UNITED STATES DEPARTMENT OF COMMERCE
National Telecommunications and Information Administration
Washington, D.C. 20230

EX PARTE OR LATE FILED

February 12, 1999

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Letter on the Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; 1998 Biennial Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35

Dear Ms. Salas:

Enclosed please find four copies of the *ex parte* Letter from Assistant Secretary Larry Irving, National Telecommunications and Information Administration, Department of Commerce, to Chairman Kennard in the above-captioned proceedings (two copies for each proceeding). A copy of this letter was also hand-delivered to each of the Commissioners.

Please direct any questions you may have regarding this filing to the undersigned. Thank you for your cooperation.

Respectfully submitted,

Kathy D. Smith

Kathy D. Smith
Acting Chief Counsel

Enclosures

cc: The Honorable William E. Kennard
The Honorable Susan Ness
The Honorable Harold Furchtgott-Roth
The Honorable Michael Powell
The Honorable Gloria Tristani

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The Assistant Secretary for Communications and Information
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The Honorable William E. Kennard
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Re: Ex Parte — Review of the Commission's Regulations Governing Television Broadcasting, MM Docket No. 91-221; 1998 Biennial Review — Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunication Act of 1996, MM Docket No. 98-35.

Dear Chairman Kennard:

I am writing to offer the views of the National Telecommunications and Information Administration (NTIA) on several critical broadcast ownership issues raised by the biennial review in the above captioned proceedings. We applaud your continuing efforts to maximize viewpoint diversity and consumer choice. We hope that these comments will prove a useful roadmap as the Federal Communications Commission (Commission) reviews its policies on national television ownership, television duopolies and local marketing agreements, daily newspaper-broadcast cross-ownership, and radio-television cross ownership.

NTIA urges the Commission to act decisively to preserve the core principle of viewpoint diversity embodied in the First Amendment as well as the fundamental values of localism and competition. We are mindful that this task is complex. President Clinton and Vice President Gore have long recognized the importance of striking the appropriate balance between promoting the free market principle of economic efficiency and the public interest principles of diversity and localism.[1]

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[1] As the President noted in signing the Telecommunications Act of 1996, "my Administration has opposed measures that would allow undue concentration in the mass media. I am pleased that this Act retains reasonable limits on the ability of one company or individual to own television, radio, and newspaper properties in local markets.

In order to maintain that balance, Section 202(h) of the Telecommunications Act of 1996 (Telecommunications Act), in our opinion, wisely directs the Commission to review its rules biennially and to repeal those rules that are no longer in the public interest because of competition.[2] However, as the *Notice of Inquiry* correctly acknowledges, section 202(h) does not relieve the Commission of its broad, statutory obligation to assess whether, even in the face of competition, the elimination or modification of a rule will disserve the public interest.[3] The Commission does not have the statutory authority, and section 202(h) grants it no new authority, to eliminate rules that continue to serve the public interest. When read along with the Commission's existing obligations, section 202(h) directs the Commission to assess whether the presence of competition has eliminated the need for particular rules and to determine whether, even if competition exists, it is a good proxy for public interest values like viewpoint diversity.[4] As the Commission engages in this assessment, we offer the following framework for review.

Framework for Review

Over the last several months, we have listened to heated debate about the critical issues now before the Commission. We have heard broadcast networks and affiliates express concern about the increasing number of entities competing for national and local advertising revenues, the increasing number of entities producing programming and competing to purchase available programming, as well as the continuing fractionalization of television

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My Administration will continue its efforts to ensure that the American public has access to many different sources of news and information in their communities." Statement of the President, Feb. 8, 1996.

2 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("The Commission shall review. . .all of its ownership rules biennially. . .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.")

3 Under section 309(a) of the Communications Act of 1934, the Commission may not grant a broadcast license unless it determines that "the public interest, convenience, and necessity will be served," and under section 309(k)(1)(A), may not renew a licensee unless it determines that the "station has served the public interest, convenience, and necessity."

4 As the Commission acknowledges, this is an extremely high standard that seeks to eliminate rules that are burdensome and unnecessary. *Notice of Inquiry, In the Matter of 1998 Biennial Review*, 13 FCC Rcd 11276, 11278 (1998)(*Notice of Inquiry*).

audiences.[5] In response to these concerns, some parties have urged the Commission to sanction intra- and inter-industry consolidation, reasoning that the best financial and service prospects for the broadcast industry lie in strategic relationships among broadcasters, cable operators, and other distributors of information and entertainment. Others claim that many of the Commission's ownership rules are unnecessary because the marketplace provides consumers with a multiplicity of entertainment and information choices.[6] They suggest that the concerns about diversity and localism are no longer relevant given the emergence of the Internet and other electronic media. We question some of the assumptions underlying these approaches and urge the Commission to carefully review the evidence.

Clearly, broadcasters and other multichannel video providers are operating in a changing media marketplace. Cable television, direct broadcast satellite (DBS), the Internet, multipoint multichannel distribution service (MMDS), open video systems (OVS), and emerging technologies are beginning to provide more choices for entertainment and informational programming than Americans enjoyed several decades ago. Emerging technologies such as the Internet, MMDS, and OVS have the potential to expand these choices even further.

However, the availability of new or competing technologies does not diminish the need for viewpoint diversity or by itself justify relaxation of the Commission's structural protections. The parties who argue for wholesale elimination of the Commission's ownership rules oversimplify the development, nature, and reach of these platforms, and in many instances fail to acknowledge that broadcast companies have made significant investments in these technologies.

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[5] *See, e.g.,* Comments of National Broadcasting Company, Inc. MM Docket No. 98-35, July 21, 1998 at 4; Comments of CBS Corporation, MM Docket No. 98-35, July, 21, 1998 at 3, 16 (noting that "broadcasters face a daunting array of competitive challenges").

[6] *See id.*, Comments of National Broadcasting Company at 4, 9-10; Comments of CBS Corporation at 3, 19. *See also*, Comments of the National Asss'n of Broadcasters, MM Docket No. 98-35, Jul. 21, 1998 at 4-5; Comments of the Ass'n of Local Television Stations, Inc, MM Docket No. 98-35, Jul. 21, 1998 at 31-37; Comments of Tribune Co., MM Docket No. 98-35, Jul. 21, 1998 at 22-51; Comments of Gannett, Co., Inc., MM Docket No. 98-35, Jul. 21, 1998 at 23-34.

Services like MMDS, DBS, and the Internet are not locally-based or do not yet reach large segments of the population.[7] More important is the web of cross ownerships that characterize many of these new services. The fact that many of the news sites on the Internet, for example, are operated by large newspaper companies like the Washington Post and the New York Times or by the broadcast networks belies the notion that a surplus of independent editorial viewpoints exists. In addition, 6 of the top 10 and 20 of the top 30 most heavily-visited sites on the Internet are linked to broadcast licensees,[8] while 5 of the 12 most popular primetime cable programs are directly or indirectly held by broadcast licensees.[9] Because much of the new media is run by old media players, we believe that the Commission should move cautiously in relaxing its ownership rules.

New and emerging technologies like the Internet may at some point signal the need for modification of some of the Commission's ownership rules. However, we are not yet at that point. Hence, the wisdom of the biennial review process which allows both the Commission and the broadcast industry to assess periodically the dynamics of the information marketplace and make necessary adjustments to the regulatory framework.

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[7] In its Fifth Annual Report on the state of competition in the communications industry, the Commission itself acknowledges that "competitive alternatives and consumer choices are still developing." *Fifth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102 (Dec. 23, 1998) at 4 (*Fifth Annual Report*). Emerging technologies like OVS, MMDS and others are not yet full competitors in the video marketplace. The Commission specifically notes that since 1997 MMDS subscribership decreased by nine percent; subscribership to satellite master antenna television fell by 19.1 percent; only 11 OVS operators have been certified to serve 17 areas; and the Internet is not yet a direct competitor to traditional providers of video services. *See id.* at 4-9.

[8] *AOL Tops Website Ratings*, Broadcasting and Cable, Jun. 22, 1998, at 63. The top websites listed have direct or indirect links to Gannett, the New York Times, Walt Disney Company, Washington Post, Time-Warner, NBC, and Viacom. These web sites and ranking include: CNN.com /4, Pathfinder.com/5, MSNBC.com/6, ESPN SportsZone.com/8, USA Today.com/9, Disney.com/10, ABCNews.com/12, CNet.com/13, WashingtonPost.com/14, CBS Sportsline.com/16, CNNSI.com/17, NYTimes.com/18, CNNfn.com/19, TVGEN.com/20, NBC.com/21, ABC.com/22, CBS.com/24, News.com/26, DisneyBlast.com/28, MTV.com/29.

[9] *See Fifth Annual Report*, at D-22, D-25 (1998); Thomas J. Buono, *BIA's State of the Industry: Television '98* (1998) at 28; *Powers That Be at Iger's ABC*, Electronic Media, Jan. 11, 999.

We, therefore, recommend the following guiding principles by which to analyze whether proposed changes to the ownership rules further the public interest.

- Broadcasters are trustees of the public airwaves and have a unique obligation to serve the diverse needs of their local communities of license. Certain cross-ownerships are likely to create disincentives to discharge this obligation fully.

- The Commission's authority under section 202(h) of the Telecommunications Act is broad and includes both competition and diversity concerns.

- Targeted, structural limitations on ownership combinations of the broadcast industry can increase the likelihood that consumers will receive diverse viewpoints and will avert government involvement in impermissible content-based judgments.

- Given the increasing level of consolidation in the broadcast industry,[10] proposed changes to the Commission's ownership rules must be analyzed in terms of the likely effect on minority-owned and small businesses if the Commission is to discharge fully its mandate under section 257 of the Telecommunications Act to identify ways to lower entry barriers for small businesses.

- Where possible, bright line rules are preferable to discretionary waiver standards. Bright line rules provide the kind of certainty that communications companies need to develop consistent business plans that will serve consumers, while discretionary waivers are inherently subjective and yield inconsistent results.

Applying this framework to the national and local ownership rules under review, NTIA concludes that wholesale changes would be detrimental to the public interest, but supports moderate relaxation in specific areas. We consider each of the rules separately below.

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[10] *See, e.g.*, Buono, *id* at 11-12, 27-29; Neil Hickey, *So Big*, Columbia Journalism Review, Jan/Feb 1997 at 23.

National Television Ownership Rule

The national television ownership rule, which imposes a 35 percent audience reach cap on broadcasters,[11] continues to serve the public interest in diversity of viewpoint and competition. NTIA opposes any increase in the national ownership limits at this time, as it would disserve these values. As a practical matter, very few station group owners are near the 35 percent limit and have ample room for continued acquisition.[12]

Only three years ago, the Telecommunications Act raised the national television ownership limit from 25 percent to 35 percent.[13] The result of this adjustment was a series of acquisitions that has reduced the number of broadcast licensees even as the number of licenses has increased.[14] We believe that lifting the national ownership cap will further jeopardize localism, diminish viewpoint diversity and will likely reduce the number of minority-owned stations.

For example, raising the national ownership cap will further decrease the amount of television programming specifically designed to meet the needs of local communities. In many areas local sports, political debates, and charity events are only aired because local

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[11] 47 C.F.R. §73.3555(e)(1).

[12] The top three station groups are: Fox Television Stations Inc. with an audience reach of 34.9 percent of the nation, CBS Station Group with an audience reach of 30.9 percent of the nation, and Paxson Communication Corp. which reaches 29.8 percent of the nation. *See Buono, supra* note 9. *See also Special Report: Top 25 Station Groups*, Broadcasting & Cable, Jan. 25, 1998, at 27, 44-45 listing the reach of the top three station groups: Fox Television Stations Inc. at 35.3 percent of the nation, CBS Station Group at 30.8 percent of the nation, and Paxson Communication Corp. at 29.2 percent of the nation.

[13] Telecommunications Act of 1996, Section 202(c)(1)(B). During the 1995 deliberations on the then telecommunications bill, Congress considered and rejected a provision that would have allowed a single owner to acquire television stations that could reach 50 percent of the nation.

[14] In 1995, there were 508 full power commercial television station owners. Three years later that number declined by 15 percent to 432 owners. *Television and Cable Factbook*, Vol. 63, at A/1361-1394 and A/1445 -1474 (1995). By contrast, over this same period the number of on-air television stations grew by 3.2 percent from 1160 to 1198. *See Broadcast Station Totals as of December 31, 1994* (Jan. 24, 1995) and *Broadcast Station Totals as of December 31 1997* (Jan. 23, 1998), FCC News Releases.

broadcasters choose to preempt network programming for the benefit of their local community.[15] When a single entity can reach up to 50 percent of U.S. households, there are few incentives to produce and air local programming or to target specific community needs.

Some parties claim that increasing the ownership limits will not impact diversity.[16] They argue that broadcasters need greater economies of scale in order to compete with cable television and other multichannel video providers and that mergers of operations will lead to the production of more public interest programming. We disagree. This argument ignores the critical distinction between more programming and more diverse programming provided by separately owned stations, each with its own editorial viewpoint.

Moreover, prior revision of the national ownership cap is already leading to fewer minority-owned stations. NTIA's annual *Minority Commercial Broadcast Ownership* study for 1998 found that the number of minority-owned commercial television stations continues to decline—decreasing by six from 38 to 32 in 1998.[17] Two of the top ten television station groups each control more than twice the number of television stations operated by all minority licensees in the nation.[18] We believe that raising the national ownership cap could have the collateral effect of creating financial incentives that may force small and minority-owned businesses out of the marketplace. This result is inconsistent with the Commission's mandate under section 257 of the Telecommunications Act. Recognizing that substantial barriers to entry for small businesses still exist, Congress directed the Commission to identify

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[15] *See* CBS Television Network Affiliates Ass'n, fact sheet, "Increasing the National Ownership Cap Hurts Localism and Leads to Concentration of Media Power."

[16] *See, e.g.,* Comments of National Broadcasting Co., Inc, *supra* note 5 at 10-11; Comments of CBS Corp., *supra* note 5 at 11-12.

[17] U.S. Dep't of Commerce, Nat'l Telecomm. and Info. Admin., *Minority Commercial Broadcast Ownership in the United States* (Aug. 1998) at 1.

[18] Paxson Communications and the Sinclair Broadcast Group respectively hold 80 licenses and 64 licenses, compared to 32 minority-owned commercial television stations. *See id.* at Section 5, p. 1. *See also*, Bill Carter, *Is Television's Future in This Man's Hands?*, New York Times, Oct. 4, 1998, at 1.

and eliminate those barriers.[19] We, therefore, urge the Commission to retain the national ownership limit at its current 35 percent threshold.[20]

Television Duopoly Rule and Local Marketing Agreements

We are also deeply concerned about the effect of industry proposals to eliminate or severely curtail the local television ownership rules. These rules continue to serve the public interest and should be retained. The television duopoly rule, which prohibits common ownership or control of television stations with overlapping "Grade B" signal contours,[21] was adopted in 1964 "to promote *maximum diversification* of program and service viewpoints and to prevent undue concentration of economic power contrary to the public interest."[22] These concerns are equally valid today, given a marketplace characterized by increasingly few national players.[23]

In the fall of 1996, the Commission proposed to relax the duopoly rule to permit common ownership of television stations in separate Designated Market Areas (DMAs) as long as the "Grade A" signal contours did not overlap.[24] We wrote to the Commission in May of 1997,

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[19] Specifically, section 257 of the Telecommunications Act directs the Commission to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services" and report to Congress every three years. 47 U.S.C. §257(a), (c). In carrying out this obligation, the Act also instructs the Commission to "promote the policies and purposes of [the Telecommunications Act] favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." 47 U.S.C. §257(b).

[20] We note that the Board of the Directors of the National Association of Broadcasters, as recently as this January, refused to change its position that increasing the national ownership limit would harm the network /affiliate relationship. *NAB Board Refuses to Ease Stand on Station Ownership Limits*, Communications Daily, Jan. 13, 1999.

[21] 47 C.F.R. §73.3555(b).

[22] *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 FCC 1476 (1964)(emphasis added).

[23] Buono, *supra* note 9.

[24] *Second Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21655, 21662 (1996).

noting that substantial concentration would result from such action.[25] In the interim, however, the absence of an official position on local marketing agreements (LMAs) has already diluted this standard.

Therefore, in recognition of the current regulatory and economic realities, NTIA would support the Commission's proposed relaxation of the duopoly rule to allow "Grade B" overlap of stations that are in separate DMAs *if and only if* the Commission also (i) prohibits combinations of two VHF stations, (ii) proscribes all other waivers of the duopoly rule, *and* (iii) phases out LMAs on an expedited schedule. Because we believe it is important to provide reasonable notice to parties involved in LMAs, we recommend a phase-out period of three to five years.

The proposed relaxation from a "Grade B" to "Grade A" threshold is a significant one. It would allow broadcasters to convert many of the current quasi-ownership relationships of LMAs into outright ownerships. In this regard, we acknowledge that all LMAs are not the same and that some broadcasters have crafted agreements which may serve the viewing public in some tangible ways. Considered in the aggregate, however, we do not believe that LMAs serve the public interest.[26] Not only do LMAs circumvent the goals of the duopoly rule, but they also do not provide an opportunity for the Commission to assess whether common ownership in a particular case would benefit the public. Therefore, changing the overlap threshold from Grade B to Grade A would disserve the public interest unless LMAs are also eliminated.

We note that under its residual waiver authority the Commission could allow some LMAs to continue after the proposed three to five-year phase-out, if parties, on a case-by-case basis, demonstrate how a particular LMA would promote diversity of viewpoint and provide other tangible public interest benefits. We urge the Commission, after providing an opportunity for notice and comment, to identify specific, diversity of viewpoint-related public interest benefits that might qualify. For example, the Commission could consider whether public interest in a particular market might be served if an otherwise prohibited LMA would create a separate and distinct editorial viewpoint. The Commission could also assess whether the public interest would be served by allowing otherwise prohibited LMAs to continue in markets that have large numbers independently-owned and operated broadcast voices.

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[25] Letter from Assistant Secretary of Commerce Larry Irving to FCC Chairman Reed E. Hundt, May 22, 1997, at 6-7.

[26] Rather than two separately-owned and operated stations disseminating independent editorial viewpoints, many LMAs create a single editorial voice.

Parties who favor the retention of LMAs argue that the Telecommunications Act directs the Commission to grandfather existing LMAs and that combining operations allows stations to devote more resources to public interest programming. First, the Commission has ample authority to decline to grandfather existing LMAs. Section 202(g) of the Telecommunications Act states "[n]othing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission."[27] Under this section, both the continuation and formation of LMAs are contingent on their "compliance with the regulations of the Commission." The statute, therefore, grants the Commission discretion to determine through its rulemaking authority whether and under what circumstances LMAs are permissible.

Moreover, even if stations choose to devote surplus resources to news and information (and the Commission cannot force them to do so without violating the First Amendment), the market will still have lost a significant source of viewpoint diversity, which is the heart of the duopoly rule. In the context of a relaxation of the duopoly rule itself, the public interest would not be served if LMAs were not dissolved as quickly as equity will allow.

Daily Newspaper/Broadcast Cross-Ownership Rule

The daily newspaper/broadcast cross-ownership rule, which prohibits cross-ownership of a daily newspaper and a television or radio station in the same community,[28] also continues to serve the public interest and we urge the Commission to retain the rule. As the Commission's *Notice of Inquiry* explicitly acknowledges, the newspaper/broadcast cross-ownership rule was designed to "promote diversity on the *local* level."[29] NTIA believes that allowing common ownership of a newspaper and broadcast station in the same market or routinely granting waivers of the cross-ownership rule will lead to further media concentration and likely harm viewpoint diversity.

We are also unpersuaded that widespread competition has eliminated the need for these rules. In fact, changes in the media landscape since the 1975 adoption of these rules confirm their continued relevance. Television station groups and newspaper chains have expanded

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[27] Telecommunications Act of 1996, Section 202(g).

[28] 47 C.F.R. § 73.3555(d).

[29] *Notice of Inquiry*, 13 FCC Rcd 11276, 11289 (emphasis added).

exponentially in recent years.[30] On the national level, the largest newspaper chains are also among the largest broadcast groups, which means that already fewer people control the news and information that Americans receive.[31] Fewer cities have competing metropolitan newspapers today. The Telecommunications Act's relaxation of limits on television/radio cross-ownership and the provisions that increased the radio station ownership limits to eight commercial radio stations in a market have significantly increased media concentration.

In addition, local broadcast news and daily newspapers are the principal sources of local information for Americans.[32] The existence of new media cannot adequately address the decrease in viewpoint diversity that would result from cross ownerships of these critical information outlets. Recent studies indicate that consumers rely on broadcast stations and the Internet to supplement rather than substitute for newspapers. The Pew Research Center's *1998 Biennial News Consumption Survey* found that despite the variety of news *formats* available, "[i]ronically, the daily newspaper, the oldest format, is the only news source used regularly by a majority of all [news audience] groups."[33] In addition, almost two-thirds of

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[30] Regarding consolidation of the newspaper industry, *see e.g., Unabashed, execs urge: deal on*, Editor & Publisher, May 30, 1998, at 3; *Tribune buys Fla. Weeklies*, Editor & Publisher, Aug. 22,1998 at 6. The chain phenomenon is also evident among "alternative" weekly newspapers. *See* Eric Bates, *Chaining the Alternative*, The Nation, Jun. 29, 1998 at 11. Regarding newspaper/broadcast cross ownership at the national level, the following firms, all among the 25 top media companies (as measured by revenue), derive a significant portion of revenues from both broadcast and newspaper properties: Gannett Co., Advance Publications, Cox Enterprises, New York Times, Hearst Corp., Tribune Corp., Washington Post Co. and the A.H. Belo Co., which are all among the top 25 media companies (as measured by revenue). *See 100 media companies by media revenue*, Advertising Age, Aug. 17, 1998, at S4.

[31] These entities include: Tribune Broadcasting Co., Gannett Company, Inc., Belo Corporation, Cox, Hearst-Argyle, Scripps Howard, Post Newsweek *See id.* at note 33, *100 media companies by media revenue, Groups of Newspaper Under Common Ownership*, Editor & Publisher Yearbook 1998 at I-483 to 1-494, and Buono, *supra* note 9, at 28.

[32] *See,* The Pew Research Center for The People & The Press, *Pew Research Center Biennial News Consumption Survey* (1998). Available at http://www.people-press.org/med98rpt.htm.

[33] *Id.* Similarly, a study conducted by Market Facts Inc. and MSNBC found that of the estimated 20.1 million U.S. residents who use the Internet as a news source, 82 percent regularly read a newspaper, 74 percent regularly turned to broadcast television news, 71 percent watched cable news, and 57 percent regularly read news magazines. Hoag Levins, *Growing U.S. Audience Reads News on Net*, Editor & Publisher, Feb. 21, 1998, at 14.

Internet users (64 percent) watched television news, over half (51 percent) read a newspaper, and almost as many (48 percent) listened to news on the radio.[34] Therefore, common ownership threatens consumers' ability to access readily the variety of diverse and antagonistic viewpoints contemplated by the First Amendment.

Maintaining "separate operations"—a solution proposed by some parties—is also an insufficient safeguard.[35] Some evidence suggests that commonly-held media properties compromise the delivery of news.[36] This outcome is especially likely because broadcasters plan to share facilities, operations, and expertise with newspapers.[37] Therefore, we urge the Commission to retain the newspaper/broadcast rule and decline to routinely grant waivers of its provisions.

Radio/Television Cross-Ownership Rule and Waiver Policy

The one-to-a-market rule, which prohibits cross ownership of television and radio stations in a single market,[38] has unevenly fulfilled its purpose of promoting competition as well as viewpoint and programming diversity. The rule's primary weakness has been the discretionary, five-part waiver standard that the Commission has applied since 1989.[39] As

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[34] *Biennial News Consumption Survey, supra* note 32 at 14.

[35] *See, e.g.*, Comments of Tribune Co., *supra* note 6 at 38.

[36] *See, e.g.*, David Noack, "Top Gannett VP Vetted Chiquita Story Package," Editor & Publisher, Jul. 25, 1998, at 16; David Noack, "Barnicle Bails From Boston Globe," Editor & Publisher, Aug. 22, 1998, at 7; Neil Hickey, "So Big: The Telecommunications Act at Year One," Columbia Journalism Review, Jan./Feb. 1997 at 25.

[37] *See, e.g.*, Comments of Tribune Co., *supra* note 6 at 65-67.

[38] 47 C.F.R. § 73.3555(b).

[39] In 1989, the Commission adopted two presumptive waiver standards premised on large market size or financial failure and a discretionary waiver policy that required licensees to meet five criteria including public service benefits of joint operation of facilities and the nature of the post-merger market in light of diversity and competition concerns. *See Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1741, 1753 (1989). Most recently, the Commission has sought comment on whether to streamline its waiver policy. *Second Further Notice of Proposed Rule Making, Review of the Commission's 's Regulations Governing Television Broadcasting*, 11 FCC Rcd 21655, 21682 (1996)(*Further Notice on Television Broadcasting*).

modified by the Telecommunications Act, this waiver standard would allow a single licensee to control a television station and as many as eight radio stations in a market. We strongly encourage the Commission to eliminate its discretionary waiver policy and replace it with a presumptive waiver standard that will yield more consistent results.

With minor modifications, NTIA supports the Commission's tentative conclusion on modifying its presumptive waiver standard described in its *Second Further Notice of Proposed Rule Making* on television broadcasting.[40] We propose a presumptive waiver standard that would permit common ownership of one television station, two AM and two FM radio stations (1TV-2AM -2FM combinations) in the top 50 markets only if 30 separately-owned, operated, and controlled voices would remain in the market after the transaction.

The critical public interest components of this approach are the independence of the outlet and the identity of the "voices" that are counted. We believe that the Commission should only count "voices" that are equivalent both in terms of the nature of the programming available and a consumer's ability to easily access the information.

Therefore, each full power television or radio station, independent cable operator, and daily newspaper of general circulation would count as one voice each. By contrast, for the purposes of determining the number of independent voices in a market, two stations that have executed a joint sales agreement (JSA) or LMA should count as a single voice. JSAs and LMAs are too closely akin to common ownership to meet the independence component of this standard. In addition, NTIA believes that the Commission should not count the Internet, MMDS, OVS, DBS, and videocassette recorders, among other alternative technologies, as "voices." While these technologies hold promise for the future, they currently do not originate or provide independent outlets for local content. DBS and the Internet are also not sufficiently accessible to the general population because of the need for expensive equipment and technical expertise.

We are confident that the Commission will do its part to ensure that viewpoint diversity, localism, and competition continue to be principle pillars of our broadcast policies as we move into the 21st century.

[40] *Further Notice on Television Broadcasting, id.*

Thank you for your consideration of these views.

Sincerely,

Larry Irving

Larry Irving

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani