opinion at the regional level.[115]

The Commission concluded that the rules were based upon the view of the First Amendment to the Constitution articulated by the Supreme Court in the Associated Press case - i.e., a notion that the Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[116]

42. In 1988, the Commission replaced the 1 mV/m contour-overlap duopoly standard, which prohibited the common ownership of stations with overlapping 1 mV/m signal contours, with a more relaxed "principal city" contour-overlap standard that prohibited common ownership of AM stations when the predicted 5 mV/m contours overlapped and common ownership of FM stations when the predicted 3.16 mV/m contours overlapped.[117] As such, the rule prohibited combinations of 2 AM or 2 FM stations in the same "principal city" but permitted AM/FM combinations within the same community. The Commission explained that efficiencies of common ownership might be realized by allowing radio broadcasters to own two or more radio stations in the same geographic area, although not in the same principal city. The Commission also explained that the goals of the duopoly rule remained the same: to promote economic competition and diversity of programming and viewpoints through local ownership diversity. The Commission noted a changed marketplace, with an increased number of broadcast stations, the introduction of new services and technologies, and the abundance of competition in local markets, as the compelling reasons to relax the local ownership regulation.[118]

43. In 1992, the Commission again cited changed economic conditions in radio markets as a basis for further relaxing the local radio ownership rules.[119] Specifically, the Commission permitted combinations of up to (i) 3 AM and 3 FM in markets with 40 or more stations, (ii) 3 AM and 2 FM in markets with 30 to 39 stations, (iii) 2 AM and 2 FM in markets with 15 to 29 stations and (iv) 3 stations (with no more than 2 in the same

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115 Id.

116 Associated Press v. United States, 326 U.S. 1, 10 (1945).

117 First Report and Order in MM Docket No. 87-7, 4 FCC Rcd 1723 (1989). The 1988 rule recognized that AM service has a larger audience reach than FM and therefore might have been discriminated against under the previous definition that used the same contour for both services.

118 Id. at 1726-27.

119 Revision of Radio Rules and Policies, supra.

service) in markets with 14 or fewer stations.[120] Under cases (i)-(iii), combinations were permitted if the combined audience share did not exceed 25 percent. In case (iv), the combination was permitted if it would not result in a single party controlling 50 percent or more of the stations in the market. The Commission noted growth in the number of radio stations and increased competition from non-radio outlets such as cable and MTV. The Commission noted that stations faced declining growth in radio revenues and concluded that economic circumstances threatened radio's ability to serve the public interest. The Commission explained that consolidation within the industry would allow radio broadcasters to realize economies of scale that would then generate greater programming investment and increase radio stations' competitiveness.

44. In response to petitions for reconsideration, the Commission moderated the relaxation of its rules permitting combinations of up to (i) 2 AM/2 FM in markets with 15 or more stations, if the combined audience share did not exceed 25 percent; and (ii) 3 stations in markets of 14 or fewer stations, with no more than 2 in the same service, if the combination would not control 50 percent or more of the stations in the market.[121] The Commission concluded "that adopting more moderate increases . . . in the permissible level of station ownership in certain local markets at this time will provide necessary relief while enabling us to monitor marketplace developments as they unfold."[122]

45. Pursuant to the Telecommunications Act of 1996, the Commission further relaxed its local radio ownership rules in March 1996, as set forth above.[123] The Commission did not change from its 1992 reconsideration decision, however, how it defined the relevant radio market or which stations it counted.[124]

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[120] The Commission based the count of radio stations on the number of commercial radio stations meeting minimum audience survey reporting standards within an Arbitron designated radio metro market, or on overlapping principal community contours outside designated radio markets.

[121] Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket 91-140, 7 FCC Rcd 6387, at 6388, 6393-6395 (1992). The Commission decided to count radio stations with reference to a contour overlap standard in all situations, not just those outside of Arbitron designated radio markets. Thus, the Commission defined the radio market "as that area encompassed by the principal community contours . . . of the mutually overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations."

[122] Id. at 6388.

[123] Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368 (1996).

[124] Id. at 12370.

46. In our biennial review NOI, we asked for comment on how the relaxation of local radio ownership rules under the Telecom Act has impacted competition, diversity and economic efficiencies within local radio markets. We noted that since the passage of the Telecom Act, the radio industry has experienced an ongoing trend towards increasing ownership concentration, both in terms of local and national radio markets; although the number of radio stations has increased, the number of owners has decreased. The NOI asked for comment on whether this trend has had a significant impact on local market competition among radio stations, and with other local media outlets, in terms of the program delivery and local advertising markets.[125] The NOI also asked for comment on whether radio ownership concentration has had a significant influence over the expression of viewpoint diversity and the level of news coverage within local radio markets.[126] We noted in the NOI that the NTIA's 1997 annual report on minorities and broadcasting showed that there has been a drop in the number of minority-owned broadcast stations, and sought comment on the relationship between our ownership limits and the opportunities for minority and female broadcast station ownership.[127] In addition, the NOI sought comment on whether our current counting method for purposes of applying the local radio ownership rules should be modified to more realistically account for the number of stations in a radio market.[128]

2. Comments

47. Commenters were divided on whether the current local radio ownership rules, mandated by the Telecommunications Act, have produced positive or negative results. Commenters concerned about the effects of the rules on the marketplace ask the Commission to maintain or strengthen, the current rules.[129] CME, for example, argues that

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125 NOI, supra at 11282.

126 Id. at 11283.

127 Id. at 11283.

128 Id. at 11283.

129 See, e.g., American Federation of Television and Radio Artists Comments at 8, 10-12 (stating that it is essential that, at the very least, the current radio ownership restrictions remain in place); W. Russell DiBello Comments at 5 (urging FCC to return to the traditional "Seven AM, Seven FM, One TV, One Group Per Market"); CBI Comments at 3, 6, 9 (urging Commission to return to 2AM/2FM radio duopoly in markets below Top-100 radio markets, with existing superduopolies required to divest); CME Comments at 24-26 (stating that the local radio ownership rules should be strengthened); Gilliam Reply at 2-4 (urging the Commission to issue a statement supporting viewpoint diversity, and to issue a notice of proposed rulemaking to propose specific reductions in the local and national ownership limits, and states

radio market consolidations have increased the market power of group owners, and explains that by November 1997 all top-250 radio markets were above 1800 on the Herfindahl-Hirschmann Index, implying substantial market concentration.[130] Some commenters further contend that consolidation has increased radio owners' influence over local advertising rates. Americans for Radio Diversity (ARD) explains that the cost of radio advertising is accelerating at roughly triple the rate of inflation, and that it is common for two or three radio station owners to receive 80% to 90% of the advertising revenues in a local market. ARD further argues that consolidation has negatively impacted small business owners who cannot afford the inflated advertising costs which the current conditions help create.[131]

48. Commenters concerned about ownership consolidation also state that such consolidation has diminished local viewpoint diversity. While group owners may have greater resources to invest in local news and public affairs programming, ARD and CME argue that the scale economies from concentrated radio ownership arise in part from a homogenization of news reporting.[132] Similarly, Greater Media, Inc., and Press Communications LLC believe that radio consolidation has reduced viewpoint diversity in broadcasting.[133]

49. Other commenters, however, rejoin that consolidation was the intent behind deregulation of local radio ownership restrictions, and that any resulting problems that

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that until greater ownership diversity is achieved, the Commission should refuse to recommend any further lessening of the ownership rules); UCC/Black Citizens Comments at 5-6 (stating that further relaxation of the radio ownership rules is not warranted at this time).

130 CME Comments at 25.

131 ARD Comments at 3-4. ARD also asserts that its members have experienced salary ceilings in markets where a few stations have market dominance. ARD Comments at 12. Commenters such as ARD and Gilliam also argue that radio consolidations have created barriers to entry for minorities. ARD cites the decline in minority ownership from 3.1% to 2.8%, since passage of the Telecom Act. ARD Comments at 3. Other commenters, however, disagree. Connoisseur comments at 7-8; Elyria-Lorain comments at 23-24; Freedom of Expression Foundation comments at 7-8; West Virginia comments at 25 (stating that "while it may be true that the number of radio stations owned by minorities declined between 1995 and 1997, there is nothing to suggest that opportunities for minorities to acquire stations that might otherwise have existed were eliminated as a result of consolidation acquisitions").

132 CME Comments at 22-24; AFTRA also argues that such consolidation and economies of scale are inherently adverse to the public interest because they tend to homogenize news programming. AFTRA Comments at 11.

133 Greater Media, Inc. and Press Communications LLC Joint Comments at 5.

may arise with market power should be left to antitrust authorities.[134] Commenters opposing strengthening the local radio ownership rules also state that anti-competitive effects are unlikely in local advertising markets. For example, CBS argues that competitive effects of changes in the local radio ownership limits must be evaluated in the context of the broad advertising markets where radio competes, and cites the fierce inter-media and intra-radio competition that occurs in advertising markets, the willingness of stations to change formats and the sharp fluctuations in listener preferences as evidence that radio incumbents can easily be challenged.[135] NAB asserts that higher ratings and higher quality service resulting from ownership consolidation account for the higher advertising rates.[136] Commenters supporting further relaxation of the local radio ownership rules also argue that consolidation has produced economic gains that reflect improved economies of scale, in terms of operating cost reductions and the improved quality and quantities of radio services offered. CBS cites transactional efficiencies that occur when a group owner can offer "one stop shopping" for advertisers, with benefits for both buyer and sellers of advertising time. Cumulus cites lower costs and improved radio service, and asserts that the improved economies of scale from group ownership allows radio stations in small and mid-sized markets to compete against local newspaper and television stations, which in many cases have enjoyed near-monopoly status with respect to their service to major local advertisers.[137] A.H. Belo and CBS also state that common ownership of multiple media sources results in greater format diversity.[138]

50. Commenters also differed on the Commission's methodology for counting stations in determining compliance with the ownership rules. Commenters such as Air Virginia, Americans for Radio Diversity (ARD), Greater Media, Inc., Press Communications, LLC, and Gross Communications Corporation argue that too many stations are counted under the Commission's current methodology. These commenters proposed to use an Arbitron or other rating service market definition,[139] taking into

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134 ABC Comments at 28; Connoisseur Comments at 7; Cumulus Comments at 25; Elyria-Lorain Comments at 23; Freedom of Expression Foundation Comments at 7; West Virginia Comments at 24.

135 CBS Comments at 35, 37, 38 and 42. Cf. Fuller-Jeffrey Comments at 4-5 (arguing that radio is at most a minor player in advertising industry).

136 NAB Reply Comments at 9.

137 Cumulus Comments at 20-21.

138 A.H. Belo Comments at 9 and 10. CBS Comments at 43.

139 Air Virginia Comments at 9 and Greater Media, Inc. and Press Communications, LLC. Joint

account listener audience and station power,[140] and to include only those stations that place a 1mV/m (FM) or 2 mV/m (AM) primary service contour over the furthest city limit of the market's principal city,[141] or using Department of Commerce MSA definitions in place of Arbitron.[142]

51. In contrast, some commenting parties urged the Commission to retain, or even expand, its current radio market definition and station count method. CBS points to Congress' awareness of how the Commission defines a "market" in setting the current regulations, and opposes any changes.[143] ABC proposes using an all-inclusive measure that includes television, radio, cable, DBS, newspapers, video cassettes, yellow pages, direct mail and the Internet, and would substitute antitrust enforcement for the Commission's current local ownership regulation.[144] Cumulus would allow parties to supplement their applications with findings prepared in accordance with Technical Note 101 of the National Bureau of Standards (now National Institute of Standards and Technology), arguing that this alternative approach generally provides a more accurate method for predicting the location of signal contours. [145]

3. Discussion

52. Overview. We conclude that our current local radio ownership rules, as mandated by the Telecommunications Act of 1996, generally continue to serve the public interest. The longstanding goal of the Commission's local radio ownership restrictions has been to promote competition and viewpoint diversity within local radio markets. While some commenters argued that consolidation has had a positive impact on the economic viability of the radio industry, in terms of improved station profitability and

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Comments at 4-5.

140 Americans for Radio Diversity Comments at 5.

141 Gross Communications Corporation Comment at 9-10.

142 John W. Barger Comments at 1-2.

143 CBS Reply Comments at 8.

144 ABC Comments at 29.

145 Cumulus Reply Comments at 5-6.

increased value of radio ownership, and has also yielded potential benefits for both the listening public and advertisers, others raised significant concerns about the impact of radio ownership consolidation on both our competition and diversity goals.

53. We recognize that the industry has undergone significant consolidation since 1996. Moreover, we expect further consolidation as a result of our recent ownership decisions relaxing the television duopoly and one-to-a-market rules. We intend to monitor the consolidation and gather information regarding the overall impact on competition and diversity. As discussed more fully below, although we will maintain our current local radio ownership rules for the time being, we are persuaded that further proceedings are warranted to address certain definitional and methodological issues affecting our local radio ownership rules. Specifically, we will commence a proceeding to seek comment on alternative means of defining radio markets and alternative methods of calculating the total number of stations "in a market" and the number owned by a particular party in a market to correct anomalies in our current methodology. We believe that proceeding will lead to rules and procedures that will be easier to apply, provide more certainty for entities contemplating acquisitions, and result in a more rational and consistent application of our multiple ownership limits.

54. Competition. Relaxation of the ownership limits under the Telecom Act has produced financial benefits for the broadcast radio industry. Financial data indicate that the industry has made significant gains since passage of the Telecom Act. For the industry as a whole, station profitability has increased and station values have reached new heights. However, it is not clear whether these gains are the result of greater efficiencies, enhanced market power, or both.

55. We are concerned that increasing consolidation may be having adverse effects on competition, especially in the local radio advertising market. Current data show that in 85 out of a total of 270 Arbitron radio markets, two entities already control more than 80% of advertising revenue; in 143 markets two entities control more than 70 percent of such.[146] We recognize that many advertisers consider alternative media to be good substitutes for radio advertising. However, the Department of Justice (DOJ) has concluded that there are a significant number of advertisers that do not. In distinguishing radio advertising as a distinct market from that of television and newspaper advertising, the DOJ explains that 1) radio advertising is unique in reaching a mobile broadcast audience; 2) radio has a greater ability to target particular audience segments; and 3) radio can be more cost effective and more flexible in responding to changes in local

[146] There are approximately 270 Arbitron radio markets. Revenue estimates are derived from BIA Database (November 1999).

advertising conditions.[147] Additionally, as we noted in our recent TV Ownership Order, "[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."[148] Thus, for certain advertisers, newspapers, cable, and broadcast television stations do not constitute an effective substitute for radio stations. For these advertisers, the consolidation of local radio markets may raise significant competitive concerns.

56. Diversity. Consolidation of radio stations under group ownership might allow owners to increase investment in news coverage, through the acquisition of more sophisticated news coverage equipment and by maintaining larger, more efficient news staffs. Some commenters thus suggest that ownership concentration has fostered viewpoint diversity. For example, Fuller-Jeffrey Broadcasting Companies, Inc. believes that viewpoint diversity is "alive and well," and that pre-Telecom Act ownership limits had placed a severe economic strain on small to medium-sized companies. It also believes that the present level of consolidation should allow the radio industry to enjoy unprecedented success and stability, which will allow it to better contribute to the public interest. One impact of consolidation, it argues, has been to reduce unnecessary format duplication and to minimize audience overlap.[149] Commenters such as NAB assert that the Commission should look at all media, including television, radio, cable, DBS, Internet and newspapers, along with smaller services such as MMDS and SMATV, when judging program diversity. NAB also finds that group owners do not impose their views on audiences.[150]

57. The scale and scope efficiencies discussed above might in part arise from the consolidation of news coverage at commonly-owned stations, leading to a lessening of viewpoint diversity and to a smaller local market for news talent. If this were the case, this would conflict with the longstanding intent of the radio multiple ownership rules to promote viewpoint diversity through independently owned local stations. Viewpoint diversity has traditionally been viewed in terms of the number of independent viewpoints expressed in local markets, in which case ownership consolidation could have a negative

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147 United States of America v. Jacor Communications, Inc. and Citicasters, Inc. (C-1-96-757) (S.D. Ohio, Aug. 5, 1996), Competitive Impact Statement at 4-5.

148 TV Ownership Order, supra at 12919, citing Robert K. Ekelund, George S. Ford, and John D. Jackson, "Is Radio Advertising a Distrinct Local Market? An Empirical Analysis," 14 Review of Industrial Organization, 239-256 (May 1999).

149 Fuller-Jeffrey Broadcasting Companies, Inc., Comments at 2-3.

150 NAB Reply Comments at 4-6 and 8.

impact on both viewpoint and source diversity. A related concern is that even without the loss of news staffs, viewpoint expression might become homogenized within a commonly owned group of radio stations as a result of the sharing of common news facilities and a common corporate culture.

58. Several commenters lend support to these notions. Air Virginia notes a trend by large group-owned stations towards less news and public affairs and more revenue-generating entertainment programming, particularly with local marketing agreements ("LMAs").[151] Americans for Radio Diversity (ARD) believes that independent broadcasters are more likely to provide diverse and unbiased programming, and that group owners tend to ignore public service to demographic groups deemed to be small or unprofitable, which often impacts minorities and those of lower economic status.[152] CME believes that consolidation has led to reduced public-affairs and local-news programming, since group owners increasingly use syndicated programming and out-sourcing to produce news and public affairs programs, often with the same production company as is used by competitors.[153] It reports that, for example, Metro Networks Inc., a Houston-based company, provides all of the news programming to 10 Washington, D.C., radio stations. Metro, it states, is one of the fastest growing companies in the United States and its growth, according to one of its executives, has been due to the "out-sourcing" his company has found at many radio stations.[154] Similarly, CME reports that Capstar Broadcasting uses ten announcers based in Austin, Texas, to record all between-song breaks and weather and traffic breaks for 37 of its stations in Texas, Arkansas and Louisiana.[155]

59. In view of the large-scale consolidation in the radio industry, we believe that the existing local radio ownership limitations remain necessary to prevent further diminution of competition and diversity in the radio industry. It appears that while there may have been a number of salutary effects flowing from the consolidation that has taken place since 1996, largely in financial strength and enhanced efficiencies, it cannot be said that consolidation has enhanced competition or diversity, and, indeed, may be having the

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151 Air Virginia Comments at 2-4.

152 Americans for Radio Diversity Comments at 2-3.

153 Center for Media Education Comments at 22-24.

154 Id. at 23.

155 Id. at 23-24.

opposite effect. There currently are hundreds of fewer licensees than there were four years ago and, in many communities, far fewer radio licensees compete against each other.

60. Our competition and diversity concerns outlined above lead us to conclude that the local radio ownership rules should not be further relaxed at this time. The industry is still adapting to the substantial relaxation of local ownership rules that followed enactment of the 1996 Act, and we expect consolidation to continue under our current ownership limits. While some commenters argue that we should tighten the ownership limits, we do not believe this appropriate given that Congress directed the Commission to adopt these limits in 1996.

61. Market Definition and Counting Methodology. Although we have decided to retain our ownership rule, our experience in administering the rule since its implementation in 1996 suggests several concerns that should be addressed, including our method of defining markets, counting the number of stations within them and counting the number of stations owned by a party in a radio market. These definitions and methodologies may be undermining Congress' intent in adopting the 1996 Act.

62. Our definition of a radio market and our method for counting the number of stations in a market were adopted in 1992.[156] These were not altered when we amended our rules to implement Section 202 of the 1996 Act.[157] To evaluate whether a proposed transaction complies with our ownership rules, we first determine the boundaries of each market created by the transaction.[158] Our rules define a radio market as the "area encompassed by the principal community contours (*i.e.*, predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m contour for FM stations) of the mutually overlapping stations proposed to have common ownership."[159] Thus, we look to all stations that will be commonly owned after the proposed transaction is consummated and group these stations

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156 Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992).

157 Order, In the Matter of Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership), 11 FCC Rcd 12368, 12370 (1996).

158 A transaction may create more than one radio market.

159 Memorandum Opinion and Order and Further Notice of Proposed Rule Making in MM Docket No. 91-140, supra at 6395. Under our rules, a radio market is created by a proposed transaction. In addition, our rules define a market as a geographic area. The particular geographic area(s) created by proposed transactions often differs from the economic and business conception of the relevant geographic market.

into "markets" based on which stations have mutually overlapping signal contours. A market is defined as the area within the combined contours of the stations to be commonly owned that have a common overlap. For example, suppose an applicant proposes to own stations A, B, C and D. The contours of stations A, B and C each overlap the contours of the other two stations – that is, there is some area which the contours of all three stations have in common. Station D, on the other hand, overlaps the principal community contour of station A, but not those of stations B or C. Under our current definitions, the area encompassed by the combined contours of stations A, B and C form one "market" and the area within the combined contours of stations A and D form another market.[160]

63. To determine the total number of stations "in the market," as defined above, we count all stations whose principal community contours overlap the principal community contour of any one or more of the stations whose contours define the market. Thus, in the market formed by the contours of stations A, B and C, any station whose contour overlapped the contour of A, B or C would be counted as "in the market." We use a different methodology, however, to determine the number of stations that any single entity is deemed to own in a given market. For this purpose, we only count those stations whose principal community contours overlap the common overlap area of all of the stations whose contours define the market. Thus, a station owned by the applicant that is counted as being "in the market" because its contour overlaps the contour of at least one of the stations that create the market will not be counted as a station owned by the applicant in the market unless its contour overlaps the area which the contours of all of the stations that define the market have in common. Referring to our example of the market formed by the contours of stations A, B and C, station D would be counted as "in the market" because its contour overlaps the contour of station A. But, station D would not be counted as a station owned by the applicant in the ABC market because station D's contour does not also overlap the contours of stations B and C. In short, the applicant's ownership of station D would not be counted against it in determining compliance with the ownership cap in the ABC market.

64. These definitions and methodologies may be producing unintended results that are contrary to Congress' intent. In the 1996 Act, Congress directed us to adopt radio ownership limits that increase as the size of the market increases. Implicit in Congress' statutory directive is: (1) a rational definition of radio "market" that reflects the number of stations to which listeners in a particular community actually have access; and (2) a consistent definition of radio market when counting the number of stations in a market

[160] This example assumes that stations A and D are same-service stations, and that at least one other station, B or C, is also in the same service as station A. *See* 47 CFR § 73.3555(a)(2)("[o]verlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service").

and when counting the number of stations an entity owns within that market.

65. The Commission's current policies raise concerns on both counts. First, the Commission's use of overlapping signal contours to assess the number of stations in the market can produce unrealistic results.[161] In other contexts, such as our television duopoly and one-to-a-market rules, we recently opted for market definitions based on commercial reality – as measured by ratings services like Arbitron and Nielsen – rather than contour overlaps. In changing our duopoly rule from a contour-based restriction to a DMA-based restriction, we stated that the 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."[162] We believe that the same reasoning could apply to radio markets. Arbitron markets reflect the number of stations that actually target listeners in a particular community because they are the listeners that advertisers pay to reach. We will issue a Notice of Proposed Rulemaking seeking comment on whether Arbitron markets (or a proxy in non-Arbitron areas) would be a more accurate measure of marketplace reality than our current approach.

66. Second, our current methodology for counting the number of stations a party owns in a market may result, as in the example discussed above, in a station being counted in the market for purposes of establishing the number of stations in the market but not being counted against a licensee's cap on the number of stations it may own in that market. In one case, this would have led to a party being permitted, in effect, to own three stations in a four-station market because our method of counting the stations it owned in the market excluded one of its stations.[163]

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161 For example, in a recent case in Wichita, Kansas, a 24-station market according to the commercial Arbitron rating service, the contour overlap approach counted 52 radio stations in the market, including several Oklahoma stations whose signals did not even reach Kansas.

162 *See* TV Ownership Order, supra at 12926.

163 *See* In re Application of Pine Bluff Radio, Inc., 14 FCC Rcd 6594 (1999). In Pine Bluff, a station that was logically in a market in terms of listenership and advertiser support, and, in fact, was counted for purposes of determining the total number of stations in that market was not counted against a party's ownership cap in that market because its principal city contour did not overlap the principal community contours of all stations that defined the market. In the 1996 Act, Congress provided that in markets with 14 or fewer commercial radio stations a party may own up to five commercial radio stations, but "may not own, operate, or control more than 50 percent of the stations in such market." (*See* Section 202(b)(1)(D) of the Telecommunications Act of 1996.) Yet, in Pine Bluff, application of our established policies led to one party owning three stations in what could reasonably be considered a four-station market. In Pine Bluff we recognized that this may appear to be an anomalous result but pointed out that it was produced by a methodology that had been consistently utilized since 1992 and that subsequent events in the market had rendered harmless the impact of this anomaly in that case.

67. This shifting market definition appears illogical and contrary to Congress' intent. For instance, in the 1996 Act, Congress provided that:

> in *a radio market* with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in *such market*.[164]

Thus, the plain language of the statute seems to require us to look at the *same market* -- i.e., to use the same definition of "market" -- when determining the number of radio stations in the market and when counting the number of stations that an entity owns, operates, or controls within that market. As a logical matter, if a station has sufficient presence that it should be counted as contributing to the number of stations "in the market," it seems appropriate to count it as being "in the market" for purposes of calculating the ownership cap.

68. We tentatively conclude that our definitions and methodologies in this area may be having effects inconsistent with what Congress intended. In addition, they may be undermining the legitimate expectations of broadcasters, advertisers and the public as to the size of their market, the number of stations in their market, and the number of stations that can be owned by an individual party in that market. To consider appropriate changes to our rules, we will issue a *Notice of Proposed Rule Making* soliciting comment on proposed modifications of our rules in this area.

C. Dual Network Rule

1. Regulatory History

69. Section 73.658(g) sets forth the Commission's current dual network rule. It directly reflects the provisions of Section 202(e) of the Telecom Act, which permits a television broadcast station to affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such networks are composed of: 1) two or more persons or entities that were "networks" on the date the Telecom Act was enacted;[165] or 2) any such network and an English-language program distribution service

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164 1996 Act, Section 202(b)(1)(D) (emphasis added).

165 A "network" is defined with reference to 47 C.F.R. § 73.3613(a)(1) for this purpose. As of the date the Telecom Act was enacted, those networks were NBC, CBS, ABC and Fox.

that on the date of the Telecom Act's enactment provided 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television households. The Conference Report identified with precision the networks to which these definitions were to apply. It stated that the Commission was being directed to revise its dual network rule,

> to permit a television station to affiliate with a person or entity that maintains two or more networks unless such dual or multiple networks are composed of (1) two or more of the four existing networks (ABC, CBS, NBC, Fox) or, (2) any of the four existing networks and one of the two emerging networks (WBTN, UPN). The conferees do not intend these limitations to apply if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such networks.[166]

70. The Commission first adopted a dual network rule for broadcast radio networks in 1941 following an investigation to determine whether the public interest required "special regulations" for radio stations engaged in chain or other broadcasting.[167] The rule provided that no license would be issued to a broadcast station affiliated with a network organization that maintained more than one broadcast network.[168] The Commission extended the dual network rule to television networks in 1946.[169] The Commission believed that permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be tied up by the more powerful network entity. In addition,

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166 S. Rep. No. 230, 104th Cong., 2d Sess. at 163.

167 6 FR at 2282 (Tuesday, May 6, 1941).

168 Id. The dual network rule did not apply if the networks were not operated simultaneously or if there was no substantial overlap in the territories served by each network. The rule was directed at NBC, the only company then with two radio networks. The Commission found that operation of the "Red" and "Blue" networks gave NBC excessive control over its affiliates because their contracts did not specify whether a station was part of the "Red" or "Blue" Network. Further, the Commission concluded that operation of two networks gave NBC an unfair competitive advantage over other networks and protected it against future competition. Commission Order No. 37, Report on Chain Broadcasting at 70-73. The Commission indefinitely suspended the rule in 1941 noting that voluntary separation of the Red and Blue networks would soon occur. FCC, Supplemental Report on Chain Broadcasting 14 (1941). After NBC sold its Blue network in 1943, the prohibition was readopted. 8 Fed. Reg. 16,005 (1943).

169 Amendment of Part 3 of the Commission's Rules, 11 FR 33 (Jan. 1, 1946).

the Commission expressed concern that dual networking could give a network too much market power. The dual network prohibition, therefore, was intended to remove barriers that would inhibit the development of new networks, as well to serve the Commission's more general diversity and competition goals.[170] The dual network rule for broadcast television remained unchanged until 1996, when the Commission amended the rule, as noted above, to conform with the provisions in Section 202(e) of the Telecom Act.[171]

2. Comments

71. Four parties (ABC, CBS, Paxson and WB) submitted comments regarding the dual network rule; all favored repeal. These four broadcast networks argue that the rule constrains their ability to restructure and achieve efficiencies of common ownership.[172] They also argue that antitrust enforcement would be sufficient to address any anticompetitive concerns that might arise in the absence of the dual network rule.[173] ABC and CBS argue that broadcast networks are in poor economic health and struggling to compete with cable and satellite.[174] CBS, Paxson, and WB maintain that competition among broadcast networks and between networks and other video media has never been more intense and mergers between networks, especially those involving an emerging network and an established network, would seldom raise competitive concerns.[175] CBS argues that only the national advertising and program production markets are relevant to competition analysis of the rule and both markets are sufficiently competitive so as not to warrant a *per se* prohibition of any and all mergers between certain broadcast networks.[176]

72. With respect to diversity, ABC maintains that a network combination would

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170 Notice of Proposed Rule Making, 10 FCC Rcd 11951, 11967 (1995).

171 Order, 11 FCC Rcd 12374 (1996).

172 ABC Comments at 25, CBS Comments at 18-19, Paxson Reply Comments at 26-27, WB Reply Comments at 13-14.

173 ABC Comments at 25, CBS Comments at 19, Paxson Reply Comments at 25.

174 ABC Comments at 25, CBS Comments at 19-20.

175 CBS Comments at 23-28, Paxson Reply Comments at 27, WB Reply Comments at 13-14.

176 CBS Comments at 26-28.

not harm local news and public affairs. ABC argues that a network combination operating two networks would provide national programming while local news and information programming would remain in the hands of the affiliates.[177] Paxson maintains that the diversity of local programming outlets has never been greater and WB asserts that repeal of the dual network rule would increase both diversity and competition because combinations involving an emerging network and an established network could produce efficient economies of scale and marketing advantages.[178]

73. These four networks maintain that the rule discriminates against broadcast networks, as opposed to cable, by allowing mergers between broadcast networks and cable networks, while limiting mergers between broadcast networks themselves.[179] CBS contends that the rule is a "striking example of regulatory inconsistency."[180] CBS argues that there is a diminishing difference between networking and syndication and every major syndicator, except All American and Hearst, produces at least four hours of programming per week with at least 75 percent audience reach and yet remains uncovered by the rule.[181]

3. Discussion

74. The current dual network rule differs markedly from the dual network rule that remained unchanged from 1946 to 1996. The latter prohibited a broadcast station from affiliating with a network organization that maintained more than one broadcast network. In contrast, the current rule effectively permits a broadcast station to affiliate with a network organization that maintains more than one broadcast network, unless such networks are created by a merger between ABC, CBS, Fox, or NBC, or a merger between one of these four established networks and UPN or WB. Thus, the current rule supports common ownership of multiple broadcast networks created through internal growth and new entry, and discourages common ownership of multiple broadcast networks created by mergers between specific network organizations.

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177 ABC Comments at 25-26.

178 Paxson Reply Comments at 27, WB Reply Comments at 13.

179 CBS Comments at 21-22, Paxson Reply Comments at 25, WB Reply Comments at 14.

180 CBS Comments at 23.

181 Id.

75. Under the current dual network rule, all existing network organizations, and all new network organizations, may create and maintain multiple broadcast networks. There are no limits on the number of broadcast networks that may be maintained by a network organization, or the number of television stations that may affiliate with a network organization. As such, it is theoretically possible for a network organization with sufficient programming to enter into affiliation agreements with every broadcast television station, in every market, and supply all of their programming. The opportunity to create and maintain multiple broadcast networks places broadcast networks on more equal footing with cable, satellite and other multichannel video programming distributors.

76. While the dual network rule gives all network organizations the opportunity to pursue any economic efficiencies that may arise from the maintenance of multiple broadcast networks, it restricts the manner in which specific network organizations become multiple broadcast networks. Specifically, the rule permits ABC, CBS, Fox and NBC to develop multiple broadcast networks by (1) creating new broadcast networks, (2) acquiring new broadcast networks created after passage of the Telecom Act, and (3) acquiring video networks from nonbroadcast media (e.g., cable or satellite) and moving them to broadcast, assuming they could find additional local stations with which to affiliate. However, the rule prohibits ABC, CBS, Fox, and NBC from developing multiple broadcast networks by merging with one another or UPN or WB.

77. We believe that the rule as it applies to UPN and WB may no longer be necessary in the public interest. Accordingly, we will adopt a *Notice of Proposed Rule Making* seeking comment on modifying the dual-network rule. We recognize that program production and broadcast networking are complementary inputs with economic characteristics (e.g., large sunk costs and large transaction costs) that make vertical integration desirable. Since UPN and WB are nascent subsidiaries of large, well-established program producers, a merger of ABC or CBS or Fox or NBC with UPN or WB may be characterized as a merger of an established broadcast network with an established program producer. We believe that allowing such mergers may permit realization of substantial economic efficiencies without undue harm to our diversity and competition goals.[182] However, because we are concerned about the effect of such a merger on our diversity goals, that *Notice* seeks comment on what, if any, safeguards should be imposed to assure a minimal reduction in diversity assuming we alter the rule in some fashion.

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[182] Section 202(e) of the 1996 Act directed the Commission to adopt the current dual network. However, it did not preclude us from later changing it. Indeed, Section 202(h) of the 1996 Act directs the Commission to review the rules it adopted pursuant to Section 202 in its biennial reviews and to change them if they are determined no longer to be in the public interest.

78. We do not, however, believe that, at the present time, the dual network rule should be eliminated in its entirety. While there may be some economic efficiencies associated with mergers between established broadcast networks, we believe such mergers would raise significant competition and diversity concerns. As such, our forthcoming *Notice of Proposed Rule Making* concerning the dual network rule will not propose elimination of that portion of the rule that prevents mergers between ABC, CBS, Fox, and NBC.

D. Daily Newspaper/Broadcast Cross-Ownership Rule

1. Regulatory History

79. Section 73.3555(d) of the Commission's rules sets forth the newspaper/broadcast cross-ownership rule. That section states:

> No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with §73.183 or §73.186, encompassing the entire community in which such newspaper is published; or (2) The predicted 1 mV/m contour for an FM station, computed in accordance with §73.313, encompassing the entire community in which such newspaper is published; or (3) The Grade A contour of a TV station, computed in accordance with §73.684, encompassing the entire community in which such newspaper is published.[183]

80. The Commission adopted the newspaper/broadcast cross-ownership rule in 1975.[184] Like all of the Commission's cross-ownership and multiple ownership rules in the broadcast context, the newspaper/broadcast cross-ownership rule rests on "the twin goals of promoting diversity of viewpoints and economic competition."[185] In adopting the rule, the Commission made clear that its diversity goal is paramount; sometimes

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[183] 47 C.F.R. § 73.3555(d).

[184] Amendment of Sections 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Docket No. 18110, Second Report and Order in Docket 18110, 50 FCC 2d 1046 (1975), recon. 53 FCC 2d 589 (1975), aff'd sub nom. FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

[185] 50 FCC 2d at 1074.

competition must "yield . . . to the even higher goals of diversity and the delivery of quality broadcasting service to the American people."[186] The Commission explained that diversification of ownership promoted diversification of viewpoint in that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergence of their viewpoints cannot be expected to be the same as if they were antagonistically run."[187] Thus, the Commission determined that, as a general rule, granting a broadcast license to an entity in the same community in which the entity also publishes a newspaper would harm local diversity, and should be prohibited.[188] The Commission did not foreclose, however, waiver requests under certain circumstances,[189] although it has only granted three waiver requests on a permanent basis.[190] In Fox and Field Communications, essentially, former owners of a newspaper were reacquiring ownership and, accordingly, new broadcast/newspaper combinations were not being created. Additionally, in Fox the Commission found that without a waiver there was substantial risk to the continued viability of the New York Post newspaper. In Columbia Montour, a waiver was granted because there were documented, unsuccessful efforts to sell the broadcast station separately, the broadcast station was a financially troubled small AM station, the common ownership would only involve a newspaper and a small AM station, there was already a high level of media diversity in the market where the facilities were located, the AM station was not a significant competitive force in the market, and the proposed combination was unlikely to have an adverse effect on media competition in the market

81. In 1978, the Supreme Court, in FCC v. National Citizens Committee for Broadcasting,[191] upheld the Commission's rules and waiver policies in their entirety. The

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186 Id. at 1074.

187 Id. at 1079-1080.

188 Id. at 1075.

189 The circumstances are: (1) where there is an inability to dispose of an interest in order to conform to the rules; (2) where the only sale possible is at an artificially depressed price; (3) where separate ownership and operation of the newspaper and the station cannot be supported in the locality; and (4) where, for whatever reason, the purposes of the rule would be disserved by divestiture. 50 FCC 2d at 1085.

190 Fox Television Stations Inc., 8 FCC Rcd 5341, 5349 (1993); aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995); Field Communications Corp., 65 FCC 2d 959 (1977); Columbia Montour Broadcasting Co., Inc., 13 FCC Rcd 13007 (1998).

191 FCC v. National Citizens Committee for Broadcasting, supra.

Supreme Court found the Commission's diversity goal an important public policy that furthered the First Amendment values of public access to diverse and antagonistic sources of information.[192] Although the Supreme Court noted the arguments of opponents of the rule to the contrary, it stated 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 viewpoints."[193] The Supreme Court approvingly cited the lower court's observation that "[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."[194] It also confirmed the Commission's opinion in the Second Report and Order in Docket 18110 that "'it is unrealistic to expect true diversity from a commonly-owned station-newspaper combination. The divergency of their viewpoint cannot be expected to be the same as if they were antagonistically run.'"[195] The Supreme Court noted the availability of waivers to underscore the reasonableness of the rule.[196]

82. For several years in the 1980s and early 1990s, Congress precluded the Commission from spending authorized funds "to repeal, retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer" the newspaper/broadcast cross-ownership rule.[197] In the Commission's 1994 appropriation, however, Congress provided that the Commission could amend policies with respect to waivers of the newspaper/broadcast cross-ownership rule as it applied to radio.[198] Subsequently, Congress dropped all restrictive language concerning the rule

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192 Id. at 795.

193 Id. at 796.

194 Id. at 796-97, citing 181 U.S.App.D.C. at 24, 555 F.2d at 961.

195 Id. at 797, citing Second Report and Order in Docket 18110, 50 FCC 2d 1046, 1079-80 (1975).

196 Id. at 802 n.20.

197 See, e.g., Department of Justice and Related Agencies, Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1828 (1992). These appropriations restrictions on eliminating the rule were continued in effect through subsequent appropriations legislation and continuing resolutions that funded the agency until April 26, 1996, when a budget was enacted. See Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996).

198 Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1153, 1167 (1993).

from the Commission's appropriations, and thus removed the statutory ban on the Commission's review of the rule itself.[199]

83. Although the Telecommunications Act of 1996 addresses various broadcast cross-ownership issues, it does not address newspaper/broadcast cross-ownership issues; indeed, the legislative history of that Act reveals that the House of Representatives explicitly considered and rejected changes to the newspaper/broadcast cross-ownership rule.[200] Thus, while the Commission now has the authority and obligation to reevaluate the newspaper/broadcast cross-ownership rule, and its policy regarding waivers thereof, there is no explicit Congressional guidance on how that authority should be exercised. However, we believe that there may be certain circumstances in which the rule may not be necessary to achieve the rule's public interest benefits. We, therefore, will initiate a rulemaking proceeding to consider tailoring the rule accordingly.

84. As a result of issues raised in the merger of The Walt Disney Company and Capital Cities/ABC, Inc.,[201] in September 1996 we issued a Notice of Inquiry soliciting comment on the possible revision of our waiver policy as to newspaper/radio combinations.[202] In that Notice we asked whether we should revise our waiver policy in ways that might make it less stringent and/or more objective, such as by adopting a voice count test.

85. Subsequently, in the instant proceeding, we solicited comment on whether the overall newspaper/broadcast cross-ownership rule should be retained, modified or eliminated.[203] In the biennial review NOI we expressed the view that permitting the

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199 Omnibus Consolidated Rescission and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996).

200 141 Cong. Rec. E-1571 (August 1, 1995).

201 Capital Cities/ABC, Inc., 11 FCC Rcd 5841 (1996).

202 Notice of Inquiry in MM Docket No. 96-197, 11 FCC Rcd 13003 (1996).

203 NOI, supra at 11288. During the pendency of the newspaper/radio waiver policy proceeding, the Newspaper Association of America filed a petition for rulemaking to eliminate the newspaper/broadcast cross-ownership rule. See Newspaper Association of America, Petition for Rulemaking in the Matter of Amendment of Section 73.3555 of the Commission's Rules to Eliminate Restrictions on Newspaper/Broadcast Station Cross-Ownership (filed April 27, 1997). In our NOI in the instant proceeding, we stated that we would incorporate NAA's petition in this proceeding, and invited comment on it. Id. at 11286. Additionally, on August 23, 1999, NAA filed an Emergency Petition for Relief. This petition, like NAA's prior Petition for Rulemaking, argues in favor of repeal of the newspaper/broadcast cross-ownership rule, although in this pleading NAA's arguments are based in part on the Commission's

owner of a broadcast TV or radio station to own a newspaper, or visa versa, could give a common owner the market power to unilaterally raise local radio, television, and/or newspaper advertising rates.[204] However, we also expressed the belief that the broadcast media and newspapers were not likely to compete in the markets for delivered programming or program production and, accordingly, elimination of the rule would likely not have adverse competitive impact in these markets.[205] We asked for comment on alternatives to elimination of the rule and other possible economic effects from such elimination (e.g., benefits to the public from efficiencies to be realized from joint operations).[206] Finally, we solicited comment on the effects elimination of the rule might have on our diversity concerns and specifically solicited comment on the arguments made in a Petition for Rulemaking filed by the Newspaper Association of America seeking repeal of the rule.[207]

2. Comments

86. Opponents of the rule claim that the Commission has never empirically demonstrated that the rule furthers its competition and diversity objectives.[208] In any event, they assert, media markets are dramatically more competitive and diverse now than when the Commission adopted the rule, such that the rule is no longer in the public interest,[209] and perhaps is even unconstitutional on First Amendment or other grounds.[210]

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action in the TV Ownership Order. As with the pleadings filed by Fox and Viacom, see supra n. 76, this pleading will be treated as a late-filed comment and not considered in this proceeding. Rather, we will include these comments in the record of the 2000 biennial review.

204 Id. at 11288.

205 Id. at 11288-89.

206 Id. at 11288-89.

207 Id. at 11289-90.

208 See, e.g., Lee Enterprises Comments at 3-4; NAA Comments at 17.

209 See, e.g., ABC Comments at 26-27; ALTV Comments at 36; Lee Enterprises Comments at 4; NAA Comments at 17; Gregory Sidak Comments at 8-11.

210 Elyria/Lorain Comments at 16-17; Freedom of Expression Comments at 22-23; Hearst Comments at 31; Gregory Sidak Comments at 45-61; Media Institute Comments at 11-13; NAA Comments at 83-84; Tribune Comments at 14-15; West Virginia Radio Comments at 14 (all First Amendment grounds). See also Cox/Media General Comments at 25-29 (equal protection grounds).

Opponents explain that the efficiencies of grandfathered combinations have enabled them to air more extensive and in-depth news and public affairs programming than their competitors, and to develop new media ventures, and therefore suggest that the efficiencies of combinations promote outlet diversity.[211] They claim that efficiencies are better realized through combinations than non-attributable joint ventures,[212] and are not driven by consolidation of content or editorial decisions and so do not compromise viewpoint diversity.[213] Opponents also contend that combinations would not affect competition in the advertising market, because the market share of newspapers is overstated in that it includes classified advertising, a market in which broadcast radio and television do not compete.[214] For these reasons, many commenters urged the Commission to repeal the newspaper/broadcast cross-ownership rule, or modify it to allow combinations if a certain number of independent voices remain after consummation of the transaction.[215]

87. Proponents of the rule counter that many of the new media outlets, such as the Internet, OVS and DBS, do not add to viewpoint diversity on the local level.[216] They also point out that new programs by the same broadcasters do not add to viewpoint diversity.[217] Rule proponents also state that the rule does not prohibit all combinations,

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211 A.H. Belo Comments at 11-13; Chronicle Comments at 16; Chronicle Reply Comments at 2. See also Hearst Reply Comments at 6-8; Hearst/Argyle Reply Comments at 2-5; NAB Reply Comments at 9-12. Stated another way, the rule discourages optimal performance and stifles new voices. ALTV Reply Comments at 25-26; NAB Comments at 9-10 (noting that combinations could save distressed newspapers and therefore facilitate diversity); Tribune Comments at 60-65.

212 Chronicle Comments at 25-27; Hearst Reply Comments at 5-6.

213 Hearst Comments at 16-20. Cf. Lee Enterprises Comments at 3-5 (explaining unlikelihood that combination would consolidate viewpoints because reporters and viewers would object); NAB Comments at 7-8 (observing that most grandfathered combinations have kept operations separate because unprofitable to combine); Schermer Reply Comments at 1-4 (stating that consumers will obtain news from other sources if combination denigrated journalistic integrity).

214 Hearst Comments at 18-19; NAA Petition at 36.

215 Elyria/Lorain Comments at 19-20 (Commission should allow newspaper/radio combinations if two independent voices would remain); Freedom of Expression Comments at 25-26 (two voices); Gannett Comments at 38 (thirty voices); West Virginia Radio Comments at 21-22 (two voices).

216 CME Comments at 26-28.

217 CME Comments at 26-28; OCC/UCC Comments at 6-7.

but rather only those in the same market; moreover, existing waiver policies allow combinations where a broadcaster or newspaper publisher is failing and cannot survive but for the combination.[218] Proponents also state that the broadcast and newspaper industries are already highly concentrated,[219] and that efficiencies could be realized from joint ventures rather than attributable combinations.[220] Proponents further claim that newspapers dominate the local advertising market, particularly in smaller markets, such that combinations would harm competition in that market.[221]

3. Discussion

88. We believe the newspaper/broadcast cross-ownership rule continues to serve the public interest because it furthers our important and substantial policy of viewpoint diversity. We therefore conclude that, as a general matter, the rule should be retained. However, we believe that there may be circumstances in which the rule may not be necessary to achieve its intended public interest benefits. We, therefore, will initiate a rulemaking proceeding to consider tailoring the rule accordingly.

89. Effects on Diversity. While the media marketplace has changed since we adopted the rule, we find that the changes are insufficient to justify repeal and we will need to gather a more complete record to determine what modifications may be appropriate. First, many of the new media outlets do not yet appear to be substitutes for broadcast stations and newspapers on the local level for diversity purposes.[222] As we have stated in the biennial review NOI and elsewhere, we are most concerned with viewpoint diversity at the local level. This is because "[m]onopolization on the means of mass communication in a locality assures the monopolist control of information received by the public and based upon which it makes elective, economic, and other choices."[223]

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218 Independent Free Papers Comments at 2-4.

219 CME Comments at 26-28.

220 Independent Free Papers Comments at 2-4.

221 Id. at 3-4.

222 See, e.g., CME Comments at 26-28; Independent Free Papers Comments at 1. See also Black Citizens for a Fair Media Comments in MM Docket No. 96-197 at 18-19.

223 Further Notice of Proposed Rule Making in MM Docket Nos. 92-221 and 87-8, 10 FCC Rcd 3524, 3559 (1995)(hereinafter "TV Further Ownership Notice").

New outlets such as DBS and MMDS, however, typically do not provide locally originated programming. In addition, even though cable systems may originate local programming, they are required to dedicate PEG channels only if their franchise authorities require them to do so, and to provide leased access channels only as a function of their activated channels.[224] There is no requirement that the material offered on cable access channels be locally originated or oriented. By contrast, as part of their public interest obligations, broadcasters are required to air programming that is responsive to issues facing their communities of license, and, although they are not required to do so, local daily newspapers typically cover local issues, endorse local candidates, and provide a platform for the presentation of local opinion.[225] Thus, the fact remains that broadcast services, in particular broadcast television, and newspapers have been and continue to be the dominant sources of local news and public affairs information in any given market.[226] Importantly, while the number of broadcast stations has increased in the past several years, the number of daily newspapers has decreased.[227] On one hand, some commenters argue that this warrants the Commission allowing newspapers to combine with local broadcast stations in order to realize the economies of joint operation, helping them to preserve their newspaper. On the other hand, to the extent that this suggests that the survival of some newspapers may depend on their joint operation with local broadcast stations, we have a waiver standard that can accommodate such instances.[228]

90. Second, we note that not all of the new media in a given market are available to all consumers in the market to the same extent as broadcast services and newspapers. Broadcast radio and TV are available free of charge to anyone who makes an investment in receiving equipment, and much of the public have such equipment; for example, 98.2%

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224 47 U.S.C. §§ 531, 532.

225 TV Further Ownership Notice, supra at 3557.

226 Id. at 3555-57. The Commission has distinguished broadcast television from radio as having more visual impact and serving more people as a primary source of news. See, e.g., TV Further Ownership Notice, supra. at 3557-3558. Almost 70% of American adults surveyed indicated that they use television as their primary source of news. The Roper Organization, "America's Watching: Public Attitudes Toward Television, 1997," (New York, 1998).

227 Independent Free Papers Comments at 5 (noting that in 1975, there were 1,756 daily newspapers in the United States, and in 1997, there were 1,520).

228 See Fox Television Stations Inc., 8 FCC Rcd 5341(1993), aff'd sub nom. Metropolitan Council of NAACP Branches v. FCC, 46 F.3d 1154 (D.C. Cir. 1995).

of Americans own a TV set.[229] Similarly, newspapers are available to anyone for a nominal charge. DBS, MMDS, and the Internet, however, are available only to those who both purchase or rent equipment and, except in the case of the Internet where some Internet Service Providers offer Internet connections free of direct charge, subscribe to a service, the monthly fees for which services are typically several times the cost of a newspaper subscription.[230] In addition, in the case of the Internet, the sunk cost of a computer and the software necessary to browse the Internet is typically several times that of a radio or TV.

91. Third, although some grandfathered combinations report that efficiencies they have derived therefrom have enabled them to air more news and public affairs programming than their competitors such additional programming does not necessarily enhance our policy goal of viewpoint diversity if the additional programs all come from the same source. The Commission has previously explained that its cross-ownership and multiple ownership rules encourage "outlet" and "source" diversity as an indirect means to achieve viewpoint diversity:[231]

> 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.[232]

92. Thus, 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 divergence of their viewpoints cannot be expected to be the

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229 National Association of Broadcasters Internet website at: http:www.nab.org/irc/Virtual/faqs.asp (citing National Bureau of Advertising, "TVB Basics – Cyber Edition which cites Nielsen Media Research).

230 For example, the Washington Post advertises a monthly subscription for $2.65 a week or, approximately, $10.60 per month, while Internet service can be obtained for free (supported by advertising) or by monthly subscription for approximately $15-20. DirecTV can cost from approximately $20 per month to over $80 per month, depending on the package of programming ordered.

231 TV Further Ownership Notice, supra. at 3549-3550. "Outlet" diversity refers to "a variety of delivery services (e.g., broadcast stations) that select and present programming directly to the public"; "source" diversity refers to "a variety of program producers and owners." 10 FCC Rcd. at 3549-3550.

232 Id. at 3550-3551.

same as if they were antagonistically run."[233]

93. We also emphasize that media markets are undergoing significant changes, occasioned by the Telecommunications Act of 1996 and our decision to relax other cross-ownership and multiple ownership rules and waiver policies. The Telecommunications Act directed the Commission to modify its radio ownership rules. Between the enactment of the Telecom Act and March 2000, the number of radio station owners declined by 22 percent from approximately 5,100 owners in March 1996, to about 4,000 in March 2000. In addition, we have recently amended our "TV duopoly" and "one-to-a-market" rules and waiver policies and we propose other changes to still other broadcast ownership rules or policies as a result of this biennial review. The response of the market to these rule changes will provide us concrete, empirical information about their impact on our public policy goals for use in our future biennial reviews. Therefore, the dominance of broadcast services and newspapers in providing local news and public affairs information, may suggest that a measured approach to modifying the newspaper/broadcast cross-ownership rule is appropriate at this time.

94. Effects on Competition. With respect to competition, we also emphasize that the record was not clear on several points. First, it was not clear that grandfathered combinations derived efficiencies only from co-located combinations. For example, Chronicle provided information that its combination aired more news and public affairs programming than its competitors in a given market, but the combination that produced these benefits included both co-located and non-co-located broadcast stations and newspapers. The newspaper/broadcast cross-ownership rule only prohibits combinations in the same market. Second, it was not clear that the efficiencies grandfathered combinations derived could not be realized from non-attributable joint ventures. Managers of existing newspaper/broadcast combinations, as well as other commenters, report that the broadcast station and the newspaper keep separate news staffs in combination situations because the combination does not derive efficiencies from consolidation of such staff. Accordingly, it does not appear that mergers of newspapers and broadcast stations would produce such efficiencies. Third, it was not clear that the efficiencies of newspaper/broadcast combinations produced any meaningful benefits for advertisers, and therefore for viewers as consumers of the advertisers' goods. As indicated above, some commenters explain that grandfathered combinations have provided more news and public affairs programming, and one could extrapolate that this translates into more advertising and viewing options. There was no evidence, however, that any of these additional options translated into benefits for advertisers in the form of reduced rates, or corresponding benefit for viewers in the form of reduced prices for

[233] 50 FCC 2d at 1079-1080.

advertised products and services. Accordingly, we conclude that the newspaper/broadcast cross-ownership rule continues to provide important public interest benefits and that its elimination would not necessarily provide any offsetting benefits to competition.

95. Notwithstanding our general conclusion that the rule should be retained, we recognize that there may be situations in which the rule may not be necessary to protect the public interest in diversity and competition. We wish to examine in greater detail such situations. There may be instances, for example, in which, given the size of the market and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed. While the record contains several proposals for tailoring the rule to address this issue, we believe that a more complete record can and should be developed regarding the circumstances in which the rule may not be necessary to achieve its intended public interest benefits. We will examine whether the rule needs to be tailored to address contemporary market conditions. We will issue a notice of proposed rulemaking seeking comment on these and other potential modifications of our rule. While we generally believe that the newspaper/broadcast cross-ownership rule should be retained, this rulemaking will ensure that the rule is tailored to cover only those circumstances in which it is necessary to protect the public interest.

96. Additional Matter. In 1996, the Tribune Company, which publishes a newspaper in Fort Lauderdale, Florida, agreed to merge with Renaissance Communications Corporation, which owned six television stations including one in Miami, Florida. Although Tribune sought a permanent waiver of the newspaper/broadcast cross-ownership rule to permit this combination, the Commission granted the license transfer subject to the condition that Tribune divest itself of either the Ft. Lauderdale newspaper or the Miami television station within one year, expiring March 22, 1998. On March 6, 1998, Commission staff granted an extension of Tribune's temporary waiver subject to the review of the newspaper/broadcast cross-ownership in the instant proceeding and required that it come into compliance within six months of the completion of the 1998 biennial review (unless, of course, Tribune's combination was in compliance with any new cross-ownership rule adopted as a consequence of that review).[234] We explained that an extension was appropriate because it would be unduly harsh for Tribune not to receive further interim relief given the confusion that may have resulted from the Commission's initial waiver decision with respect to its policy on interim waivers pending rulemaking. We also stated that an extension would not so compromise our diversity and competition interests as to outweigh the substantial

[234] Stockholders of Renaissance Communications Corporation, 13 FCC Rcd 4717 (1998).

equitable considerations favoring the grant.[235] Given our decision here to issue a Notice of Proposed Rulemaking seeking comment on possible modifications of the newspaper/broadcast cross-ownership rule, and the unusual circumstances that led to the prior extension of Tribune's waiver,[236] we will extend that temporary waiver, under the same terms and conditions now applicable, until the completion of the rulemaking.

E. Cable/Television Cross-Ownership Rule

1. Regulatory History

97. Section 76.501(a) of the Commission's rules sets forth the "cable/TV cross-ownership rule." That section states:

> No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).[237]

The Commission adopted the cable/TV cross-ownership rule in 1970.[238] In doing so, the Commission noted its concerns about concentration in the broadcast industry,[239] and stated that the rule would further the Commission's policy favoring diversity of control over local mass communications media, and thereby lead to diverse sources of programming.[240] The Commission noted that it wished to avoid over-

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235 Id. at 4718.

236 We note particularly the withdrawal of the waiver opponent's opposition to the joint operation as long as Tribune continues to operate the newspaper and television station separately and the fact that we have found the joint operation does not so compromise our diversity and competition interests as to outweigh the substantial equitable considerations favoring the grant of an interim waiver.

237 47 CFR § 76.501(a).

238 Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems, and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, Docket No. 18397, Second Report and Order, 23 FCC 2d 816 (1970), recon., 39 FCC 2d 377 (1973).

239 Second Report and Order, supra. at 819-820.

240 Id. at 820.

concentration of media control.[241] On reconsideration, the Commission reiterated that its "adoption of these provisions -- designed to foster diversification of control of the channels of mass communication -- was guided by two principal goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas."[242]

98. Congress codified and then repealed a statutory prohibition on cable/TV cross-ownership. On October 30, 1984, the Cable Communications Policy Act of 1984 became law.[243] Section 613(a)(1) of the Cable Act of 1984 codified the cable/TV cross-ownership rule.[244] Section 202(i) of the Telecommunications Act of 1996, however, eliminated section 613(a)(1) of the Cable Act of 1984,[245] thereby ending the statutory bar to cable/TV cross-ownership. In eliminating the bar, however, Congress stated: "The conferees do not intend that this repeal of the statutory prohibition should prejudge the outcome of any review by the Commission of its rules."[246] The instant proceeding is the first one in which the Commission has reviewed the rule since its adoption.

99. In the Biennial Review NOI we solicited comment on the cable/TV cross-ownership rule. Specifically we asked for comment on the possible effects that repeal or relaxation of the rule might have on various markets, including the market

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241 Id. at 821.

242 Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals, Memorandum Opinion and Order, 39 FCC 2d 377, 391 (1973).

243 Pub. L. No. 98-549, 98 Stat 2779 (1984).

244 Section 613(a)(1) stated: "It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system." The Commission found no need to modify Section 76.501(a) of its Rules as a result of this codification. Report and Order in MM Docket No. 84-1296, 58 RR 2d 1, 14 (1985).

245 47 USC § 533(a)(1).

246 H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 165 (1996).

for delivered programming, on the appropriate scope of the product and geographic advertising markets in which cable and broadcast television compete, and on whether cable/broadcast television combinations could exercise monopsony power[247] in the program production markets. Additionally, we sought comment on the impact on diversity of both the increased number of video outlets and allowing cable/television cross-ownership.

2. Comments

100. Twelve parties commented on the cable/TV cross-ownership rule; seven supported retention of the rule,[248] and five supported repeal or modification.[249] Opponents of the rule note that relevant markets are more competitive and diverse than when the Commission adopted the rule, and state that the rule no longer serves the public interest,[250] and perhaps is even unconstitutional.[251] Opponents explain that the current delivered programming market now includes more broadcast television stations, DBS, MMDS, SMATV, OVS, VCRs, and even the Internet.[252] They contend that the advertising market is competitive and that the market share of broadcasters is significantly larger than that of cable.[253] Opponents also suggest that the program production market would not be affected by repeal of the rule, because most cable systems that provide local programming produce it themselves; very few cable systems buy syndicated programming for their own local channels. Opponents also claim that carriage and channel positioning rules, and the incentive of cable operators to provide their customers with the television stations that they desire on channel positions that work best for customers ensure that cable/TV combinations would not discriminate in favor of

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247 We defined this power in this context as the ability of the cable/television combination to artificially restrict the price paid for programming. NOI, supra at 11292-93.

248 The seven commenters are ABC, ALTV, CME, NASA, NAB, OCC/UCC, and Univision.

249 The five commenters are Ameritech, NBC, NCTA, Time Warner, and Warner Brothers.

250 See, e.g., NCTA Comments at 5-12.

251 See, e.g., Time Warner Comments at 6-7; Time Warner Reply Comments at 7.

252 NCTA Comments at 5-6.

253 Id. at 8.

their owned stations.[254] Opponents further suggest that repeal of the cable/TV cross-ownership rule would not impact diversity. They explain that consumers of news and public affairs information have numerous alternatives from which to choose, and they point out that cable operators provide local programming through leased-access and PEG channels, and in many instances do not have control over that programming.[255] For these reasons, opponents of the rule contend that its economic costs outweigh its benefits;[256] some claim that repeal would increase competition and diversity by facilitating the development of new broadcast networks, and suggest that if the Commission repeals the rule, it could accomplish its competition and diversity objectives through certain conditions and safeguards.[257]

101. Proponents of the rule claim that the rule continues to serve the public interest because cable is the dominant competitor in the multichannel video programming distribution market, and thus serves as a "gatekeeper" to the delivered programming market.[258] Proponents also contend that a cable/TV combination could harm competition in the advertising market by discriminating in favor of its television station and cable programming services, manipulating carriage and channel positioning and offering joint advertising rates, realizing economies of scale, driving competitors out of the market and frustrating new entrants.[259] Proponents also explain that our carriage and channel positioning rules are not sufficient to deter anticompetitive discriminatory conduct as a joint owner could still offer joint advertising opportunities and joint cross-promotions

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254 Id. at 10; Time Warner Comments at 18. See also NBC Comments at 17-18 (contending that rule was motivated by concern that cable operator might not carry programming of non-affiliated broadcast station, but must-carry rules address this and have been affirmed by Supreme Court).

255 NCTA Comments at 12-13; Time Warner Comments at 16.

256 NCTA Reply Comments at 8.

257 Ameritech Comments at 23; Warner Brothers Reply Comments at 4, 8. Additionally, we note that on January 27, 2000, the WB Television Network filed "Supplemental Comments" and a "Request for Leave to File." The Supplemental Comments argued for elimination of cable/TV cross-ownership rule. We will treat this filing in accord with our treatment of the late-filed Fox and Viacom comments, as set forth above.

258 ABC Comments at 29-30; NAB Comments at 15; NAB Comments at 15; NASA Comments at 15.

259 NASA Comments at 18.

unavailable to other competitors.[260] Additionally, absent the cable/TV cross-ownership rule, they contend that there would be no structural regulatory impediment to combined ownership of, for example, AT&T/TCI, GE and NBC by a single entity, creating a combination with unique competitive advantages.[261] Proponents suggest that cable/TV combinations would compromise diversity, and explain that a combination would reduce the number of independent sources of local news.[262]

3. Discussion

102. As explained more fully below, we agree with proponents of the rule that it continues to serve the public interest because it furthers our important public policies of fostering competition and viewpoint diversity. The cable/TV cross-ownership rule promotes competition and diversity and prevents unfair discrimination against competitors, including in forms not covered by existing law. We therefore retain the rule.

103. Effects on Competition. We conclude that the rule continues to serve the public interest because it furthers our goal of competition in the delivered video programming market.[263] This market includes an array of participants, such as operators or providers of broadcast television, cable systems, DBS, MMDS, OVS, SMATV, and possibly even the Internet and videocassettes for VCRs. Sixty-seven percent of American television households, however, subscribe to cable.[264] In the context of discussing the status of competition in the market for the delivery of multichannel video programming, the Commission stated in its most recent Cable Competition Report that "[t]he market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry."[265] Under these circumstances, we agree

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260 ALTV Comments at 38; NASA Comments at 18-20; OCC/UCC Comments at 8; Univision Comments at 6-14.

261 NASA Comments at 19.

262 CME Comments at 28-29; NASA Comments at 16; OCC/UCC Comments at 8. CME also contends that a cable/TV combination would have an incentive to discontinue the programming of local news altogether on the cable system in order to avoid competition with its broadcast affiliate. CME Comments at 28-29.

263 As discussed below, the record was unclear on whether the rule continues to serve the public interest as a result of competition in the advertising and program production markets.

264 13 FCC Rcd. at 18.

265 Sixth Cable Report, supra at 1044.

with proponents of the rule that cable, in many instances, functions as the "gatekeeper" to local markets for delivered video programming.[266] As commenters point out, this status gives cable system operators both the incentive and the means to discriminate against their competitors with respect to such core issues as carriage and channel positioning[267] as well as in areas not covered by statute or Commission rule such as joint advertising rates and promotions. As commenters also point out, a cable/TV combination would have even greater incentive and means to discriminate against others and in favor of its own broadcast affiliate in this fashion, and both the broadcast station and the cable system would stand to unfairly benefit.[268]

104. The record indicates that current carriage and channel position rules prevent some of the discrimination problems, but not all of them. For example, opponents of relaxing the rule note that current law would not prevent discrimination through joint advertising sales and rates practices and joint promotions unavailable to competitors. Additionally, although section 614(b)(6) of the Communications Act entitles a local commercial television station to be carried by a cable system on the same channel as it broadcasts over the air,[269] Univision describes protracted disputes with a cable system in securing its "on air" channel, with one cable system shuffling Univision's channel position four times in four years.[270] Univision also claims that a cable system abruptly changed the channel position of one of Univision's stations in order to provide that position to the cable system's own local news channel.[271] Univision further claims

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266 ALTV Comments at 38; NAB Comments at 16; Univision Comments at 8-9.

267 ALTV Comments at 38; NASA Comments at 18; UCC Comments at 8; Univision Comments at 10-11, 14.

268 ALTV Comments at 38; NASA Comments at 18; Univision Comments at 12.

269 47 U.S.C. § 614(b)(6).

270 Univision reports that the controversy remains protracted because although the Cable Services Bureau recently resolved the controversy in Univision's favor, the cable system has filed a petition for review by the full Commission. Univision Comments at 10-11. In its *Order on Reconsideration* (*see WXTV License Partnership, G.P.*, 15 FCC Rcd 3308 (2000)), the Commission granted reconsideration as to four of the twenty-one cable systems involved but agreed with the Cable Services Bureau that channel positioning violations had occurred with regard to the other seventeen cable systems and that a forfeiture proceeding should commence. A *Notice of Apparent Liability* for $127,500 was released concurrently with the *Order on Reconsideration (Notice of Apparent Liability, Cablevision Systems Corporation,* 15 FCC Rcd 3269 (2000)).

271 Id. at 12-13.

that cable system operators sometimes otherwise delay carriage by denying that they receive an adequate signal from a station, which forces the broadcast station to divert resources away from obtaining quality programming and toward obtaining carriage and channel position.[272] Other commenters also emphasize that cable systems can delete broadcasters from carriage through waiver, and that cable/TV combinations will be unlikely to offer retransmission consent agreements.[273] Univision emphasizes that all of this anti-competitive behavior occurred in spite of the cable/TV cross-ownership rule, and claims that such behavior will only be exacerbated by cable/TV combinations that seek to favor their own broadcast affiliate over others.[274]

105. Although, as we noted in the NOI, DTV holds the potential to enable broadcasters to compete better with cable in the multichannel video programming distribution market, the reality is that DTV is now nascent. In addition, because of the advent of DTV, our DTV must-carry rules are the subject of a pending proceeding.[275] Modification of the cable/TV cross-ownership rule at this time could frustrate and undermine the potential that DTV holds for broadcasters if, as suggested by ALTV, a cable/TV combination, in order to give its own broadcast station a competitive advantage, denied carriage to a competitor and inhibited its DTV roll-out.[276] We believe that it is particularly important to ensure stability and a level playing field as the technology of DTV reaches the marketplace and competitive forces determine its fate in the marketplace. Cable/DTV competition may ultimately provide a basis for some modification of the cable/TV cross-ownership rule, but we believe that time has not yet arrived.

106. Effects on Diversity. We also conclude that the cable/TV cross-ownership rule is necessary to further our goal of diversity at the local level. As we noted above, current media markets include a variety of participants; as we also noted above in our discussion of the newspaper/broadcast cross-ownership rule, however, many new media

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272 Id. at 14-15.

273 NASA Comments at 19.

274 Univision Comments at 11. NCTA, however, contends that there is no evidence that a combined cable/television station operation would diminish competition in the local market or that it could skew the market in a manner that adversely affects advertising rates. NCTA Comments at 7.

275 Notice of Proposed Rule Making in CS Docket No. 98-120, 13 FCC Rcd 15092 (1998).

276 ALTV Comments at 39.

do not contribute to diversity at the local level. Broadcasters contribute to local diversity through the fulfillment of their public interest obligations to air programming responsive to the issues facing their communities of license; cable contributes through PEG and leased access channels and to some degree through origination of local cable news channels. In the TV Further Ownership Notice, the Commission thus tentatively concluded that broadcast television and cable are to a certain extent substitutes for diversity purposes,[277] but also stated:

> [w]e tentatively see no reason to include in our diversity analysis the other electronic video media [beyond cable], such as MMDS, VCRs, and VDT, as substitutable for a broadcast television station. None of these has nearly the ubiquity of cable and most do not have the capability for local origination that cable has. All provide similar entertainment programming; however, our core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events.[278]

107. More recently, we reaffirmed this view in the TV Ownership Order where we stated that many of these alternative video delivery systems "are still establishing themselves in the marketplace and generally do not provide an independent source of local news and informational programming."[279] While newspapers and radio contribute to local diversity, broadcast television and cable television are the only participants in the market for delivered news and public affairs video programming at the local level. The Commission has distinguished the influence of television from that of newspapers as being more immediate, and from that of both newspapers and radio as having more visual impact and serving more people as a primary source of news.[280] The Commission has also noted that the public receives more news from television than from any other source;[281] while broadcast television is the more dominant source of local news and public affairs programming, cable functions as the "gatekeeper" to broadcast television,

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277 TV Further Ownership Notice, supra. at 3556-3557.

278 Id. at 3557.

279 TV Ownership Order, supra at 12917-18.

280 TV Further Ownership Notice, 10 FCC Rcd at 3557-3558.

281 Id. at 3555 (citing The Roper Organization, "America's Watching: Public Attitudes Towards Television, 1997" (New York, 1997)).

as we have noted above.[282] Cable/TV combinations thus would represent the consolidation of the only participants in the video market for local news and public affairs programming, and would therefore compromise diversity.

108. Opponents of rule retention argue that cable does not control the content of its PEG channels and, therefore, contend that cable/TV combinations do not threaten diversity at the local level.[283] However, PEG programming typically is not the cable programming that provides the closest substitute for broadcast local news and public affairs programming. The cable programming that is the closest substitute for such broadcast programming is originated by local cable systems. NCTA suggests that it is the efficiencies and synergies that could be derived from combining just this type of programming that makes the combinations desirable, and, in fact, contends that these efficiencies and synergies would enable combinations to produce more local news and public affairs programming, perhaps targeted at niche markets.[284] Such cable/TV combinations, however, would erode the number of independent local news and public affairs voices in the market. As CME explains, "[e]ven if the common owner created a local cable news station, it would not be providing a diverse source of local news programming because of the common ownership."[285]

109. The television industry has just begun adapting to the recent relaxation of our local television ownership rule. Further consolidation of local television broadcast stations will reduce the number of independent voices providing local news and public affairs programming. Prudence dictates that we monitor and ascertain the impact of these changes on diversity and competition before relaxing the cable/TV cross-ownership rule.

F. Experimental Broadcast Stations

1. Regulatory History

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282 In the TV Ownership Order we concluded that cable would not count as an independent local voice for the duopoly rule because there was an absence of factual data in the record indicating that cable is a substitute for broadcast television. TV Ownership Order, supra at 12935.

283 See, e.g., NCTA Comments at 12-14.

284 NCTA Comments at 13-14.

285 CME Comments at 29.

110. The multiple ownership rule for experimental broadcast stations was initially adopted in 1946 in Part 4 (4.134), and generally limited ownership to one station.[286] In 1963 this rule was redesignated as Part 74 (74.134) with no changes. In 1984 the Commission combined Parts 74 A (Experimental TV), 74 B (Experimental Facility) and 74 C (Developmental Broadcast Stations) into the present subpart, 74 A (Experimental Broadcast Stations) without changing the ownership limits. The rule currently reads:

> §74.134 **Multiple ownership**. No persons (including all persons under common control) shall control, directly or indirectly, two or more experimental broadcast stations unless a showing is made that the program of research requires a licensing of two or more separate stations.

2. Comments

111. Only one comment was filed. NAB recommends repeal of this rule stating that broadcast auxiliary facilities are facing regulatory change and dislocation and, accordingly, there is now ever greater need for responsible use of experimental stations to develop solutions to these problems. While supporting elimination of what it characterizes as "this arbitrary restriction,"[287] it urges the Commission to ensure that such stations not endanger the interference-free service provided by other broadcasters.[288]

3. Discussion

112. The rules authorizing experimental broadcast facilities seek to encourage experimentation and innovation in the provision of broadcast service to the public. A license for an experimental broadcast station will be issued for the purposes of carrying on research and experimentation for the development and advancement of new broadcast technology, equipment, systems or services which are more extensive or require other modes of transmission than can be accomplished by using a licensed broadcast station under an experimental authorization ((§74.102) Uses of experimental broadcast stations.). Most of the related rules are intended to prevent interference to existing services.

113. Experimental broadcast licenses are also subject to a broad variety of operating and reporting requirements, as well as a requirement that prohibits their

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286 An exception is allowed when a showing is made that the program of research requires the licensing of two or more separate stations.

287 NAB Comments at 16.

288 Id. at 16.

commercial use. The licensee of an experimental broadcast station may make no charges nor ask for any payment, directly or indirectly, for the production or transmission of any programming or information used for experimental broadcast purposes (§74.182(b). Nor may it transmit program material unless it is necessary to the experiments being conducted, and no regular program service may be broadcast unless specifically authorized (§74.182(a)). These commercial restrictions prevent entities from exploiting an experimental broadcast station for commercial purposes while functioning under the guise of an experimental authorization. The supplementary statement to be filed with an application for a construction permit (§74.112), supplementary reports filed with an application for renewal of license (§74.113), and the requirement to make a satisfactory showing of compliance with the general requirements of the Communications Act of 1934, as amended, to satisfy the licensing requirement (§74.131), allow for the oversight necessary to protect the goals of competition and diversity.

114. We find that elimination of the rule will have no adverse impact on our diversity and competition goals. Repeal of this multiple ownership rule would not affect the Commission's ability to ensure that experimental stations are used solely for their avowed purposes, which is separately covered under §74.102. Neither would it imply that any petitioner will necessarily be able to control multiple frequencies, since a license of an experimental broadcast station will not authorize the exclusive use of any frequency, under §74.131. The multiple ownership rule for experimental broadcast stations appears to have been originally adopted to limit the opportunities for the commercial use of experimental stations.[289] We believe that the current requirement that such stations operate for research purposes and the proscriptions on the broadcast of a regular program service and the imposition of charges for the transmission of programming or information on experimental broadcast stations are sufficient to assure that, even absent the multiple ownership rule, licensees do not, under the guise of experimentation, obtain sufficient experimental stations to create, *sub rosa*, commercial broadcast services. These stations operate for research purposes and, thus, do not compete in the marketplace for programming or advertising and existing rules will provides safeguards against abuse in the absence of the experimental station multiple

[289] The early history of the Federal Radio Commission and, later, the Federal Communications Commission with regard to commercial use of experimental stations demonstrates an ambivalence with regard to such use of these stations. The FRC initially permitted commercial use but, in 1933, prohibited any further commercial use of such stations. The FCC also initially prohibited their commercial use, then, in 1935, permitted some commercial use, and, still later (1936) again prohibited their commercial use. Rules for experimental stations adopted in the late 1930s, were intended to prevent commercial operations from predominating and interfering with experimentation. Our current rules prohibit the licensee of an experimental broadcast station from making charges or asking for payment, directly or indirectly, for the production or transmission of any programming or information used for experimental broadcast purposes. (See 47 CFR § 74.182.)

ownership rule. There existing no competitive bar to the elimination of the multiple ownership rule applicable to them, we believe that the multiple ownership rule governing experimental broadcast stations may no longer be in the public interest. We will issue an NPRM proposing elimination of the rule.

V. Constitutional Issues

115. Commenters raised Constitutional arguments with respect to two of our rules. The newspaper/broadcast cross-ownership rule is objected to by several commenters on the grounds that it violates the First Amendment.[290] Additionally, both that rule and the dual network rule are said to discriminate. In the case of the newspaper/broadcast cross-ownership rule, the discrimination is alleged to be between newspaper owners and other media owners.[291] The dual network rule is claimed to discriminate against broadcast networks as opposed to cable networks as it allows mergers between broadcast and cable networks but not between broadcast networks themselves.[292]

116. As an initial matter, our newspaper/broadcast cross-ownership rule has already been sustained by the Supreme Court.[293] Beyond that, it is well-established that a content-neutral regulation, such as the subject rule, will be sustained against claims that it violates the First Amendment if:1) it advances important governmental interests unrelated to the suppression of free speech; and 2) does not burden substantially more speech than necessary to further those interests (the "O'Brien test").[294]

117. As we noted previously, the Supreme Court has determined that the preservation of media diversity is a government interest that is not only important, but is of the highest order[295] and is unrelated to the suppression of free speech. Therefore, the rule meets the first prong of the O'Brien test. Even were one to conclude that it confines free speech of newspaper owners by limiting their ownership of co-located broadcast stations, that burden is the minimum necessary to accomplish the diversity goal. It does

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290 See n. 210, supra.

291 Cox/Media General Comments at 25-29.

292 CBS Comments at 21-22; Paxson Reply Comments at 25; WB Reply Comments at 14.

293 FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).

294 Turner II, 520 U.S. at 189, citing U.S. v. O'Brien, 391 U.S. 367, 377 (1968).

295 Turner I, 512 U.S. at 663; Turner II, 520 U.S. at 190.

not prevent newspaper publishers from owning broadcast outlets. It does not prevent them from entering into joint venture agreements with broadcasters in their community. Rather, it simply precludes them from owning -- and therefore having ultimate editorial control over -- broadcast and newspaper outlets in the same community due to the impact of such common ownership on, especially, local viewpoint diversity. Accordingly, we believe that the newspaper/broadcast cross-ownership rule, to the extent it burdens free speech at all, does so to the minimum extent necessary. It therefore passes the constitutional test for such rules.

118. As to commenters' claims of discrimination, the Supreme Court has repeatedly held that "a classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose."[296] As we noted above, protecting media diversity has been determined by the Supreme Court to be a governmental interest of the "highest order."[297] We believe that the classifications inherent in both the newspaper/broadcast and cable/television cross-ownership restrictions are, under current conditions, necessary to promote that governmental interest and, therefore, do not violate the rights of any party to equal protection of the law.

VI. Conclusion

119. In this, the first of our biennial reviews of our broadcast ownership rules, we conclude that some regulations are no longer in the public interest in their current forms as a result of competition.[298] We are, therefore, proposing to modify or eliminate these rules in Notices we will issue. We also conclude, however, that, for now, the other ownership rules considered in this proceeding warrant retention. We will, of course, revisit our ownership rules biennially, as directed by the 1996 Act. Our future biennial

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[296] Central State University v. American Association of University Professors, Central State University, (*per curiam*), 526 U.S. 124. 119 S.Ct. 1162, 1163 (1999), citing Heller v. Doe, 509 U.S. 312, 319-321, (1993), FCC v. Beach Communications, Inc., 508 U.S. 307, 313-314 (1993), Nordlinger v. Hahn, 505 U.S. 1, 11 (1992). We do not concede that a fundamental right is involved in the instant matter. It is well established that there is no unabridgeable First Amendment right to a broadcast license. See, e.g., FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 798-802 (1978); Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94, 101 (1973); United States v. Weiner, 701 F.Supp. 14 (U.S.D.C. Mass., 1988).

[297] Turner I, 512 U.S. at 663; Turner II, 520 U.S. at 190.

[298] These are: the dual network rule and the limitation on the multiple ownership of experimental broadcast stations. We will also adopt a *Notice* to explore the manner in which we define radio markets and determine both the number of stations in a radio market and the number of radio stations owned by a party in such a market.

reviews will be informed by the impact of the substantial changes we made to our television "duopoly" and "one-to-a-market" rules this past August.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary