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

In the Matter of	)	
Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8

REPORT AND ORDER

Adopted: August 5, 1999 Released: August 6, 1999

By the Commission: Chairman Kennard and Commissioners Ness, Powell, and Tristani issuing separate statements; Commissioner Furchtgott-Roth dissenting and issuing a statement.

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I. INTRODUCTION

1. In this *Report and Order*, we revise our local television ownership rules -- the "TV duopoly" rule and the radio-television cross-ownership or "one-to-a-market" rule -- to respond to ongoing changes in the broadcast television industry. Our action today culminates a broad- reaching examination of these and other broadcast media ownership rules first initiated by the Commission in 1991, and more recently guided by the statutory directives of the Telecommunications Act of 1996.[1] The new rules we adopt today reflect a recognition of the growth in the number and variety of media outlets in local markets, as well as the significant efficiencies and public service benefits that can be obtained from joint ownership. At the same time, our decision reflects our continuing goals of ensuring diversity and localism and guarding against undue concentration of economic power. The rules we adopt today and in our related national television ownership and broadcast attribution proceedings, being adopted simultaneously with this *Report and Order*,[2] balance these competing concerns and are intended to facilitate further development of competition in the video marketplace and to strengthen the potential of broadcasters to serve the public interest.

II. BACKGROUND

2. The television duopoly rule currently prohibits an entity from having cognizable interests in two television stations whose Grade B signal contours overlap. The Commission rarely grants permanent waivers of the duopoly rule, reserving such relief for cases with unique or highly unusual

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

[2] *See Report and Order, In the Matter of Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket Nos. 96-222, 91-221, & 87-8, FCC 99-208 (adopted Aug. 5, 1999) ("*National TV Ownership Report and Order*"); *Report and Order, In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51, & 87-154, FCC 99-207 (adopted Aug. 5, 1999) ("*Attribution Report and Order*").

circumstances.[3] Under current policy, the time brokerage by one television station of another television station, even one in the same market, pursuant to a time brokerage or "local marketing" agreement ("LMA"),[4] is not attributable, and accordingly these relationships are not subject to our multiple ownership rules. The radio-television cross-ownership rule generally forbids joint ownership of a radio and a television station in the same local market.[5] We have presumed it is in the public interest to waive this rule in the top 25 television markets if, post-merger, at least 30 independently owned broadcast voices remain, or if the merger involves a failed station. Such waivers are available to permit ownership of up to one television, one AM, and one FM station per market. We have evaluated other waiver requests case by case, based on an analysis of five criteria (the "five factors" test).

3. This proceeding began in 1991 with the issuance of a *Notice of Inquiry* soliciting comment on whether existing television ownership rules and related policies should be revised in light of ongoing changes in the competitive market conditions facing broadcast licensees.[6] After reviewing the comments received in response to the *NOI*, the Commission issued a *Notice of Proposed Rule Making* containing a number of alternative proposals involving the national and local television ownership rules, and seeking comment on the extent and impact of LMAs in the broadcast television industry.[7]

4. In 1994, in a *Further Notice of Proposed Rule Making* in this docket, the Commission set

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[3] For example, the FCC has permitted common ownership of television stations in New York City and Philadelphia. In addition, the Commission has granted temporary waivers of the duopoly rule, subject to fixed, near-term divestiture requirements, to facilitate mergers.

[4] An LMA or time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot announcements to support the programming. *See Further Notice of Proposed Rule Making, In the Matter of Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51, 87-154, 11 FCC Rcd. 19895, 19908 (1996) (*"Attribution Further Notice"*).

[5] Specifically, the rule forbids joint ownership of a radio and a TV station where the specified service contour of the radio station (2 mV/m for AM and 1 mV/m for FM) encompasses the entire city of license of the TV station or the Grade A contour of the TV station encompasses the entire city of license of the radio station.

[6] *Notice of Inquiry, In the Matter of Review of the Policy Implications of the Changing Video Marketplace*, MM Docket No. 91-221, 6 FCC Rcd 4961 (1991) ("*NOI*").

[7] *Notice of Proposed Rule Making, In the Matter of Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, 7 FCC Rcd 4111 (1992). This *NPRM* also examined the dual network rule, national ownership, and other network rules. The dual network and national ownership rules are presently under examination in the Commission's 1998 biennial review of its broadcast ownership rules. *Notice of Inquiry, In the Matter of 1998 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 98-35, 13 FCC Rcd 11276 (1998) ("*Biennial Review NOI*").

forth a competition and diversity analysis for examining our ownership rules.[8] Based on this analysis, the Commission proposed changes to the national television ownership rule, the local television ownership rule (otherwise known as the "duopoly" rule), and the radio-television cross-ownership rule. In addition, the Commission solicited comment on whether broadcast television local marketing agreements ("LMAs") should be considered attributable for purposes of applying the ownership rules in a manner similar to radio LMAs.

5. On February 8, 1996, the Telecommunications Act of 1996 became law. Section 202 of the Act directed the Commission to make a number of significant revisions to its broadcast ownership rules.[9] Section 202 also requires us to review aspects of our local ownership rules that were the subject of the *TV Ownership Further Notice*. Specifically, Section 202 requires the Commission to: 1) conduct a rulemaking proceeding concerning the retention, modification, or elimination of the duopoly rule;[10] and 2) to extend the top 25 market/30 independent voices one-to-a-market waiver policy to the top 50 markets, "consistent with the public interest, convenience, and necessity."[11] In addition, both the Act and its legislative history contain language regarding the appropriate treatment of existing television LMAs under our ownership rules.[12] Finally, Section 202 directs the Commission to conduct a biennial review of all of its broadcast ownership rules and to repeal or modify any regulation it determines is no longer in the public interest.[13]

6. In view of the 1996 Act's directives regarding broadcast multiple ownership, the

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[8] *Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221 & 87-8, 10 FCC Rcd 3524 (1995) ("*TV Ownership Further Notice*").

[9] Among other things, Section 202 directed the Commission to eliminate its restriction on the number of radio stations a single entity can own or control nationally, and to increase the number of radio stations that a single entity can own or control in a local market. *See* Sections 202(a) and (b) of the 1996 Act. The Act also states that the Commission may permit an entity to exceed the revised local radio ownership limits if such ownership or control "will result in an increase in the number of radio broadcast stations in operation." Section 202(c). Section 202 also directed the Commission to eliminate the numerical cap on the number of television stations a single entity can own or control nationally, and revised upward (from 25 percent to 35 percent) the national audience reach limitation for television stations. Section 202(c)(1).

[10] Section 202(c)(2) of the 1996 Act.

[11] Section 202(d) of the 1996 Act.

[12] Section 202(g) of the 1996 Act.

[13] Section 202(h) of the 1996 Act. The Commission initiated this biennial review in March 1998. *See Biennial Review NOI*. This review covers a number of our ownership rules that were not already subject to pending proceedings. In the *Biennial Review NOI*, the Commission stated that it would take action with respect to the rules that were already subject to pending proceedings, including the TV duopoly and radio-television cross-ownership rules, independently of the biennial review proceeding. We take such action today in amending our TV duopoly and radio-television cross-ownership rules.

Commission in 1996 adopted a *Second Further Notice of Proposed Rule Making* in this proceeding inviting comment on several issues in light of the 1996 Act.[14] We reiterated that "'our concern with diversity is most acute with respect to local ownership issues.'"[15] We further stated our belief that we should proceed with "reasonable caution" to consider the impact on industry structure made possible by the legislation and by other forces that are "changing, often in unpredictable ways, the marketplace for video programming. . . ."[16] The Commission solicited further comment in light of its review of comments previously filed in this proceeding, and invited comments on a number of specific issues pertaining to the duopoly rule, the radio-television cross-ownership rule, and the treatment of existing television LMAs in the event they are deemed attributable under any rules adopted in our attribution proceeding.

7. Our ownership rules, particularly the local ownership rules at issue in this proceeding, serve a vital public interest by promoting competition and diversity in the mass media. These are bedrock goals -- reaffirmed by Congress and the Supreme Court on numerous occasions -- in carrying out our statutory mandate of ensuring that broadcast licensees serve the "public interest, convenience, and necessity."[17] With these goals in mind, and after carefully reviewing the record in this proceeding,[18] we believe we should relax to some extent our local television ownership restrictions where the public interest benefits resulting from same-market common ownership outweigh the threat to diversity and localism. The record reflects that there has been an increase in the number and types of media outlets available to local communities. With respect to cable television, we recognize that clustering of systems in the major population centers enables cable to compete more effectively for advertising dollars.

8. Specifically, we have decided to modify our local television ownership rule as follows. First, we are relaxing our television duopoly rule by narrowing the geographic scope of the rule from the current Grade B contour approach to a "DMA" test. Thus, common ownership of two television stations will be permitted without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas ("DMAs"). In addition, we will allow common ownership of two stations in the same DMA if their Grade B contours do not overlap (a continuation of our current rule), or if eight independently owned, full-power and operational television stations (commercial and noncommercial) will remain post-merger, and one of the stations is not among the top four-ranked stations in the market, based on audience share, as measured by Nielsen or by any comparable professional and accepted rating service, at the time the application is filed. We will also adopt three waiver criteria as follows. First, we will presume a

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[14] *Second Further Notice of Proposed Rule Making*, MM Docket Nos. 91-221 & 87-8, 11 FCC Rcd 21655 (1996) ("*Second Further Notice*").

[15] 11 FCC Rcd at 21657 (quoting *TV Further Ownership Notice*, 10 FCC Rcd at 3574).

[16] 11 FCC Rcd at 21657.

[17] 47 U.S.C. § 309(k)(1). *See also infra* ¶¶ 17, 20, 21 (discussing decisional and statutory sources regarding competition and diversity).

[18] For a list parties that filed comments in response to our *Second Further Notice*, *see* Appendix C, attached.

waiver of the rule is in the public interest to permit common ownership of two television stations in the same market where one station is a "failed station," as supported by a showing that the station either has been off the air for at least four months immediately preceding the application for waiver, or is currently involved in involuntary bankruptcy or insolvency proceedings. Second, we will presume a waiver of the rule is in the public interest where one of the merging stations is a "failing" station, as supported by a showing that the station has had a low audience share and has been financially struggling during the previous several years, and that the merger will result in demonstrable public interest benefits. Third, we will presume a waiver is in the public interest where applicants can show that the combination will result in the construction and operation of an authorized but as yet "unbuilt" station, supported by a showing that the permittee has made reasonable efforts to construct. For all of these waivers, we will also require a showing that the in-market applicant is the only buyer ready, willing, and able to operate the station, and that sale to an out-of-market applicant would result in an artificially depressed price.

9. With respect to the radio-television cross-ownership rule, we are adopting a new, three-part rule that permits some degree of same-market radio and television joint ownership. We will permit a party to own a television station (or two television stations if permitted under our modified TV duopoly rule or television LMA grandfathering policy) and any of the following radio station combinations in the same market:

- up to six radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules[19]) in any market where at least 20 independent voices would remain post-merger;

- up to four radio stations (any combination of AM or FM stations, to the extent permitted under our local radio ownership rules) in any market where at least 10 independent voices would remain post-merger; and

- one radio station (AM or FM) notwithstanding the number of independent voices in the market.

In addition, in those markets where our revised rule will allow parties to own eight outlets in the form of two TV stations and six radio stations, we will permit them to own one TV station and seven radio stations instead.

10. For purposes of the new radio-television cross-ownership rule, we will count as voices all independently owned, full-power, operational, commercial and noncommercial television stations licensed to a community in the DMA in which the TV station in question is located, and all independently owned and operational commercial and noncommercial radio stations licensed to, or with a reportable share in, the radio metro market where the TV station involved is located. In addition, we will count independently owned daily newspapers that are published in the DMA and have a circulation exceeding 5 percent in the DMA. Finally, we will count, as a single voice, wired cable service, provided cable service is generally

[19] For example, if the radio/TV combination at issue is in a market where our local radio ownership rules would allow a radio-only combination to own eight stations, five of which are FM and three of which are AM, the radio/TV combination could own five FM stations and one AM station.

available in the DMA. As with our revised duopoly rule, we will permit waiver of our new radio/TV cross-ownership rule where one station is a failed station. We will not, however, adopt a presumptive waiver based on a showing that one station is a failing station or that the combination will result in the construction and operation of an authorized but as yet unbuilt station. We will consider further relaxation of this rule and waiver policies as part of future biennial reviews.

11. We have granted a number of radio-television cross-ownership rule waivers conditioned on the outcome of this proceeding. The majority of these waivers involve radio-television combinations that will now be permissible under the revised rule we adopt today. For those that are not covered by the revised rule, as well as for those for which an application was filed on or before July 29, 1999 (the date of the "sunshine" notice for this *Report and Order*) if such application is ultimately granted by the Commission, we will allow these combinations to continue, conditioned on the outcome of the Commission's 2004 biennial review. Parties who wish the Commission to conduct this review prior to 2004 may apply for such relief, using criteria set forth below,[20] beginning one year after the date this *Report and Order* is published in the Federal Register. Any transfer of a grandfathered combination after the adoption date of this Report and Order (whether during the initial grandfathering period of after a permanent grandfathering decision has been made) must meet the radio/TV cross-ownership rule.

12. Finally, with respect to existing television LMAs, we have decided in our related attribution proceeding to attribute time brokerage of another television station for purposes of our multiple ownership rules where the brokered and brokering station are in the same market and the amount of time brokered is more than 15 percent of the brokered station's weekly broadcast hours.[21] Once attributed, however, the majority of currently existing same-market television LMAs will not violate our new TV duopoly rule going forward, because they either will be in separate DMAs, or will constitute an otherwise permissible arrangement under the new rule or related waiver policies. We will permit those LMAs that do not comply with our new duopoly rule and waiver policies to continue in full force and effect, if entered into before November 5, 1996, the grandfathering cut-off date proposed in the *Second Further Notice*. LMAs entered into on that date or thereafter must come into compliance with our new duopoly rule and/or waiver policies or terminate within two years of the adoption date of this *Report and Order*. Television LMAs entered into before November 5, 1996 will be grandfathered, conditioned on the outcome of the Commission's 2004 biennial review, at which time the Commission will reconsider their status. Parties who wish the Commission to review the status of their LMAs prior to the 2004 biennial review may apply for such relief, using the criteria specified below,[22] beginning one year after the date this *Report and Order* is published in the Federal Register. During the initial grandfathering period, the parties to the LMA may renew and/or transfer the term of LMA that remains in the five-year period.

13. We note that a number of parties have expressed concern about the fact that greater consolidation of ownership in broadcasting makes it more difficult for new entrants -- parties that own

[20] *See infra* ¶ 148.

[21] *See Attribution Report and Order*, section III.C.

[22] *See infra* ¶ 148.

no or only a few mass media outlets -- to enter this industry. This is particularly the case for minorities and women who are underrepresented in broadcasting.[23] We share these concerns. The Commission has recognized the importance of promoting new entry into the broadcast industry as a means of promoting competition and diversity. Indeed, we have adopted a "new entrant" bidding credit as part of our broadcast auction procedures for these reasons and also to comply with our statutory mandate to "ensure that small businesses, rural telephone companies, and businesses owned by members of minority groups and women are given the opportunity to participate in the provision of spectrum-based services."[24] We will monitor the effects of the relaxation of our local TV ownership rules on new entry.

14. We are now guided in considering initiatives to encourage greater minority and women-owned mass media businesses by a 1995 Supreme Court decision that held that any federal program that uses racial or ethnic criteria as a basis for decision-making is subject to strict judicial scrutiny; to withstand this scrutiny, any such programs must now be shown to "serve a compelling governmental interest, and must be narrowly tailored to further that interest."[25] We are presently conducting studies that we believe will allow us to address this issue in the context of our broadcast licensing and ownership policies. Upon the completion of these studies, we will examine the steps we can take to expand opportunities for minorities and women to enter the broadcast industry. In the interim, we encourage broadcasters to establish incubator programs and to engage in other cooperative ventures that will boost new entry into the broadcast industry, particularly with regard to the participation of women and minorities in the mass media.

III. OVERVIEW

15. The ultimate objectives of our ownership rules are to promote diversity and to foster economic competition, while minimizing any adverse effects our pursuit of these goals has on the efficient organization of the industry. All of our broadcast cross-ownership and multiple ownership rules, including the "TV duopoly" and "one-to-a-market" rules at issue in this proceeding, are based on these "twin goals" of competition and diversity. For example, when the Commission adopted the current version of the TV duopoly rule in 1964, it stated that its multiple ownership rules "seek to promote maximum diversification of program and service viewpoints and to prevent undue concentration of economic power contrary to the

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[23] *See, e.g.*, Letter from David Honig, Executive Director, Minority Media and Telecommunications Center, to William Caton, Acting Secretary, FCC, dated March 25, 1997; AWRT Comments.

[24] 47 U.S.C. § 309(j)(4)(D). *See First Report and Order*, *In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, Reexamination of the Policy Statement on Comparative Broadcast Hearings, Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, MM Docket No. 97-234, GC Docket No. 92-52, GEN Docket No. 90-264, 13 FCC Rcd 15920, 15993-15996, ¶¶ 186-190 (1998) ("*Competitive Bidding First Report and Order*").

[25] *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 235 (1995).

public interest."[26] The Commission explained:

> The concept embodied in these rules is not complex: When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people. This objective flows logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have 'an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.'"[27]

Similarly, when the Commission adopted the one-to-a-market rule in 1970, it likewise stated that the rule has a "twofold objective: (1) [f]ostering maximum competition in broadcasting, and (2) promoting diversification of programming sources and viewpoints."[28]

16. In considering the changes we have proposed to our local television ownership rules, we must assess the costs and benefits of such modifications in light of both our diversity and competition objectives. Our multiple ownership restrictions must strike a balance between the benefits to the industry and to the public of common ownership, such as economies of scale which can result in stronger stations and improved service to the public, and the reduction in the diversity of ownership and competition in a market that may arise from consolidation of station ownership. We must also take into account marketplace developments and the increased competition broadcasters are facing from other mass media outlets.

17. Promoting Diversity. One of the most important purposes of our multiple ownership rules is to encourage diversity in the ownership of broadcast stations so as to foster a diversity of viewpoints in the material presented over the airwaves.[29] As the Supreme Court recently reaffirmed, "'it has long

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[26] *Report and Order, In the Matter of 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*, Docket No. 14711, 45 FCC 1476, 1476-77 (1964).

[27] *Id.* at 1477 (citation omitted).

[28] *First Report and Order, In the Matter of Amendment of Sections 73.35, 73.240, and 73.636 of the Commission Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, Docket No. 18110, 22 FCC 2d 306, 307 (1970).

[29] We have previously observed that our ownership rules seek to foster "outlet" and "source" diversity as a means of promoting a diversity of viewpoints. *TV Ownership Further Notice*, 10 FCC Rcd. at 3549-3550, ¶ 60-61. "Outlet" diversity refers to "a variety of delivery services (*e.g.*, broadcast stations) that select and present

been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.""[30] This diversity policy is consistent with, and in fact furthers, the First Amendment goal of fostering the "marketplace of ideas"[31] and encouraging "uninhibited, robust, and wide-open" debate.[32] For these reasons, the Supreme Court has stated that it has "no difficulty" in concluding that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest"; indeed, the Supreme Court has stated that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[33]

18. This is especially the case with respect to broadcasting. Broadcast stations, particularly television stations, reach large audiences and are the primary source of news and entertainment programming for Americans.[34] Broadcasters consequently play a leading role in shaping democratic debate and cultural attitudes. For example, the manner and viewpoint a station uses in presenting the news can have a substantial impact on a local election. A television drama that raises controversial or important societal issues can not only be entertaining but also shape cultural attitudes about these issues in significant ways. There is consequently a vital public interest in ensuring that these influential outlets for communication are in the hands of a broad number of different owners.

19. Our concern for ensuring diversity in broadcasting is most pressing at the local level. As the Commission explained in the *TV Ownership Further Notice*, "[t]he reasons for seeking diversity on the local level are readily apparent. Monopolization [of] the means of mass communication in a locality assure the monopolist control of information received by the public and based upon which it makes

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programming directly to the public"; "source" diversity refers to "a variety of program producers and owners." *Id.* at 3549-3550, ¶ 61. Both outlet and source diversity are "integral to the ultimate goal of providing the public with a variety of viewpoints. . . . The Commission has felt that without a diversity of outlets, there would be no real viewpoint diversity -- if all programming passed through the same filter, the material and views presented to the public would not be diverse. Similarly, the Commission has felt that without diversity of sources, the variety of views would necessarily be circumscribed." *Id.* at 3550-3551, ¶ 61.

30 *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*"Turner I"*) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

31 This "marketplace of ideas" metaphor was first articulated by Justice Holmes. *See Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

32 *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) (Brennan, J.).

33 *Turner I*, 512 U.S. at 663.

34 According to a recent survey, almost 70 percent of adults said they get most of their news from television - almost twice the number that list newspapers as their main news source. *See* "America's Watching," - March/April, 1997, Roper Starch Worldwide, Inc.

elective, economic and other choices. Measures to prevent such control have taken the form of our duopoly and one-to-a-market rule and our newspaper/broadcast cross-ownership rule, all of which limit the ability of a single person or entity to control local organs of mass communications in a geographic locale."[35]

20. The strong policy of promoting diversity is distinct from our competition goal. As the Supreme Court has recognized as recently as 1997, "[f]ederal policy . . . has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation."[36] Whether or not a particular ownership combination may have anticompetitive effects in the sale of advertising time or other markets in which broadcasters compete, it may nonetheless reduce the diversity of independently owned voices in a community. Congress implicitly recognized this in amending the local radio ownership rules in the 1996 Act. Although these amendments significantly relaxed these rules, they nevertheless maintained a set of radio ownership limitations. Congress promoted diversity separate and apart from competition. Indeed, Section 202(b) of the 1996 Act, which sets forth the new limitations, is titled "Local Radio *Diversity*."[37] Moreover, in discussing the radio-television cross-ownership rule, the Conference Report to the 1996 Act noted "the potential for public interest benefits of [radio-television station combinations] *when bedrock diversity interest[s] are not threatened*," and further stated that in reviewing this rule the FCC should take into account not only the increased competition facing broadcasters but also "the need for diversity in today's radio marketplace."[38]

21. Congress has repeatedly emphasized in other contexts its concern for promoting diversity in the mass media, notwithstanding the increasingly competitive nature of virtually all communications markets.[39] For example, the 1996 Act, as stated in its preamble, seeks to establish a "pro-competitive, de-regulatory national policy framework," yet still directs the Commission, in Section 257, in identifying and eliminating market entry barriers for entrepreneurs and other small businesses in certain services, "to promote the policies and purposes of this Act favoring diversity of media voices."[40] Likewise, among the policies of the Cable Competition and Consumer Protection Act of 1992 ("1992 Cable Act") were not only to "ensure that cable television operators do not have undue market power," but also to "promote the

[35] 10 FCC Rcd. at 3559, ¶ 78.

[36] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 194 ("*Turner II*").

[37] Pub. L. No. 104-104, 110 Stat. 56, 110 (1996) (emphasis added).

[38] S. Conf. Rep. 104-230, 104th Cong. 2d Sess. 163 (1996) (emphasis added).

[39] Michael Harrington, *A-B-C, See You Real Soon: Broadcast Media Mergers and Ensuring A "Diversity of Voices,"* 38 B.C. L. Rev. 497, 523-25 (1997) ("Congress has repeatedly expressed its intent to maintain a diversity of media viewpoints.").

[40] 47 U.S.C. § 257(b).

availability to the public of a diversity of views and information."[41] The 1992 Cable Act's requirement that cable systems carry the signals of local broadcast stations also reflects Congress' efforts to advance diversity.[42] The Supreme Court has also consistently recognized the strong public policy of promoting viewpoint diversity in the mass media.[43]

22. Some question whether diverse outlets and sources lead to diverse viewpoints, or whether our rules are necessary to promote diversity, suggesting that commonly owned outlets can produce diverse viewpoints equally as well as separately owned outlets. We disagree with these arguments. As the Commission stated when it adopted the newspaper/broadcast cross-ownership rule, ". . . it is unrealistic to expect true diversity from a commonly-owned newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run."[44] As the Commission explained, "[t]he significance of ownership from the standpoint of 'the widest possible dissemination of information' lies in the fact that ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation, all of which are a critical aspect of the Commission's

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[41] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(b) (1992).

[42] *See* S. Rep. No. 92, 102d Cong., 1st Sess. 58 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1191; H.R. Rep. No. 628, 102d Cong., 2d Sess. 28, 63 (1992).

The communications laws otherwise incorporate the public policy goal of diversity. *See, e.g.,* 47 U.S.C. § 309(i)(3)(A) ("The Commission shall establish rules and procedures to ensure that . . . significant preferences will be granted to applicants or groups of applicants, the grant to which of the license or permit would increase diversification of ownership of the media of mass communications."); 47 U.S.C.§ 521 ("The purposes of this title are to . . . assure that cable communications . . . are encouraged to provide the widest possible diversity of information sources. . . ."); 47 U.S.C. § 532(a) ("The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public. . . .); 47 U.S.C. § 548(a) ("The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market. . . .").

[43] *See, e.g., Turner II,* 520 U.S. at 189-190 (1997); *Turner I,* 512 U.S. at 662-63 (1994); *Metro Broadcasting, Inc. v. FCC* 497 U.S. 547, 566 (1990), *overruled on other grounds by Adarand,* 515 U.S. 200 (1995); *National Citizens Committee for Broadcasting v. FCC,* 436 U.S. 775, 795 (1978); *Associated Press,* 326 U.S. at 20 (1945). *Adarand* overruled *Metro Broadcasting* only to the extent it was inconsistent with the *Adarand* holding that all racial classifications are constitutional only if narrowly tailored to further compelling government interests. *Adarand,* 515 U.S. at 227. Thus, *Adarand* does not undermine either the importance of the policy goal of viewpoint diversity from a constitutional perspective, or non-race-based ownership regulation as a means to achieve that goal.

[44] *Second Report and Order, In the Matter of Amendment of Sections 73.34, 73.240 & 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM & Television Broadcast Stations,* Docket No. 18110, 50 FCC 2d 1046, 1079-1080, ¶ 111 (1975).

concern with the public interest."[45] Although the issue is not easily susceptible to empirical proof, we think intuitive logic and common sense support our belief that the identity and viewpoint of a station's owner can in fact influence the station's programming. This certainly can be seen when a station chooses to editorialize, as well in many other decisions affecting a station's news and other programming.[46]

23. The Supreme Court has upheld the Commission's judgment that there is a positive correlation between a station's ownership and its editorial viewpoint. The Court observed in *Metro Broadcasting*, with reference to the Commission's decision adopting the newspaper/broadcast cross-ownership rule, that the link between ownership and viewpoint is logical because "'ownership carries with it the power to select, to edit, and to choose the methods, manner and emphasis of presentation. . . .'"[47] In part because of this intuitive logic, the Supreme Court, in upholding the newspaper/broadcast cross-ownership rule, stated in *National Citizens Committee for Broadcasting* that ". . . notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint. . . . In these circumstances, the Commission was entitled to rely on its judgment, based on experience, that 'it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run.'"[48]

24. We consequently believe our local television ownership rules continue to further the important public interest of promoting diversity. Of course, in attempting to foster our diversity goals through structural regulation, we endorse a content-neutral method that does not evaluate the substance of any station's editorial decisions,[49] but seek only to ensure a sufficient number of independently owned

[45] *Id.* at 1050, ¶ 14.

[46] *See, e.g.*, Jeff Dubin & Matthew Spitzer, *Testing Minority Preferences in Broadcasting*, 68 S. Cal. L. Rev. 841 (May 1995) (concluding that increasing number of minority-owned broadcasting stations increases amount of minority-oriented programming); Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There a Nexus?* (June 1988) (concluding same). *See also* CME Comments at 4-8 in MM Docket No. 98-35 (describing how two broadcast owners produced new programming to promote "conservative" or "traditional" values, and explaining how owners have affected content and editorial decisions).

[47] *Metro Broadcasting*, 497 U.S. at 571 n.16 (1990) (quoting *Second Report and Order/Docket 18110*, 50 FCC 2d at 1050).

[48] *National Citizens Committee for Broadcasting*, 436 U.S.at 796-797 (1978) (citing *Second Report and Order/Docket 18110*, 50 FCC 2d at 1079-1080, ¶ 111).

[49] The Court has noted that the Commission's ownership rules are "content neutral." *National Citizens Committee for Broadcasting*, 436 U.S. at 801 (noting that newspaper/broadcast cross-ownership rule was "not content related"). According to the applicable test, "[a] content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner II*, 520 U.S. at 189. The Supreme Court has stated that with respect to the government interest in "promoting the widespread

outlets to attempt to maximize the available independent viewpoints in a given local market.

25. Promoting Competition. As we stated in the *TV Ownership Further Notice*, an important part of the Commission's public interest mandate is to promote competition, because competition promotes consumer welfare and the efficient use of resources.[50] Competitive markets serve the public interest because such markets generally result in lower prices, higher output, more choices for buyers, and more technological progress than markets that are less competitive.[51] To encourage competition, the Commission's structural ownership rules and policies have been aimed at precluding broadcasters from obtaining and exercising market power. We have concluded that local ownership rules serve the public interest by preventing broadcasters from "dominat[ing] television and radio markets and wield[ing] power to the detriment of small owners, advertisers, and the public interest."[52]

26. Competition is likely to be greater in markets where many separate firms vie to serve the customer than in markets where few firms serve the market.[53] In general, the intensity of price competition in a given market is directly related to the number of independent firms that compete for the patronage of consumers. A larger rather than a smaller number of firms competing in the same market usually results in lower unit price to consumers, all other things remaining the same. Conversely, as the number of firms declines from many to few, price competition is diminished, and the unit price paid by consumers may be expected to increase.

27. As both the radio and television broadcast industries consolidate to achieve operating efficiencies and improvements in the scope and quality of services available to consumers, effective constraints on the possible attenuation of price competition in broadcasting advertising markets will derive

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dissemination of information from a multiplicity of sources," it has "no difficulty" in concluding that the interest "is an important governmental interest"; indeed, the Supreme Court has stated that "assuring the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment." *Turner I*, 512 U.S. at 662-63. As mentioned above, *see supra* ¶ 23, the Supreme Court has likewise found that ownership regulation is an appropriate and sufficient means to achieve the Commission's interest in viewpoint diversity; as the Court has noted, any means other than ownership regulation would likely present a more difficult avenue to achieve the goal of viewpoint diversity, because "'[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds.'" *National Citizens Committee for Broadcasting*, 436 U.S. at 797 (quoting lower court's opinion).

[50] *TV Ownership Further Notice*, 10 FCC Rcd at 3532.

[51] *See* F. M. Scherer and David Ross, *Industrial Market Structure and Economic Performance*, Third Edition, Houghton Mifflin Co., Boston, 1990 at 19-28.

[52] *See, e.g., Second Report and Order, In the Matter of Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, MM Docket No. 87-7, 4 FCC Rcd 1741, 1745 (1989) (*Second Report and Order*).

[53] *See* Joseph E. Stiglitz, *Economics*, Second Edition, 1997, W. W. Norton & Company, New York at 346.

increasingly from the growing availability of substitute products and services that compete with television advertising and programming. To the extent that such competing media and programming are, or will, become effective constraints on the possible exercise of market power by incumbent television broadcasters, then concerns about the possible adverse effects of increasing concentration on competition in the television broadcasting industry will be substantially diminished.

28. Broadcasters compete in numerous markets: the markets for delivered video and audio programming, the national and local advertising markets, and geographically diverse (perhaps worldwide in scope) markets for programming.[54] In each of these markets, the Commission has taken steps to increase competition and the range of choices for consumers. For example, we have increased the number of licensed broadcast television and radio stations to benefit viewers, listeners, and advertisers. Similarly, we have facilitated the development of alternative technologies such as cable television, direct broadcast satellite ("DBS") service, digital audio radio satellite ("DARS") service, multichannel multipoint distribution service ("MMDS"), and open video systems ("OVS") to increase the range of choices open to advertisers, viewers and listeners. We have also adopted various rules and regulations to permit and promote the development of new networks to increase competition to long-time broadcast networks and thus increase viewer options. In each market, we have tried to increase the number and variety of suppliers to benefit customers.[55]

29. Increased Consumer Choice. Numerous commenters in this proceeding have provided evidence concerning the continued growth in the number of mass media delivery systems. For example, there are currently 11,600 cable systems passing more than 94 million homes and serving almost 65 million TV households.[56] Aside from cable, there are also a number of other multichannel delivery systems, although many are still establishing themselves in the marketplace and generally do not provide an independent source of local news and informational programming. They include: Direct Broadcast Satellite (DBS), which currently provides up to 240 channels to over 7 million subscribers; MMDS, which serves 1 million subscribers; SMATV, which has almost 1 million subscribers. In addition, over 2 million households have Home Satellite Dishes (HSD), and Open Video Systems (OVS) has 66 thousand subscribers.[57] In addition to these alternative media, there has been an increase in the number of traditional broadcast outlets since adoption of our ownership rules. Since 1970, when the radio-television cross-ownership rule was adopted, the total number of radio and television stations has increased by over

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[54] *See TV Ownership Further Notice*, 10 FCC Rcd at 3535.

[55] In the programming market, the Commission's rules and regulations have tended to increase the number of potential buyers for such programming and thus increase the demand for programming.

[56] *Broadcasting & Cable*, July 15, 1999, at 40.

[57] *See In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 98-102, FCC 98-335 (released Dec. 23, 1998) ("*Fifth Annual Report*"), at Appendix C, Table C-1.

85 percent.[58] This increase is attributable largely to increased popularity of FM radio and maturation of the UHF television service. The Commission has also adopted a DTV standard, a Table of Allotments for DTV, and DTV service rules which include a timetable for construction of DTV facilities. Taken together, these actions provide the opportunity to increase the number of program services provided by broadcast television.

30. In the *TV Ownership Further Notice* and *Second Further Notice*, we requested commenters to provide us with evidence regarding the degree to which these and other alternative media serve as economic substitutes for broadcast television and radio in the program delivery, advertising, and program production markets. Although most commenters agreed that various media substitute for each other to some extent in these markets, we received no evidence quantifying intermedia substitutability.

31. We are aware of no definitive empirical studies that quantify the extent to which the various media are substitutable in local markets. The most extensive study in the record of this proceeding is provided by National Economic Research Associates, Inc. ("NERA") in support of comments filed by the Local Station Ownership Coalition ("LSOC"), and indicates that broadcast television competes in the local spot advertising market with a wide variety of media, including radio, cable, direct mail, newspapers, magazines, yellow pages, and billboards.[59] NERA's study was conducted in response to a U.S. Department of Justice request pertaining to the degree of cross-elasticity of demand between local spot advertising on television and other media. NERA analyzed the boundaries of the relevant product market for local advertising within the Cleveland DMA and the nature of competition for the purchase and sale of advertising there. For evidence on substitutability, NERA looked at information from sellers and buyers, the academic and trade press, and general trends in rates and advertising purchasers. NERA reaches two conclusions relevant to this discussion. First, because local spot television prices result from bilateral oral negotiations between advertising buyers and sellers, the data required to construct the formal statistical estimates of cross-elasticities of demand within the Cleveland DMA the Commission asked for are not available. Second, NERA believes that other information, including a survey of advertising buyers in Cleveland and a survey of the academic and trade literature, is sufficient to conclude that the relevant product market includes electronic media (radio, broadcast television, and cable television) and nonelectronic media (direct mail, newspapers, magazines, yellow pages and billboards).

32. Economists Incorporated ("Economists Inc.") also submitted an economic study in response

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[58] *See* "Record of Radio Station Growth Since Television Began" and "Record of Television Station Growth Since Television Began," *Broadcasting & Cable Yearbook 1996*, pp. B-671 and C-244, respectively. *See also* "Broadcast Station Totals as of May 31, 1999," June 18,1999.

[59] *See* P. Kitt and Phillip A. Beutel, National Economic Research Associates, *An Economic Analysis of the Relevant Advertising Market(s) within Which to Assess the Likely Competitive Effects of the Proposed Time Brokerage Arrangement between WUAB Channel 43 and WOIO Channel 19* (filed on behalf of Malrite in response to the *TV Ownership Further Notice*), July 15, 1994, at 2-3 ("*NERA Study*").

to the *TV Ownership Further Notice*.[60] Economists Inc. contends that reliance on current antitrust enforcement standards will protect the public from the creation of market power in local advertising markets. Similar to the NERA study, Economists Inc. analyzed the boundaries of the relevant product market for local advertising and submits illustrative competitive calculations in five DMAs (New York, Cleveland, Portland, Richmond and Amarillo). Economists Inc. concludes that the product market proposed by the Commission includes broadcast stations, cable systems, radio stations, local newspapers, as well as yellow pages, outdoor and direct mail. In support of its conclusion, Economists Inc. states that there is abundant evidence of competition between different types of advertising media. As is typically the case, they assert, there are no econometric studies that demonstrate quantitatively the extent of substitution by advertisers among various types of advertising in response to changes in relative prices. It would be very difficult to conduct such a study because transaction prices for alternative media, as well as non-price terms, are negotiated for each advertising contract and are not publicly available. The practice in antitrust analysis is to rely on other types of information. Relevant advertising markets are defined with the assistance of information obtained in interviews with advertisers and executives at advertising agencies. To obtain the relevant information, Economists Inc. interviewed seven advertising agency executives and one media consultant on a confidential basis to obtain information on competition between advertising sold to local advertisers by broadcast television stations and other advertising media in a certain urban area. The individuals interviewed were at advertising agencies that spend significant sums of money on broadcast television advertising in that urban area.

33. The weight of the evidence in this record supports the general conclusion that there may be some intermedia substitutability in the markets served by broadcasters. As to competitive concerns underlying our ownership rules, this evidence justifies some relaxation of our local television ownership rules, as it suggests that consumers and advertisers may have more viable alternatives to broadcast stations than they once had. The evidence, however, does not support more extensive relaxation or elimination of the rules at this time because it is insufficient to characterize generally the degree of the substitutability of different media. This is a critical issue, for many of the arguments for greater relaxation or elimination of our ownership rules are premised on the assertion that consumers and advertisers have the option of turning to a large number of nonbroadcast media. Yet there remain unresolved questions about the extent to which these alternatives are widely accessible and provide meaningful substitutes to broadcast stations. A recent econometric study finds that other advertising media are not good substitutes for radio advertising and that radio advertising probably constitutes a separate antitrust market.[61] In future biennial reviews we will ask parties to submit more evidence on the extent to which intermedia competition can be relied on

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[60] *See* Economists Inc, *An Economic Analysis of the Broadcast Television National Ownership, Local Ownership and Radio Cross-Ownership Rules*, May 17, 1995 ("*Economists Inc. Study*").

[61] *See* Robert K. Ekelund, George S. Ford, and John D. Jackson, "Is Radio Advertising a Distinct Local Market? An Empirical Analysis," 14 *Review of Industrial Organization*, 239-256 (May 1999). While the conclusions of this study should be considered tentative, the analysis is consistent with a cautious approach toward modification of our ownership rules until the efficacy of product substitutes as a constraint on the possible exercise of market power in the advertiser-supported television industry is better understood.

to constrain anticompetitive behavior and provide additional outlets for diverse viewpoints to the public.[62]

34. Benefits of Common Ownership. Economic theory suggests, and the record in this proceeding largely confirms, that there may be certain efficiencies inherent in joint ownership and operation of television stations in the same market, and of radio-television combinations. These efficiencies can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public interest. Much of the evidence regarding the efficiencies of common ownership is anecdotal and is provided by broadcasters drawing upon their own experience in operating a same-market television LMA or a radio-television combination. The efficiencies mentioned by these broadcasters include the ability to co-locate and share the studio and office facilities of same-market stations, sharing of administrative and technical staffs, efficiencies in advertising and promotion, and efficiencies involving news gathering and sales operations.[63] Although the greatest benefits of common ownership likely occur between stations located in the same market, efficiencies are also possible among stations located in separate markets.[64]

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[62] For a discussion of those media that we will count as voices with respect to our revised duopoly and radio/TV cross-ownership rules, *see infra* ¶¶ 68-70, 111-114.

[63] Numerous parties cited cost-savings resulting from co-location and sharing of station operations between LMAed television stations in the same market. *See, e.g.,* Comments in response to the Commission's LMA Public Notice ("LMA Comments") of Pegasus Communications Corporation, River City Limited Partnership, Sinclair Broadcasting Group, Inc., LIN Television Corporation, WJZY-TV, Inc., Capitol Broadcasting, Inc., Carolina Broadcasting System, Inc., Kelly Broadcasting Company, Channel 58, Inc., Waterman Broadcasting Corp., Montclair Communications, Inc., New Mexico Broadcasting Company, Inc., Ramar Communications, Inc., RKM Media, Inc., Max Television of Syracuse, L.P., Cannell Cleveland, L.P., Whitehead Media of Florida, Inc., and MAC America Communications, Inc.

With respect to the cost savings and related programming benefits of joint operation of radio and TV stations in the same market, *see* Group W Comments in response to the *TV Ownership Further Notice* at 41-42. According to Group W, the decision to place its Boston radio/television operations under one general manager allowed it to double the number of minutes of news aired on the radio station. Similarly, Group W states that, after adding an AM/FM combination to its ownership of a television station in San Francisco, it was able to provide an additional all-news radio service in the San Francisco Bay area. Group W asserts that developing this service was substantially less difficult and time consuming in San Francisco than when Group W developed a stand-alone radio news service in another market some years previous. *See also* Communications Corporation of America, ("CCA") Comments in response to the *TV Ownership Further Notice* at 22-25. According to CCA, its radio-television combination in Lafayette, LA enabled its UHF station there to survive, and its UHF-AM combination in Mansfield, OH enabled both these stations to remain on the air.

[64] *See, e.g.,* Viacom, Inc. LMA Comments at 3-4 (regarding the LMA linking its station WBFS of Miami with WTVX of West Palm Beach); TV Alabama, Inc. and RKZ Television, Inc. LMA Comments (regarding LMA between WCFT in Tuscaloosa, AL and WJSU in Anniston, AL). According to TV Alabama and RKZ Television, their "enhanced coverage LMA" permits two UHF stations to provide ABC network service to three markets by maintaining a combined production studio presence that delivers simulcasted programming to Birmingham, Tuscaloosa and Anniston, Alabama in addition to production facilities in the communities of license. According to these commenters, the LMA extends the reach of the ABC service to previously

35. Two commenters provided estimates of the specific cost savings that may be generated by these efficiencies. According to Pegasus Communications Corporation ("Pegasus"), construction of a new stand-alone TV station costs at least $5 million, with an additional $1-2 million required for locally produced programming or news.[65] Pegasus estimates that combining a second new station with an already existing facility will reduce the fixed operating costs of the second station by up to two-thirds, cut required capital investment for the second station by as much as two-thirds, and make it possible for local news production costs to be shared by the two stations (possibly creating two news efforts where there was previously none).[66] ALTV asserts that co-location of facilities in a single market can produce cost savings of approximately 25%.[67] Other evidence of cost savings and efficiencies came from numerous broadcasters' descriptions of the benefits of same-market LMAs. According to many of these reports, LMAs have saved failing stations, and permitted them to invest in more expensive programming and updated facilities.

36. The cost savings of joint station ownership may contribute to programming benefits, including more news, public affairs, and other non-entertainment programming as well as enhanced entertainment programming choices for viewers and listeners. Again, the evidence in the record of such benefits was largely anecdotal and related to same-market LMAs. Examples of the benefits broadcasters claimed resulted from such arrangements include first-time presentation of local news on the brokered station, change of the brokered station format from infomercials to one with other entertainment and non-entertainment programming, acquisition by the brokered station of a network affiliation, and improved

underserved areas, thereby enhancing diversity.

[65] *See* Pegasus Comments at 9. According to Pegasus, to amortize the cost of construction, a broadcaster must anticipate an annual operating income of at least $750,000 (or $1 million if an investment in local news is also made). The costs of station operation are both variable (programming and sales costs) and fixed (overhead, utilities, and general and administrative expenses). Pegasus estimates that variable expenses are approximately 40-50% of station revenues. In addition, fixed costs for a stand-alone station (exclusive of news or local programming) will exceed $1-1.5 million per year (an additional $1 million if local news is offered). Therefore, for a stand-alone television station to cover its fixed costs and generate sufficient operating income, the station must generate annual revenues of $3-4 million ($5-7 million with local news), according to Pegasus.

[66] *See* Pegasus Comments at 9, 13-14. Pegasus argues that these cost savings are especially significant in smaller markets. For example, in New York Pegasus claims that a station can be profitable without exceeding 1% of total market revenues. However, in a smaller market, a stand-alone station without news would require a market share of 10% to 12.5% to justify construction (20% with news). Even smaller markets may result in minimally-profitable market shares higher than 25-30%. The cost reductions associated with common ownership would enable the creation of new stations in markets with relatively small total market revenue (as little as $18 million according to Pegasus), thereby promoting competition in these markets.

[67] *See* ALTV Comments at 30.

news and public affairs programming on both stations.[68] In addition to programming benefits, other possible benefits of joint station ownership include enabling a struggling station to continue to provide service to the public or returning a dark station to the air, possible activation of a new or unused radio or TV allocation, and improvement in the technical facilities of the stations, and creation of new jobs in the community.

37. Need for Relaxation of Ownership Limits. We believe the considerations we have described above warrant relaxation to some extent of our local television ownership restrictions. The record reflects that there has been an increase in the number and types of media outlets available to local communities. With respect to cable television, we recognize that clustering of systems in the major population centers enables cable to compete more effectively for advertising dollars. In markets with many separate licensees and a variety of other media outlets, we believe the benefits of joint ownership in certain instances outweigh the cost to diversity from permitting such combinations. There is evidence concerning the efficiencies inherent in joint ownership and operation of television stations in the same market, and of radio-television combinations. These efficiencies can lead to cost savings, which in turn can lead to programming and other service benefits that serve the public interest.

38. At the same time, we do not agree with those parties that argue for greater relaxation or elimination of the local television ownership rules due to the important competition and diversity goals at stake. As discussed above, there is insufficient evidence regarding the extent of substitutability and the availability of local programming among the different media now available to consumers. In addition, there already has been a high degree of consolidation in the broadcast industry since passage of the 1996 Act, which liberalized the radio and national television ownership rules. Over 2,100 radio stations

[68] Commenters provided numerous examples of the benefits of television LMAs. For example, ALTV cited two broadcasting combinations: (1) Cleveland LMA between WOIO and WUAB led to an increase in the quantity and quality of informational and entertainment programming on both stations and permitted the creation of a number of new jobs; and (2) Naples, FL LMA between WEVU and WBBH-TV permitted WEVU to provide its first local news. ALTV Comments at 17. According to A.K. Media, LMA agreement pursuant to which KCBA-TV in Monterrey-Salinas provides programming to KCCN in that community saved a failing station, permitted improvement of KCCN's signal quality, and permitted plans to increase the quantity of news and children's educational programming broadcast on the brokered station. A.K. Media Comments at 8-9. Glencairn, Ltd. provided a number of examples of the benefits of LMAs including: (1) WTTO-TV brokerage of programming on WABM-TV in Birmingham, AL pulled WABM out of bankruptcy and permitted it to air children's educational and informational programming; (2) WPGH-TV's brokerage of programming on WPTT-TV in Pittsburgh permitted WPTT to change from an exclusively home-shopping format to one that includes 20 hours/day of entertainment programming and core children's programming; (3) LMA between WLFL-TV and WRDC-TV in Durham permitted WRDC to engage a public affairs director and to improve its public affairs programming and to air children's programming. In addition, Gannett provided an example of the beneficial results of a television duopoly. According to Gannett, its temporary joint ownership of WXIA-TV in Atlanta and WMAZ-TV in Macon has permitted the Macon station to improve its news and public affairs programming, to hire a community affairs director, to apply for a license to operate a weather radar station, and to use a news helicopter to provide aerial footage of stories of local interest. Gannett Comments at 2-3.

changed hands in 1996 and again in 1997, and 1740 changed hands in 1998.[69] At the national level, the number of owners of commercial radio stations has declined by 12.1 percent from 5,133 to 4,512. This decline is primarily due to mergers between existing owners.[70]

39. At the local level, there has also been a downward trend in the number of radio station owners per market. Since passage of the 1996 Act, the average number of radio station owners across all radio metro markets declined from 14 to 11, a loss of about three owners per market. The top 10 radio metro markets experienced an average loss of 5 owners per market, from about 33 owners to about 28 owners per market. The smallest radio metro markets (markets 101-268) experienced an average loss of about two owners per market, from about 10 owners to 8 owners. Further, the top owners in each metro market generally account for an increasing share of total radio advertising revenues in these markets. For example, the top four radio owners in each metro market, on average, account for more than 91 percent of their metro market's total revenues, compared to about 83 percent in March 1996.[71] This increasing level of ownership concentration suggests that it is appropriate for us to move prudently so that we can monitor consolidation to prevent harm to competition and diversity.

40. Our decision today is an exercise in line drawing -- perennially one of the most difficult yet inevitable challenges facing a government agency.[72] On the one hand, we want to allow broadcasters and the public to realize additional economic efficiencies and public interest benefits generated by common ownership. On the other hand, we must ensure that diversity and competition are protected, especially in view of the vital role played by broadcast television in our society. Currently, 98 percent of the population owns a television set and thus has access to the entertainment, sports, local and national news, election results, weather advisories, access for candidates, children's educational programming, and other public interest programming it provides. Although the number of video competitors to television continues to increase, broadcast television remains the primary source of news and information for most Americans.[73]

41. Balancing these competing considerations based on the record before us, and recognizing

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[69] BIA Companies, *State of the Radio Industry 1999*, May 1999, at 127.

[70] FCC staff review of BIA database.

[71] FCC staff review of BIA database. Examples of growing concentration in the local radio marketplace include Louisville, KY, the 53rd ranked market, where three companies own or operate 18 of the 34 stations, including the top 14-rated stations, and one company now controls at least 32 percent of the radio advertising market in six of the nation's ten largest markets. Increases in national ownership concentration have also occurred in the television industry. As of April 1999, the nation's top 25 television station groups owned almost 40% of the commercial television stations in the U.S., more than twice the 17% they owned in 1995. *See Broadcasting and Cable*, April 18, 1999, at 38.

[72] Justice Holmes once observed, "[n]either are we troubled by the question where to draw the line . . . [t]hat is the question in pretty much everything worth arguing in the law." *Irwin v. Gavit*, 268 U.S. 161 (1925).

[73] *See* "America's Watching," *supra* note 34.

the continuing dominant role played by broadcasting in society and the continuing importance of ensuring that diversity and competition are protected, we believe that the revisions we make today to our rules reflect the degree of relaxation warranted by the growth of alternatives to broadcast television, the demonstrated benefits of common ownership, and our objective of ensuring diversity and competition. Of course, we will monitor the effects of our changes on our competition and diversity goals, as well as ongoing changes in the media environment, and we will adjust our ownership rules as needed in the context of future biennial reviews.

IV. THE LOCAL TELEVISION OWNERSHIP RULE

A. Geographic Scope of the Rule

42. Background. Our local television ownership rule presently prohibits common ownership of two television stations whose Grade B signal contours overlap.[74] In the *TV Ownership Further Notice*, we sought comment on whether the geographic scope of the rule should be changed to Grade A signal contours or to Designated Market Areas ("DMAs").[75] Based on the comments we received, we tentatively concluded in the *Second Further Notice* that the geographic scope of the local television ownership rule should be based on a combination of DMAs and Grade A contours. We sought comment on that tentative conclusion in the *Second Further Notice*, as well as comment about possible exceptions to and waivers of the rule to permit television duopolies in certain circumstances where they would serve the public interest.

43. Comments. While a few of the broadcasters that commented on the issue of the proper geographic scope of the television duopoly rule supported the Commission's proposal to rely on a joint DMA/Grade A test,[76] the majority of broadcasters urged the Commission to define the geographic market by DMA only, without reference to Grade A signal contours.[77] Those advocating a DMA-only test argued generally that the DMA is the best single measure of the relevant geographic market for television stations

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[74] 47 C.F.R. § 73.3555(b) ("No license for a TV broadcast station shall be granted to any party (including all parties under common control) if the grant of such license will result in overlap of the Grade B contour of that station (computed in accordance with 47 C.F.R. § 73.684) and the Grade B contour of any other TV broadcast station directly or indirectly owned, operated, or controlled by the same party.").

[75] DMAs are unique, county-based geographic areas designated by Nielsen Media Research, a television audience measurement service, based on television viewership in the counties that make up each DMA. Nielsen assigns counties to DMAs on the basis on audience viewership as recorded in diaries placed in television households. Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in that DMA. *See also infra* ¶ 48.

[76] *See* Comments of NAB, ABC, AK Media, Kentuckiana, Max Media, and Post-Newsweek.

[77] *See* Comments of ALTV, Benedek, CBS, Gannett, HSN, LIN, LSOC, Malrite, NBC, Pappas, Paxson, Sinclair, Viacom, and Waterman.

because it defines the market in which stations compete for viewers, ratings, programming, and advertisers.

44. Those broadcasters that supported the Commission's tentative proposal to rely on a joint DMA/Grade A test generally concurred with other broadcasters that the DMA component of the test best reflects a station's economic market. These commenters gave different reasons for supporting the additional Grade A component of the test. ABC and NAB stated that a combined DMA/Grade A standard is appropriate since different-market stations with Grade A overlaps may in some cases compete for viewers and advertisers.[78] Two other commenters expressed the view that a DMA standard alone could lead to a level of consolidation that would threaten the Commission's diversity and competition goals.[79]

45. Two broadcasters, Jet Broadcasting Co., Inc. ("Jet") and Sunbelt Communications Company ("Sunbelt"), supported replacing the existing Grade B contour measure with a Grade A measure, without reference to DMAs. Jet argues that the Grade A contour best represents the area in which stations compete because it includes the area in which viewers can regularly expect to receive a station's signal.[80] Jet and Sunbelt raise a number of arguments against relying on DMAs for the new duopoly rule, including the fact that DMA boundaries are subject to change thereby creating some uncertainty, and that use of DMA to determine the permissibility of multiple ownership penalizes stations that are not carried on a cable system.[81]

46. Finally, four commenters supported retaining the Grade B-based duopoly rule. The NTIA, Media Access Project, which filed jointly with nine other public interest groups (jointly referred to herein as "MAP *et al.*"),[82] Centennial Communications, Inc. ("Centennial") and BET Holdings, Inc. ("BET")

[78] *See* ABC Comments at 3; NAB Comments at 4. NAB stated, however, that the Commission should be careful to recognize that there may be situations where two stations have overlapping Grade A contours, but in fact serve different markets.

[79] *See* Post-Newsweek Comments at 4; Kentuckiana Comments at 3.

[80] *See* Jet Comments at 4.

[81] *See* Jet Comments at 3; Sunbelt Comments at 5-6, 9-12. In addition, Sunbelt claims that DMAs vary widely in geographic size and population. As a result, a single broadcaster could acquire six stations in Montana, which has six separate, sparsely-populated DMAs, but would be limited to only one station in more populous Utah. The difference in the size of these DMAs, and hence the impact on common ownership of stations within these states under our rules, is related to the location of residents of those states and not the size of their respective populations. Montana is larger than Utah and its population is widely dispersed, thereby accounting for the fact that it is divided into more than one DMA. Utah's population is more concentrated in the major urban area, Salt Lake City, and hence is treated as a single DMA.

[82] MAP filed on behalf of itself and the following groups: Black Citizens for a Fair Media, Center for Media Education, Minority Media and Telecommunications Council, National Association for Better Broadcasting, Office of Communication of the United Church of Christ, Philadelphia Lesbian and Gay Task Force, Telecommunications Research and Action Center, Washington Area Citizens Coalition Interested in Viewers' Constitutional Rights, and Women's Institute for Freedom of the Press.

generally argued that relaxation of the current duopoly rule would increase concentration in the television market and adversely affect diversity.[83] Centennial argued that relaxation of the duopoly rule would reduce the number of independent sources of programming to viewers and increase the advantage of group owners in bidding for programming, thus narrowing access to programs for independent stations.[84] NTIA argued that relaxation of the duopoly rule would increase the demand for television properties and impair the ability of minorities to enter the broadcast industry. NTIA cites a recent study which shows a positive relationship between minority broadcast ownership and the supply of minority-oriented programming. NTIA also argued that the Commission's DTV proceedings offer the prospect of increasing diversity by expanding the number of broadcast channels, but that relaxation of the ownership rules at this time may permit consolidation that would foreclose this opportunity. Before the duopoly rule is relaxed, NTIA believes that the Commission should study the cumulative impact of recent changes in the television market on competition and diversity.[85]

47. Discussion. After careful analysis of the record in this proceeding, we have decided to narrow the geographic scope of the television duopoly rule so as to permit common ownership of television stations provided they are in different DMAs without regard to contour overlap.[86] We will also continue to allow common ownership of stations within the same DMA as long as their Grade B contours do not overlap. We have chosen this DMA test based on our belief that, compared to the current Grade B signal contour standard, DMAs are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products. Changing the geographic scope of the duopoly rule will consequently more accurately define a local television market and permit mergers of stations in different markets without harming local competition and diversity. Moreover, we believe that the mergers that will be allowed under our new rule can lead to improved television service and viewer choice.

48. There are several benefits to defining the geographic dimensions of the local television market by reference to DMAs. Most importantly, unlike a rule relying on predicted field strength contours, DMAs reflect actual television viewing patterns and are widely used by the broadcasting and advertising industries. DMAs reflect the fact that a station's audience reach, and hence its "local market," is not necessarily coextensive with the area of its broadcast signal coverage. For example, a station's over-the-air reach can be extended by carriage on cable systems and other multichannel delivery systems,

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[83] *See* NTIA Comments at 4-5; MAP *et al.* Comments at 11-12; Centennial Comments at 4-7; BET Comments at 1-3, 5-6.

[84] *See* Centennial Comments at 6-7.

[85] *See* NTIA Comments at 4-6.

[86] For purposes of this rule, a broadcast station is considered to be in the DMA to which Nielsen assigns it.