements. In the radio ownership proceeding, we adopted guidelines primarily applicable to the AM and FM services for LMAs. These guidelines were affirmed and clarified in both the First Reconsideration Order, 7 FCC Rcd 6387 at 6400-6402 (1992), and the Second Reconsideration Order, 9 FCC Rcd 7183 (1994). Specifically, we required that a licensee's time brokerage of any other radio station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limits. See 47 C.F.R. Section 73.3555(a)(2)(i). We also required that most radio LMAs be kept in the public inspection files of the stations involved and also be filed with the Commission. See 47 C.F.R. Section 73.3613(d). We also decided that TV station LMAs should be kept at the station and be made available for inspection upon request by the Commission. See 47 C.F.R. Section 73.3613(e).[160]

134. In the TV NPRM, we sought comment on the prevalence of TV LMAs, whether they presented the same types of competitive and diversity concerns that we found in the radio context, and whether they should be subject to some limitations. Few commenters addressed LMAs, and none provided specific information concerning their prevalence. The comments we did receive basically expressed two divergent general views. Some commenters felt that TV LMAs should remain unregulated absent evidence of abuse, irrespective of whether new TV multiple ownership rules are adopted.[161] Other commenters felt that if the Commission did adopt rules governing TV LMAs, such rules should be no more restrictive than those governing radio LMAs.[162]

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network programming, the affiliate, unless actually owned by the network, is not attributed to the network. See generally, 47 C.F.R. § 73.3555, Note 2 (network affiliation agreement is not included in the list of attributable interests); 47 C.F.R. § 73.658 (distinction between network affiliation and network ownership implicit in discussion of guidelines for network affiliation agreements).

[160] In the First Radio Reconsideration, supra, we adopted a requirement that all LMAs be kept at the stations involved and be made available for inspection upon request by the FCC. Although the Notice of Proposed Rulemaking in that proceeding did not specifically include TV LMAs, the notice given was sufficiently broad to support the rule as adopted. To whatever extent, if any, that commenters disagree with this conclusion, we will give further consideration to this requirement in the instant proceeding.

[161] See Comments of KFVE p.10; Comments of Associated Broadcasters, Inc. and Galloway Media, p.17.

[162] See Comments of INTV, p. 27; Comments of Fisher Broadcasting, p. 6; Comments of National Broadcasting Company, Inc., p. 42.

135. From our experience with radio LMAs, it appears that such agreements, subject to some general Commission guidelines, can provide competitive and diversity benefits to both the brokering parties and to the public. To maximize such benefits in the TV context, while minimizing potential adverse consequences, we believe that guidelines similar to those governing radio LMAs may be necessary with regard to TV LMAs as well. Accordingly, since the comments regarding LMAs from the TV NPRM require elaboration, we now seek such further comments to enable us to adopt appropriate guidelines for TV LMAs.

136. Although we are aware that LMAs are currently used by some TV stations, we have already noted that the previous comments did not address the prevalence of such agreements in the TV industry. Accordingly, as an initial matter, we seek comment providing specific quantitative data about this issue indicating the number of such agreements currently in existence. If such comment is not received, it may be necessary for the Commission to conduct a survey to obtain this quantitative data.

137. Experience has shown us that in the radio context, LMAs are often used as precursors to the sale of radio stations pending the acquisition of financing and Commission approval of the assignment application. Such agreements may also enable radio stations to enjoy the benefits of economies of scale by combining various operations and facilities. Although it seems probable that LMAs serve the same general purposes for TV stations, we seek comment on the following issues. Do TV LMAs serve the same purposes as radio LMAs or are there significant differences between them? What benefits accrue to the parties involved in TV LMAs? What benefits accrue to the public from TV LMAs?

B. Analysis and Tentative Proposals

138. To ensure that stations using LMAs comply with the Commission's new national and local radio ownership rules, we adopted certain attribution principles for radio LMAs. Specifically, we determined that time brokerage of another radio station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours, would result in counting the brokered station toward the brokering licensee's national and local multiple ownership limits.[163] Similarly, to ensure that TV stations using LMAs comply with the TV multiple ownership rules, regardless of whether such rules are modified, we believe that some guidelines may be necessary. We tentatively propose to treat LMAs involving television stations in the same basic manner as we did for radio stations. That is, time brokerage of another television station in the same market for more than fifteen percent of the brokered station's weekly broadcast hours would result in counting the brokered station toward the brokering licensee's national and local ownership limits. If the local TV multiple ownership rules are not relaxed, such an attribution provision would preclude TV LMAs in any market where the time broker owns or has an attributable interest in another TV station. Additionally, TV LMAs would be required to be filed with the Commission in addition to the

[163] See 47 C.F.R. § 73.3555(a)(2)(i).

existing requirement that they be kept at the stations involved in an LMA. Furthermore, our TV LMA guidelines would allow for "grandfathering" TV LMAs entered into prior to the adoption date of this Notice, subject to renewability and transferability guidelines similar to those governing radio LMAs. [164]

139. To test the appropriateness of this proposal, we seek comment on the following issues. Are there any compelling reasons why the Commission should not apply the existing radio LMA guidelines, including the filing requirements, the limitation on program duplication, and the ownership attribution provisions, to TV LMAs? If the radio ownership attribution rule applies to TV LMAs, should the Commission use the fifteen percent benchmark that it used in the radio context, or is some other percentage more appropriate? What effects, if any, should LMAs have on the renewal expectancy of TV stations? What effects, if any, would these proposed attribution guidelines have on ownership of TV stations by minorities and women, and how should the Commission deal with such effects? Comments relating to the effects of LMAs on ownership of broadcast stations by minorities and women, should be directed to our concurrent Notice of Proposed Rulemaking dealing specifically with the issues of minority and female ownership in MM Docket No. 94-150.

140. To avoid any unnecessary disruption to existing contractual relationships, we also seek comment on guidelines concerning the termination, transferability and renewal of TV LMAs. Should the contract rights associated with existing TV LMAs be transferable when the brokering station is sold? If so, what restrictions, if any, should apply? Should TV LMAs entered into before the adoption date of this Notice be subject to the same "grandfathering" and renewability guidelines that govern radio LMAs as set forth in the Second Radio Reconsideration, supra, irrespective of whether the local TV multiple ownership rules are modified? Specifically, should existing LMAs be "grandfathered" for the remainder of the initial term of the LMA and then be subject to the governing local TV multiple ownership rules?

IX. SUMMARY

141. By this Further Notice of Proposed Rule Making, we hope to receive comments on the myriad of issues pertinent to our proposed changes in the Commission's television ownership rules. These comments should attempt to frame their discussion and analysis in a manner consistent with our proposed analytical frameworks for addressing our historic competition and diversity concerns. However, if there are issues pertinent to these concerns, which we have not specifically addressed in the above discussion, then we would expect commenters to bring those issues to our attention. Further, for these newly identified issues, commenters are asked to provide sufficient data and/or analysis so we can determine the importance of the newly raised issue.

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[164] See Second Radio Reconsideration Order, supra.

X. ADMINISTRATIVE MATTERS

142. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before (April 17, 1995), and reply comments on or before (May 17, 1995). To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239), 1919 M Street, N.W., Washington, D.C. 20554.

143. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission Rules. See generally 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

144. Additional Information: For additional information on this proceeding, contact Roger Holberg (202-418-2134), or Robert Kieschnick (202-418-2183), Mass Media Bureau.

XI. INITIAL REGULATORY FLEXIBILITY ACT STATEMENT

145. The Initial Regulatory Flexibility Act Statement found in paragraphs 45 through 52 (7 FCC Rcd at 4120) in the Notice of Proposed Rule Making in this proceeding remains unchanged.

146. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in the Notice of Proposed Rule Making in this proceeding as set forth above. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this Further Notice, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this Further Notice of Proposed Rule Making, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel forAdvocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq (1981).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary

APPENDIX A: LIST OF COMMENTING PARTIES

Comments

1. Abry Communications
2. Act III Broadcasting, Inc.
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Barnstable Broadcasting, Inc.
6. Buck Owens Production Company, Inc.
7. Capital Cities/ABC, Inc.
8. Capitol Broadcasting Company, Inc.
9. CBS Inc.
10. Clear Channel Communications
11. Commonwealth Communications Services, Inc.
12. Fisher Broadcasting Inc.
13. Fox Inc.
14. Home Shopping Network, Inc.
15. Jet Broadcasting Co., Inc.
16. KFVE Joint Venture
17. LIN Broadcasting Corporation, Midwest Television, Inc., Paducah Newspapers, Inc., Post-Newsweek Stations, Inc., Providence Journal Company, and The Spartan Radiocasting Company
18. Malrite Communications Group, Inc.
19. Marion TV, Inc.
20. McKinnon Broadcasting Company
21. Morgan Murphy Stations
22. National Association of Broadcasters
23. National Broadcasting Company, Inc.
24. National Telecommunications and Information Administration
25. Network Affiliated Stations Alliance
26. Office of Communication of the United Church of Christ
27. Press Broadcasting Company, Inc.
28. Sinclair Broadcast Group, Inc.
29. Trinity Broadcasting Network
30. United States Catholic Conference
31. Vetter Communications Company, Inc.
32. Westinghouse Broadcasting Company, Inc.
33. WKRG-TV, Inc. and WEVV, Inc.
34. WNAL-TV, Inc.

Reply Comments

1. ABC Television Affiliates Association
2. American Federation of Television and Radio Artists
3. Associated Broadcasters, Inc. and Galloway Media, Inc.
4. Association of Independent Television Stations, Inc.
5. Blackburn & Company, Inc.
6. Federal Trade Commission, Staff of the Bureau of Economics
7. Jet Broadcasting Co., Inc.
8. KMTR, Inc.
9. Morgan Murphy Stations
10. National Association of Black Owned Broadcasters
11. National Association of Broadcasters
12. National Broadcasting Company, Inc.
13. Office of Communications of the United Church of Christ
14. Paramount Stations Group, Inc.
15. Telecommunications Research and Action Center/Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights
16. WJAC, Inc.
17. WKRG, Inc. and WEVV, Inc.

APPENDIX B: COMMENT SUMMARY

National Broadcast Television Ownership Rules

Current regulation limits the number and audience reach of television stations in which an entity may hold an attributable interest to 12 stations and 25% of total television households on a national basis. The NPRM proposed several alternatives including:

-increasing the numerical limit to 20 or 24 and the reach limit to 35%
-increasing the numerical limit to 18 and the reach limit to 30%
-increasing the numerical limit only and retaining the 25% reach limit.

Public interest groups commenting in this proceeding[165] and one broadcaster, Fisher Broadcasting[166], favored retention of the existing limits. They argue that increasing the ownership limits will harm the Commission's core goal of promoting diversity of programming. Contrary to the Commission's assertion that the economies of scale made possible by increased ownership limits could permit the production of new, diverse, and locally produced programming[167], they argue that such savings will be used to reduce debt or purchase more expensive syndicated programming.

All other comments filed favor elimination or relaxation of the rule. NTIA and CBS, among others[168], urge total elimination of the rule.[169] Fox believes that the Commission should relax the national ownership limitations to permit entities to hold attributable interests in television stations reaching less than 50% of the nation's households. If a numerical limitation is retained, Fox continues, it should be increased to 25 stations and the Commission should retain its current rule attributing UHF stations with 50% of the households in their

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[165] Comments of Office of Communication of the United Church of Christ ("UCC"), p. 10 and United States Catholic Conference ("USCC"), p. 1.

[166] Comments of Fisher Broadcasting Inc. ("Fisher Broadcasting"), p. 2.

[167] See, Notice of Proposed Rule Making in MM Docket No. 91-221, 7 FCC Rcd 4111, para. 11 (1992).

[168] Comments of Associated Broadcasters, Inc., and Galloway Media, Inc., p. 2, and of Home Shopping Network, Inc., p. 2.

[169] Comments of National Telecommunications and Information Administration ("NTIA"), p. 1, and comments of CBS, Inc. ("CBS"), p. 5. Alternatively, NTIA supports phase-out of the rule and CBS would raise the limit to 24 stations with a combined audience reach of not more than 35 percent.

ADI market.[170] NBC argues for a more moderate increase, such as raising the numerical limit to 18 stations and the audience reach limit to 35%.[171] ABC[172], NAB[173] and INTV[174] also favor a numerical limit of 18 stations, but argue for a 30% audience reach limit. INTV argues, in addition, that we should review the national TV ownership limits again every three years, applying a presumption that the limits should be relaxed.

The proponents of elimination or relaxation of the rule argue that the proliferation of television stations and competing video sources has obviated or undermined the diversity rationale that has supported regulation in this area. Moreover, they contend that increased group ownership would foster competition by permitting broadcasters to achieve economies of scale that would enable then to better compete with cable, which enjoys a dual revenue stream from subscribers as well as advertisers, not available to over-the-air television.[175]

Local Broadcast Television Ownership Rules - Duopoly

A vast majority of commenters agreed that relaxation of current local duopoly rules will promote broadcasters' overall competitiveness in the video marketplace.[176] Nearly all proponents think that a Grade A contour standard provides a substantially more realistic and accurate measure of a station's core market than the existing Grade B contour rule.[177]

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170 Comments of Fox, Inc.("Fox"), p. 1, and of Trinity Broadcast Network ("Trinity"), pp. 4-5. Trinity also supports eliminating numerical limit but retaining a 25% audience reach limit.

171 Comments of National Broadcasting Company, Inc. ("NBC"), p. 2.

172 Comments of Network Affiliated Stations Alliance ("NASA"), p. 18.

173 Comments of National Association of Broadcasters ("NAB"), p. 3.

174 Comments of Association of Independent Television Stations, Inc. ("INTV"), p. 2.

175 Comments of NTIA and CBS.

176 Act III Broadcasting, Inc., indicates that if the Commission retains the current Grade B local duopoly restriction, that it should establish a policy for de minimus waivers, or other such process, so that buyers can bypass the rule when no substantial concerns of diversity loss or undue concentration are raised.

177 Commenters did not hesitate to categorize the current duopoly rule as "anachronistic". Fisher Broadcasting states that the Grade B standard no longer comports with reality, and more specifically the development of "strip cities" over the last 20 years. Fisher believes that the current rule causes huge metropolitan areas to receive a lower quality of service than would otherwise be the case.

Moreover, most proponents believe that the switch from a Grade B standard to a Grade A standard will increase broadcasters' long-term viability by enabling them to reap the benefits provided by "economies of scale" -- without out any commensurate loss in program "diversity."[178] In fact, several commenters indicate that the savings allowed by streamlining management, marketing and station administration will actually increase broadcasters' ability to provide program diversity, variety and quality. While NAB and Fisher Broadcasting oppose any further relaxation of the rule,[179] some commenters suggest that additional relaxation should be considered in two to three years.

Several commentators, particularly broadcasters, urge the Commission to go further. Generally, CBS, INTV, Westinghouse and others support relaxation of the rule, particularly with respect to UHF-UHF combinations in any market. Westinghouse and others would permit VHF-UHF combinations in the same market, although conditions they would place on these arrangements vary. Some commenters would support only VHF-UHF combinations within the Grade A contour while others would allow any television duopoly combination as long as a certain number of voices remained in the market. Still others would only allow the combination if both stations were non-network affiliates while others would permit it if the UHF station was an independent.

A few commenters would drop contour-based duopoly restrictions altogether. Proponents of this view, such as Fox and NTIA, believe that the Commission should adopt an actual audience share approach by utilizing Arbitron ADI data because it is the most accurate indicator of a broadcaster's market power.[180] While Fox proposes that a minimum number of independents remain in the market after acquisition, along with ADI data to prevent undue local concentration, NTIA proposes a system based solely on audience reach, regardless of the

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[178] Commenters note that the greatest cost savings stem from ownership of co-located stations because most costs are local.

[179] NAB and Fisher are concerned that further relaxation of duopoly restrictions into the Grade A contour area would have a "destabalizing effect"-- causing broadcast owners to attempt to purchase another station while also trying to finance the technical upgrades necessary for ATV. Thus, they argue that there are tangible limits to the benefits of economies of scale, and that further relaxation beyond going from a Grade B to Grade A overlap standard would undermine the public interest by allowing dominant broadcasters to benefit from additional economies of scale at the expense or demise of weaker broadcasters, who are unable to further streamline station administration, etc. See Comment of Fisher Broadcasting, p. 4.

[180] Fox, however, does not address the regulatory and administrative difficulties of dealing with rating fluctuations.

number of remaining independently controlled community voices.[181] A few commenters suggest the adoption of an *ad hoc* regulatory scheme, in order to take into consideration the uniqueness of a particular market.[182] Still others propose a two-to-a-market rule, so long as there remain four to six independently owned stations in the local market. Arby Communications proposes perhaps the most radical approach, suggesting that local duopoly restrictions should be dropped altogether--indicating that diversity and undue concentration concerns are best kept in check at the national level.[183]

Some commenters, such as Sinclair Broadcast Group, Inc., feel that duopoly restrictions should only be eliminated for UHF licensees, (keeping the rule otherwise in its current form) thereby leveling the playing field between UHF stations and dominant VHFs. Trinity Broadcasting Network, owning 11 independent UHF stations, however, urges the Commission to adopt Grade A contour restriction for all stations, except unaffiliated UHF broadcasters, who would be free to come under common ownership, regardless of contour overlap.[184] Vetter Communications Company, Inc., suggests that the duopoly rules be relaxed to two-to-a-market combinations between VHF-UHF or UHF-UHF combinations only, while

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[181] Like Fox, NTIA urges eliminating either a Grade B or Grade A signal contour standard. It flatly states that the Commission's duopoly proposal is "inadequate", because it would still preserve many of the problems of the current rule. Instead, it suggests the adoption of an audience share cap whereby the combined audience share of commonly-owned stations could not exceed an established threshold. See comments of NTIA, pp. 21-22. Divestiture of a station would not be required of a group owner whose stations, subsequent to acquisition, exceeded the audience share cap because of internal growth. This would reduce the administrative burden that would otherwise attend such a system.

[182] Comments of KFVE Joint Venture ("KFVE"), pp. 3-4, and 6. KFVE, licensee of an independent VHF television station, also wants the Commission to drop distinctions between UHF and VHF, and not adopt any rule that would distinguish between affiliated and non-affiliated stations, stating that success or failure of stations has more to do with market size and the number of over-the-air competitors. Id. at 7. It would have the Commission review every market independently to determine whether common ownership of television stations with Grade A overlap would be permitted. See also, Comment of Marion TV, Inc., (UHF, Indianapolis, Indiana), pp. 3-4. Marion would have us adopt a presumption favoring duopoly situations with Grade A contour overlap present as long as certain, specific factors are met.

[183] Abry estimates that the typical savings available to co-owned stations with overlapping Grade B contours is only about 6%, on average, while the savings for co-owned stations within Grade A overlap would provide as much as 26% annual savings. Therefore, they argue, going from a Grade B restriction to a Grade A restriction is not enough.

[184] Comments of Trinity Broadcasting Network, pp. 7-8.

also replacing the Grade B standard with a Grade A standard.[185] WNAL-TV, Inc., (UHF, Gadsden, Alabama) which approves a relaxation of current duopoly rules, wants the Commission to consider "additional television services" like LPTV, DBS, and local translators in ascertaining the number of community voices for market concentration determination, and to create a rebuttable presumption that UHF-UHF acquisitions in same market will not undermine diversity or foster undue market control.[186] Along the same lines, Home Shopping Network would eliminate duopoly altogether for "unaffiliated" UHF's, as defined by 47 C.F.R. s. 73.662(i), citing UHF's historical handicaps.

In general, public interest groups (e.g., The United Church of Christ (UCC), United States Catholic Conference (USCC), Telecommunications Research and Action Center (TRAC)) and a few broadcasters (e.g., Press Broadcasting Company, and Malrite Communications Group, Inc.) oppose relaxing local duopoly rules. They believe that the "economies of scale" benefits provided to already financially strong stations will not only cause loss of diversity due to common control (via acquisition), but that those stations that cannot secure economic partners will ultimately be forced to shut-down operations. Opponents to duopoly relaxation insist that stations who do not merge will be "priced out" of the quality programming market, and will increasingly rely on the broadcast of "infomercials" for profit, rather than programming in the public interest. Thus, they continue, relaxation of the current rules will undermine all the goals that the Commission was created to promote; competition, diversity, localism, and public affairs programming. Moreover, opponents are in general agreement that the "economies of scale" justification for duopoly is unconvincing. According to those commenters, relaxation will financially burden many stations because the costs associated with acquiring and maintaining co-owned stations will not be commensurate with the only minimal or non-existent savings that will occur. These commenters assert that the existence of commonly controlled stations will lead to a sharp increase in the demand for, and costs of syndicated programming -- placing it out of the reach of individually owned stations, and even taxing the cash flow of the combinations. As a result, UCC argues that all broadcasters will be further weakened, allowing other video service providers such as DBS, cable, and other competitive video outlets to threaten the prolonged viability of "free" over-the-air television.

Local Broadcast Television Ownership Rules - "One to a Market"

The NPRM proposed alternatives to the current restrictions on common ownership of radio-television combinations in the same market, i.e., "one-to-a-market" rule.[187] Although the Commission currently grants presumptive waivers in the top-25 markets, if 30 independent voices will remain after the merger and normally issues waivers when certain specified factors

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[185] Comments of Vetter Communications Company, Inc., pp. 8-12.

[186] Comment of WNAL-TV, Inc., pp. 3-5.

[187] 47 C.F.R. § 73.3555(b).

are present,[188] the Commission offered four alternative proposals[189] for commenters to consider. A majority of commenters who discussed this rule, including NTIA, CBS, INTV, and Westinghouse, favored its complete elimination, based on an "economies of scale" rationale. Commenters such as Associated Broadcasters, Inc., and Galloway Media, Inc., argue that elimination is justified as it would allow marginal stations to remain on the air, and would likely spur the activation of unused channels, or permit upgrade of facilities.[190] Clear Channel Communications, Inc., argues that 12 "independent operators" remaining in the market would be sufficient to prevent undue concentration, so long as the definition of "operators" include cable, commercial and non-commercial radio and TV broadcasters. Barnstable Broadcasting, Inc., licensee of nine stations (three FM's, two FM-FM's, and one AM-FM), was the only commenter that specifically opposes repeal of the current rule, citing the economic advantage allowed to TV broadcasters, adversely affecting radio-only operations.

As an alternative to repeal, INTV suggests allowing common ownership of at least one station per service (e.g., an AM, an FM and a single TV), with the potential ownership of additional stations up to the maximum number permitted for each particular service. Similarly, NAB urges the Commission to allow cross-ownership up to the limits for each service, so long as 15 independently-owned total voices remain in the local market.[191] ABC concurs, but suggests that 30 such voices should remain. Fisher Broadcasting, Inc., who opposes changes in the national ownership rules and local duopoly, supports "liberalizing" cross-ownership, particularly for the smaller markets. Fisher points out, however, that the Commission's proposal of 30 remaining independently controlled voices would not direct "help" where it is needed, i.e., the smaller markets, where stations would be unable to avail themselves of the rule. JET Broadcasting Co. ("JET"), owner of a grandfathered radio-TV combination, favors the elimination of the one-to-a-market rule and states that the quality of public affairs programming on its FM station is vastly improved by utilizing its TV news facilities. Moreover, JET argues that the inherent separation of the two different media prevents the build-up of viewpoint concentration for TV-radio combinations. Unlike Fisher, however, JET asserts that markets of all sizes would benefit from relaxation. Buck Owens

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188 See, 1989 Multiple Ownership Second Report, 4 FCC Rcd at 1754, which adopted an expanded waiver policy.

189 The NPRM's proposals included: (1) Elimination of Rule--using local limits of each service to prevent undue concentration; (2) Allowing common ownership of one AM, one FM and one TV station per market; (3) Allowing TV-AM combinations only; (4) Codifying current waiver criteria and applying them to all markets where 30 independently owned voices remain. See, Notice of Proposed Rulemaking, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992).

190 Comments of Associated Broadcasters, Inc., and Galloway Media, Inc., pp. 7-8.

191 NAB, however, is unclear how this proposal should be implemented if local duopoly rules are significantly relaxed.

Production Company, working under a "failed station" waiver in Bakersfield, CA, urges the Commission to adopt an AM-FM-TV rule, in order to prevent a penalty of divestiture if "rescues" are successful.

Local Marketing Agreements

Current FCC policy does not restrict television local marketing agreements ("LMAs"); the licensee is, however, required to remain in control of the station at all times. In the radio context, the Commission recently restricted unattributable time brokerage to 15% of the brokered station's weekly broadcast hours; agreements exceeding that will result in ownership attribution to the broker. In the NPRM, the Commission questioned the extent to which LMAs were pervasive in television, whether they present the same competitive and diversity concerns in television as in the radio industry, and whether restrictions on LMAs should be imposed if the television local ownership rules are substantially relaxed.

Few commenters addressed LMAs, and none provided specific information as to their prevalence in the industry. LIN Broadcasting Corp., *et al.*, comments that LMAs are beneficial, but argues that unless duopoly restrictions are relaxed, imposition of the radio model, in which LMAs may be considered an "attributable ownership interest", would preclude such arrangements between television stations in the same area--undermining the potential reduction in local costs. Such a result, they say, is inconsistent with previous policy articulations by the Commission, which has characterized such agreements as beneficial mechanisms that "enable stations to pool resources and reduce operating expenses without necessarily threatening competition or diversity".[192] Associated Broadcasters, Inc. and Galloway Media, Inc. believe that the Commission should not limit LMAs. Rather, they say, the Commission should encourage separately owned television stations to enter LMAs, time brokerage, program affiliation, and simulcast agreements, and other cooperative arrangements, so long as they are consistent with antitrust laws.[193]

INTV suggests that if the Commission substantially relaxes the local television ownership rules, it should govern time brokerage and local marketing agreements by the same standards as attributable ownership interests.[194] Fisher Broadcasting believes that the Commission should restrict television LMAs with limits identical to the radio limits (i.e., brokering more than 15% of a station's broadcast time should result in the station's treatment

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[192] Joint comments of LIN Broadcasting Corp., Midwest Television, Inc., Paducah Newspapers, Inc., Post-Newsweek Stations, Inc., Providence Journal Co., and Spartan Radiocasting Co., pp. 13-14.

[193] Comments of Associated Broadcasters, Inc., and Galloway Media, Inc., p. 17.

[194] Comments of INTV, p. 27.

as an attributable ownership interest for purposes of the multiple ownership rules).[195] In addition, NBC agrees that the Commission's rules regarding television LMAs should be no more restrictive than those regarding radio, because common utilization of newsgathering and production facilities may yield substantial cost savings and thus benefits viewers.[196] In fact, NBC argues that such arrangements may increase diversity by allowing both experimental programming and programming targeted to specific groups. KFVE contends that LMAs should remain unregulated absent evidence of abuse, whether or not the duopoly rule is liberalized and without regard to the adoption of new television multiple ownership rules.[197] The Office of Communication of the United Church of Christ believes that the Commission should adopt safeguards to prevent *de facto* transfers of control by requiring brokered stations to develop issues/program lists based on community ascertainment.[198]

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[195] Comments of Fisher Broadcasting, p. 6.

[196] Comments of National Broadcasting Company, Inc., p. 42.

[197] Comments of KFVE, p. 10.

[198] Comments of Office of Communication of the United Church of Christ, p. 14.

APPENDIX C: BREAKDOWN OF LEISURE ACTIVITES*

	% of total time acccounted for by each activity	
Leisure Activity	**1970**	**1988**
Television	46.5	45.3
Network affiliates		26.3
Independent stations		10.7
Basic cable programs		5.5
Pay cable programs		2.8
Radio	33.1	33.9
Home		16.4
Out of home		17.5
Newspapers	8.3	5.3
Records & tapes	2.6	6.4
Magazines	6.5	3.2
Leisure books	2.5	2.8
Video games (home)		0.4
Movies	0.4	0.4
Spectator Sports	0.1	0.4
Videocassette recorders		1.8
Video games (arcade)		0.1
Cultural events	0.1	0.1
Total	100.0**	100.0**

* These data come from Table 1.3: Time spent by adults on selected leisure activities, 1970 and 1988, published in H. L. Vogel, <u>Entertainment Industry Economics: A guide for financial analysis</u>, (2nd edition, 1992, Cambridge University Press).

** Due to rounding, these columns do not added up to 100 exactly.

APPENDIX D: BREAKDOWN OF ADVERTISING REVENUES*

MEDIUM		1990	1991	1992	1993
TELEVISION	Total	28,405	27,402	29,409	30,584
	Network	9,383	8,933	9,549	10,209
	Syndication (national)	1,288	1,853	2,070	1,576
	Spot (national)	7,354	7,110	7,551	7,800
	Spot (local)	7,612	7,565	8,079	8,435
	Cable (national)	1,197	1,521	1,685	1,970
	Cable (local)	330	420	475	594
RADIO	Total	8,323	8,476	8,654	9,457
	Network	476	490	424	458
	Spot	1,547	1,575	1,505	1,657
	Local	6,300	6,411	6,725	7,342
NEWSPAPERS	Total	32,368	30,409	30,737	32,025
	National	3,720	3,685	3,602	3,620
	Local	28,414	26,724	27,135	28,405
MAGAZINES	Total	6,803	6,524	7,000	7,357
	Weeklies	2,864	2,670	2,739	2,850
	Women's	1,713	1,671	1,853	2,009
	Monthlies	2,226	2,183	2,408	2,498
DIRECT MAIL	Total	23,370	24,460	25,391	27,266
OUTDOOR	Total	1,084	1,077	1,031	1,090
	National	640	637	610	605
	Local	444	440	421	485