BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20054

In the Matter of	)	
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

To: The Commission

COMMENTS OF VIACOM INC.

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Summary

More than sixty years ago, the original local radio ownership restrictions were adopted when terrestrial radio stations were the only media outlets with the technological means to provide individuals with real-time news and information. In this outlet-constrained environment, the limitation was premised on the hypothesis that diversity of ownership would promote public access to diverse viewpoints. Through decades of technological advancement, and the spur of a fully competitive media marketplace, this landscape has changed forever. Radio broadcasters now offer just a few of the many channels that connect speakers with the public. And broadcast radio group owners, in turn, provide outlets for a wide range of viewpoints and programming, more diverse than can be offered by single outlet owners. Accordingly, the Commission's original premise for the rules has become obsolete.

In undertaking "a comprehensive examination" of its local radio ownership rules through the *NPRM*, the Commission should acknowledge the reality of the modern media marketplace. Indeed, Section 202(h) of the Telecommunications Act of 1996 (the "1996 Act") directs the Commission to take a close look at its structural regulations on a biennial basis to determine whether they remain necessary to promote the public interest in light of the changing, and increasingly competitive marketplace. As recently confirmed by the U.S. Court of Appeals for the D.C. Circuit, the burden of proving the continued necessity of the ownership rules falls squarely upon those supporting continued regulation. In other words, the statutory presumption favors deregulation.

If the Commission does nothing else in this proceeding, it should remedy the omissions of its 1998 and 2000 biennial reviews and subject the local radio ownership rules to the level of scrutiny and analysis required under Section 202(h) of the 1996 Act. The Commission will ultimately find as a result of this review that the local radio ownership rules have outlived any purpose that they once had, and that they should be repealed. Where once a radio licensee might have gained a near-monopoly simply by owning the only radio station and the only newspaper in town, today's public has the opportunity to get news and entertainment from thousands of sources – from satellite and broadcast radio, broadcast, cable and satellite television, the Internet and print (and faxed) media.

As a result of these dramatic changes in the marketplace, broadcasting, particularly radio broadcasting, no longer holds a dominant position in the exchange of news, information and opinion. There is no current dysfunction in the marketplace of ideas that requires Commission intervention – *i.e.,* there is no "scarcity" of opportunities for citizens to obtain information from a variety of sources. In today's competitive marketplace, media consumers elect what to listen to, what to watch and what to read. Media owners who fail to deliver what consumers want will rapidly lose their audiences to the intense competition. Today's modern media companies are successful not because they impose their will on the American public, but because they strive to gauge what consumers demand and to deliver desired news and information to them.

The policies underlying the Commission's broadcast ownership rules are fundamentally rooted in the promotion of First Amendment values, and the rules should therefore be consistent with those values. Broadcast ownership regulation has been upheld against Constitutional challenge in the past, based on a narrow exception to the First Amendment rooted in the alleged scarcity of outlets. In the absence of scarcity in the marketplace of ideas, however, the Commission's local radio ownership rules do not serve the goal of securing the public's access to diverse viewpoints and are therefore unconstitutional.

The Supreme Court itself, in *Red Lion v. F.C.C.*, indicated that the "scarcity doctrine" underpinning distinct First Amendment treatment for broadcasters was fundamentally the product of the circumstances and technology as they existed at that time. This strongly suggests that *Red Lion*, and the cases following its First Amendment holding, did not articulate an immutable principle of jurisprudence, but rather a transitory doctrine applicable only so long as its factual underpinnings remain.

Indeed, the Court has specifically invited the Commission and Congress to signal the obsolescence of scarcity as a justification for differential First Amendment treatment of broadcasters. And both the Commission and Congress have responded by rejecting the scarcity justification. Congress provided an explicit declaration that scarcity was no longer relevant in adopting the 1996 Act, which set out a clearly deregulatory course. The Commission has signaled the irrelevance of scarcity both explicitly, through statements of policy, and implicitly, through its allocation of spectrum without regard to scarcity concerns, *e.g.,* allocating a large amount of spectrum for satellite radio, and allotting it to just two national service providers. Each satellite radio licensee has access in *every* local market to more than half the total bandwidth allotted to terrestrial broadcast radio as a whole and more than ten times the spectrum that a single terrestrial radio owner may acquire in even the largest markets.

Having itself abandoned the scarcity rationale as a basis for imposing special regulations upon radio broadcasters, the Commission should now take this opportunity to recognize the full import of these judgments – that arbitrary limits on broadcast ownership are inconsistent with the First Amendment. Absent the scarcity justification, there can be no basis for singling out the broadcast media for second-class status under the First Amendment.

Finally, the Commission should not turn to regulation of economic competition as an alternative justification for imposing numerical ownership limits in local markets. While the Commission has historically made reference to promoting competition as a goal of its ownership policies, it has done so as a proxy for promoting diversity, on the theory that it is necessary to take affirmative measures to prevent concentration as a means of ensuring viewpoint diversity. With the present level of diversity in the marketplace, there is no need for continued FCC structural regulation.

Repeal of the Commission's local radio ownership regulations will not have any adverse impact on listeners because the radio marketplace will still be subject to the antitrust and competition oversight and enforcement by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). The Commission itself is not best-suited to engage in such review because it has never acted as a broadcast competition regulator and has no statutory authority in this area. In the absence of a need to impose numerical requirements to promote diversity, there is simply no reason for the Commission to engage in duplicative analysis of radio industry transactions in the name of promoting competition. The DOJ and the FTC are better positioned to remedy any problems that may occur because they have the professional staff, regulatory authority, institutional experience and established review guidelines necessary to do the job. The DOJ and the FTC thus have the necessary resources to conduct flexible and tailored reviews according to specific circumstances in any affected market. An inflexible, bright-line approach will unnecessarily preclude potentially beneficial transactions that would survive a more finely calibrated analysis.

As a factual matter, the changes over the last half-decade have promoted economic efficiencies leading to improved program service, including greater format diversity. Moreover, evidence shows that the consolidation that has taken place to date in the radio industry has actually increased format diversity in the markets studied.

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To: The Commission

COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom"), the parent company of Infinity Broadcasting Corporation ("Infinity"),[1] by its attorneys and pursuant to Sections 1.415 and 1.419 of the Commission's rules, hereby comments on the Commission's *Notice of Proposed Rule Making and Further Notice of Proposed Rule Making* in the above-captioned proceedings, released November 9, 2001 ("*NPRM*"). Viacom believes that the Commission has failed to fulfill the statutory directive of the Telecommunications Act of 1996 ("1996 Act") in reviewing its ownership rules – a view recently corroborated by the U.S. Court of Appeals for the D.C. Circuit in *Fox Television Stations, Inc. v. FCC*. This proceeding provides the Commission with an opportunity to revise its approach in a manner that will be consistent with Congressional directives.

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[1] As the Commission is aware, Infinity and its affiliated companies are licensees of AM and FM broadcast radio stations in communities throughout the United States, and thus have a significant interest in the determinations to be made in this proceeding.

Although the Commission states that a goal in this docket is the development of "a new framework" for regulation of the local radio marketplace, Congress has given the Commission a specific statutory framework for such regulation. Under Section 202(h) of the 1996 Act, the Commission must either justify retention of this framework as necessary to promote the public interest or abandon it as obsolete, due to competition. As demonstrated in these comments, the current local radio ownership regulations should be repealed because they do not currently serve any purpose in the diverse media marketplace that has developed over the last two decades. Indeed, the dramatic changes in the marketplace cast significant doubt on the constitutionality of the regulations given the dearth of justification for their continued application.

I. The Commission Must Determine Whether The Local Radio Ownership Rule Remains Necessary To Advance The Public Interest.

At the outset of the discussion in the *NPRM,* the Commission states that it is poised "to undertake a comprehensive examination of [its] rules and policies concerning local radio ownership."[2] Such an undertaking is welcome, and the D.C. Circuit Court of Appeals has very recently clarified the Commission's obligations in this connection.[3]

The Commission is obligated, as part of the biennial review process mandated by the 1996 Act, to examine thoroughly all of its broadcast ownership regulations and to determine whether they continue to be necessary. The burden of proving the continued necessity of all of the Commission's ownership rules falls upon

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2 *NPRM* at ¶ 19.

3 *See Fox Television Stations, Inc. v. FCC,* 280 F.3d 1027, 2002 U.S. App. LEXIS 2575 (D.C. Cir. Feb. 19, 2002).

those supporting continued regulation, <u>not</u> those advocating relaxation of these rules. The Commission did not even acknowledge, much less carry, this burden in the 1998 and 2000 biennial reviews, and the burden cannot be carried now.

A. The Commission Is Required Under Section 202(h) To Determine Whether Its Ownership Rules Remain Necessary To Promote The Public Interest In Light Of Increased Competition.

Section 202(h) of the 1996 Act directs the Commission to review each of its broadcast ownership rules every two years to determine whether any of them remain "necessary in the public interest as the result of competition." The statute goes on to provide that "the Commission *shall repeal or modify* any regulation it determines to be no longer in the public interest."[4] In enacting this provision of the 1996 Act, Congress placed the burden of justifying the continued retention of the rules squarely on the shoulders of the Commission and those seeking the perpetuation of the existing numerical limits.[5]

Accordingly, in order to retain an ownership rule without modification or elimination, the Commission must have evidence demonstrating that the rule is *necessary* to promote the public interest.[6] As the U.S. Court of Appeals for the D.C. Circuit recently found in *Fox Television Stations, Inc. v. FCC*, this necessity requirement means that "Section 202(h) carries with it a presumption in favor of repealing or modifying the

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4 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996) (emphasis added).

5 "The question, therefore, is whether the Commission adequately justified its retention decision as necessary to further diversity or localism." *Fox Television Stations*, 2002 U.S. App. LEXIS 2575, at *31.

6 According to Webster's Dictionary, "necessary" means: 1. Absolutely required: indispensable. 2. Needed to bring about a certain effect or result…. 3. a. Unavoidably determined by prior conditions or circumstances: inevitable… b. logically inevitable. 4. Required by obligation, convention, or compulsion. WEBSTER'S II NEW COLLEGE DICTIONARY 731 (Riverside 1995).

ownership rules."[7] Chairman Powell was therefore absolutely correct in 1998 when he described the Commission's duty under Section 202(h):

> [T]he clear bent of the biennial review process set out by Congress is deregulatory, in recognition of the pace of dramatic change in the marketplace and the understanding that healthy markets can adequately advance the government's interests in competition and diversity. Thus, ... I start with the proposition that the rules are no longer necessary and demand that the Commission justify their continued validity.[8]

Although the *Fox* court's definitive explanation of the Commission's obligations under the statute renders unnecessary any detailed evaluation of legislative intent, it does bear mentioning that Congress placed specific emphasis upon its deregulatory aims. The Conference Committee responsible for the final version of the legislation stated that the 1996 Act was intended "to provide for a pro-competitive, de-regulatory national policy framework" to encourage the provision of the best and most advanced technology to the American public.[9] For broadcasting specifically, Congress expressly stated that the time had come for deregulation in light of the sweeping changes it noted in the media marketplace.[10] Accordingly, in crafting Section 202(b), Congress merely set the floor for future Commission regulation and mandated through Section 202(h) that the Commission justify, eliminate, or relax the local radio ownership rule every two years.

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7 *Fox Television Stations*, 2002 U.S. App. LEXIS 2575, at *48.

8 *1998 Biennial Regulatory Review*, 15 FCC Rcd 11058, 11151 (2000) (statement of Commissioner Powell) [hereinafter *1998 Biennial Review*].

9 H.R. CONF. REP. NO. 104-458, at 1 (1996). *See also* Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56 (1996).

10 S. REP. NO. 104-23, at 64 (1995).

B. The 1998 And 2000 Biennial Reviews Failed To Fulfill The Commission's Statutory Mandate.

Both of the biennial reviews that have occurred since the passage of the 1996 Act have fallen far short of demonstrating that the local radio ownership rules are necessary to promote the public interest. Neither biennial review adduced any empirical evidence that the radio ownership rules were benefiting the public interest at all, much less that they were necessary to serve that interest, especially in light of increased competition in the marketplace.

The 1998 Biennial Review engaged in a largely theoretical discussion of the effects of the changing media marketplace on competition and diversity, but it did not satisfy the requirement that the Commission engage in a thorough inquiry demonstrating that the local radio ownership rule is necessary in the public interest. This failing is exhibited by the Commission's conclusion: "We conclude that our current local radio ownership rules, as mandated by the Telecommunications Act of 1996, generally continue to serve the public interest."[11] While the Commission recited a litany of facts and figures describing the broadcasting marketplace, as the D.C. Circuit observed in *Fox*, this "brief description . . . a single paragraph of the 1998 Report under the heading "Status of the Media Marketplace," is woefully inadequate…."[12]

Most significantly, the Commission failed to consider the impact of other media, such as broadcast and cable television and the Internet, among others, that contribute to the media marketplace and the diversity of viewpoints. Nor did the

11 *1998 Biennial Review*, *supra* note 8, at 11087.

12 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 2002 U.S. App. LEXIS 2575, at *37 (D.C. Cir. Feb. 19, 2002) (citing *1998 Biennial Review*, *supra* note 8, at 11064).

Commission substantiate its conclusory determination that the drawbacks of consolidation outweighed the benefits to the public.

The 2000 Biennial Review failed even more dramatically to fulfill Congress's mandate. The Commission simply adopted, in their entirety, all of the staff recommendations on the elimination, modification, or retention of the rules as detailed in a Staff Report.[13] While the Staff Report acknowledged "the increasingly competitive nature of virtually all communications markets,"[14] it failed to explore the impact of these changes on the basis for regulation. Despite noting the increase in competition in the media marketplace, the staff stated only that the local radio ownership rule "remains necessary" to promote competition and diversity without any further discussion.[15] Although the Commission noted increasing consolidation in the local radio market, it made no showing, or even any effort to show, that such consolidation harmed the public interest.

The Commission has thus far failed to undertake the thorough review required for by the 1996 Act to determine whether the local radio ownership limits remain necessary in the public interest. Congress has directed the Commission to conduct an in-depth examination to address and eliminate its long-held stereotypes. To date, however, the Commission has not even scratched the surface. It has in the case of the local radio ownership rules, just as the *Fox* court found it had in connection with the

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13 *2000 Biennial Regulatory Review*, Report, 16 FCC Rcd 1207, 1207 (2001).

14 *2000 Biennial Regulatory Review*, Updated Staff Report, CC Docket No. 00-175, at ¶ 116 (rel. Jan. 17, 2001).

15 *2000 Biennial Regulatory Review*, Updated Staff Report, CC Docket No. 00-175, at 173 (rel. Jan. 17, 2001).

television national ownership cap, "failed even to address meaningfully the question that Congress required it to answer."[16]

C. The Commission Should Remedy Previous Flawed Biennial Review Approaches, And Undertake In This Proceeding The Analysis And Scrutiny Of The Local Radio Ownership Rules That Congress Required In The 1996 Act.

The *NPRM* indicates that the Commission continues to misconstrue its statutory obligations. For example, in the *NPRM*, the Commission imposes a burden on proponents of deregulation.[17] The statute, however, places the burden on proponents of continued regulation.

If the Commission does nothing else in this proceeding, it should remedy the fundamentally flawed approach that the Commission took in the 1998 and 2000 biennial reviews, and subject the local radio ownership rules to the analysis and scrutiny that Congress required in the 1996 Act. The existing regulations cannot be sustained upon a mere conclusion that they are generally consistent with the public interest. As the court stated in *Fox*, "the statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."[18]

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16 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 2002 U.S. App. LEXIS 2575, at *37 (D.C. Cir. Feb. 19, 2002).

17 *See, e.g., NPRM* at ¶ 38 (commenters are requested to provide "empirical data and analysis demonstrating" both an increase in diversity since deregulation began and "the causal link, as opposed to mere correlation, between the increase and greater consolidation in local markets.").

18 *Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575, at *55. The Commission may consider both competition and diversity in considering whether to modify or eliminate the broadcast ownership rules. *Id.* at *31.

II. The Commission's Focus In This Proceeding Must Be On The Current Level Of Viewpoint Diversity In Local Media Markets As Indicated By Public Access To A Wide Range Of News And Opinion Information.

The primary purpose of the broadcast ownership rules is to promote public access to diverse viewpoints. In evaluating the continued necessity of the local radio ownership rule, the Commission's focus must be whether diverse outlets for news and information are available.

A. The Purpose Of The Local Radio Ownership Rule Is To Ensure Citizen Access To A Wide Range Of Viewpoints On Matters Of Public Concern.

More than sixty years ago, the Commission, applying its mandate to regulate in the "public interest," developed its first broadcast ownership rules. At the time, radio and newspapers were the dominant forces in the media marketplace. In this option-limited environment, the Commission adopted its first limits on broadcast ownership to promote the public's access to diverse and antagonistic viewpoints, thereby facilitating the First Amendment interest in a well-informed citizenry, able to derive information from a wide array of "diverse and antagonistic" sources.

In the *NPRM,* the Commission asks a number of questions relating to the issue of diversity, seeking comment on how it is defined, how it should be quantified, and the appropriate area within which it should be evaluated.[19] Each of these questions must be answered premised on the original marketplace concerns that led to adoption of the rules.

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[19] *See NPRM* at ¶¶ 29-38.

1. Viewpoint Diversity Means Access To Varied News And Information Sources.

With respect to the type of programming and other content that is relevant to the diversity inquiry, the Commission has historically displayed a special concern with the public's access to news and information sources.[20] In the context of evaluating viewpoint diversity, the Commission has stated that it is "compelled to give special weight to evidence showing a greater quantity of public affairs and news programming, as it is this programming which best advances First Amendment interests."[21] Given the fact that the promotion of First Amendment values is the basis for broadcast ownership regulation, it is apparent that news, public affairs, informational and issue-oriented content is the relevant end product to be considered. The Commission's analysis should therefore focus on the ability of individuals to obtain a broad range of opinions and information regarding important issues.

2. In Assessing Viewpoint Diversity, The Focus Should Be On Local Markets.

As the Commission indicated in the *NPRM*, in keeping with its well-established concern with "localism" in the broadcasting industry, the appropriate geographic area for evaluating diversity is the local market.[22] Each individual media consumer has the ability to obtain information from every outlet, source and speaker that

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20 *See, e.g., Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903 (1999).

21 *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 36(1984).

22 *See NPRM* at ¶ 33. *See also Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d at 36 ("Within the United States, the most important idea markets are local.").

can be accessed in the area where he or she lives. This range of available viewpoints is not limited to broadcast radio and television stations or daily newspapers, but encompasses all magazines, cable and satellite channels, and Internet websites that are accessible to individuals in the local market.

3. Viewpoint Diversity Is The Only Proper Goal Of Broadcast Ownership Regulation – Outlet And Source Diversity Are Only Means To Achieve This End.

In the *NPRM*, the Commission solicits input on the appropriate categorical definition of diversity, suggesting that three "aspects of diversity" that it has previously evaluated may be relevant to its inquiry – "viewpoint," "outlet" and "source" diversity.[23] In fact, however, only viewpoint diversity is an actual goal of FCC regulation. The importance of viewpoint diversity in promoting First Amendment values has received explicit judicial endorsement.[24]

Outlet and source diversity, on the other hand, are merely the regulatory means that the Commission has chosen to achieve the end result of "diverse and antagonistic" information sources, regulating both ownership and the programming marketplace as a means of achieving this end. The Commission has not collected specific evidence supporting this approach, but has premised these structural regulations on the assumption that promotion of diverse broadcast ownership and of a broad range of program producers would also ensure consumer access to robust and wide-ranging opinions on matters of public importance.

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23 *See NPRM* at ¶ 30.

24 The First 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, that a free press is a condition of a free society." *Associated Press et al. v. U.S.*, 326 U.S. 1, 20 (1945).

a. Outlet And Source Diversity Are Theoretical Means To An End.

The terms outlet and source diversity do not appear at all in the Commission's early discussion of ownership regulation,[25] but seem to have crept into the ownership analysis from the related area of program market regulation within the past decade. The Commission first mentioned these concepts during the 1980s in the context of its regulation of the programming marketplace through the Financial Interest and Syndication Rules ("FinSyn") and the Prime Time Access Rule ("PTAR").

In those proceedings, the Commission defined source diversity as "a measure of the number of program originators."[26] While the Commission once sought to intervene in the programming acquisition market in an attempt to influence "source diversity," this approach has been abandoned due to changes in that marketplace. For example, PTAR's "principal purpose was to promote source diversity by strengthening existing independent producers and encouraging entry of new producers."[27] A decade ago, the Commission appropriately reconsidered the need for PTAR to regulate the programming market in view of the substantial changes in market conditions that had occurred since this rule was first adopted. Finding that parties supporting retention of PTAR had "not identified a market failure or provided a justification for regulatory

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25 *See, e.g., Amendment of Sections 73.34, 73.240 and 73.636 of the Rules and Regulations Relating to the Multiple Ownership of Standard, FM and Television Broadcast Stations*, 3 R.R.2d 1554, 1561-62 (1964) (referring just to "diversity").

26 *Amendment of 47 CFR Sec. 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules.* 94 F.C.C.2d 1019, 1054 (1983). *See also 1998 Biennial Review*, *supra* note 8, at 11062 ("Source diversity refers to promoting a variety of program or information producers and owners."); *NPRM* at ¶ 30 ("Source diversity ensures that the public has access to information and programming from multiple content providers.").

27 *Review of the Prime Time Access Rule,* 11 FCC Rcd 546, 570 (1995).

intervention," the Commission repealed the rule, concluding that the large number of video programming outlets that had emerged created a strong demand for independent productions, and that intervention in the market was therefore unnecessary – and possibly counterproductive.[28] In so doing, the Commission noted that the Seventh Circuit had concluded that source and outlet diversity were merely means of achieving program (viewpoint) diversity, and "questioned whether increasing the numbers of producers *or* outlets as goals in and of themselves was a valid regulatory objective."[29]

b. Viewpoint Diversity Is The Fundamental Goal Of Broadcast Ownership Regulation.

Any inquiry into the impact of outlet or source diversity is therefore unnecessary unless there is inadequate viewpoint diversity. As the Commission states in the *NPRM*, the mere placement of radio stations in the hands of different operators, without more, does not fulfill a Commission goal – "ownership diversity [is] not an end in itself, but a means of 'promoting diversity of program sources and viewpoints.'"[30]

Accordingly, the focus in this proceeding should be on the current level of viewpoint diversity available through the news and information sources now accessible to the American public within local media markets. Efforts to increase the number of

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28 *Id.* at 579. *See also id.* at 601 ("The Commission adopted PTAR in 1970 as a structural rule to promote its competition and diversity goals. It did so at a time when the three major networks were said to dominate the television marketplace. The record shows that this is not the case under today's market conditions. The three networks now face greater competition than they did in 1970. There has been dramatic growth in the number of independent stations, and broadcasters now must compete for audiences with the increasing numbers of non-broadcast outlets, especially cable service. The networks can no longer be viewed as a funnel through which all television programming must pass. PTAR is thus not necessary to promote independent program sources, PTAR's primary goal. The record shows that the large number of video programming outlets today creates a healthy demand for non-network programs.")

29 *Evaluation of the Syndication and Financial Interest Rules*, 8 FCC Rcd 3282, 3287 (1993), citing *Schurz Communications, Inc. v. FCC,* 982 F.2d 1043, 1054-55 (7th Cir. 1992) (emphasis added).

30 *NPRM* at ¶ 7.

outlets for and sources of programming would potentially be necessary only if the level of viewpoint diversity is found insufficient. As shown in Section III.A., below, both outlet and viewpoint diversity have increased dramatically in the past decade.

B. Commercial Radio Should Not Be Considered Distinct From Other Media.

While the promotion of the public's access to news and information is a concern worthy of the Commission's attention, no medium has special properties that fundamentally distinguish its capability to inform the public, even though each one uses distinct means – audio, video, text or a combination thereof – to provide information. Nearly two decades ago, in its discussion of the relevant market for purposes of evaluating the ownership rules, the Commission stated that "the information market relevant to diversity includes not only TV and radio outlets, but cable, other video media and numerous print media as well . . . [T]hese other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire."[31]

As the Commission recognized then, the public has a variety of means of gaining information, each with its own strengths and weaknesses. Media such as radio and television broadcasting, including cable and satellite delivered stations, permit real-time dissemination of news using audio and video. Newspapers and periodicals, on the other hand, can provide more in-depth coverage of specific issues using text, graphics and still images. Internet media, such as the World Wide Web, increasingly have the

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[31] *See Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 25 (1984), *and Memorandum Opinion and Order on Reconsideration*, 100 F.C.C. 2d 74, 82-83 (1985) ("The fact that the various media may not be perfect substitutes for one another does not negate their status as competing, antagonistic sources of information for purposes of diversity analysis.").

ability to employ all of these elements – audio and video, as well as text, still photos and illustrations – to offer both real time dissemination of news and in-depth coverage of specific issues and events.

Broadcast radio does not constitute the sole or even predominant informational source available to the public because "consumers today have many media outlets from which to obtain news and information."[32] The particular media and specific outlets, sources and speakers accessed by consumers are largely a matter of personal preference and convenience. Americans may choose to obtain information on a variety of topics from newspapers, magazines, radio, broadcast and cable television, and the Internet at various times during the course of a day.

1. Radio Is Not An Insular Marketplace Of Ideas.

Despite the undeniable capability of individuals to draw on different types of media as they go about their daily routine, the local radio ownership rules currently focus on diversity in the broadcast radio market alone, as if it operated in a vacuum. And even within the radio market itself, the Commission appears to discount the availability of noncommercial broadcast radio, Digital Audio Radio by Satellite ("DARS"),[33] digital radio over Direct Broadcast Satellite ("DBS") systems, and Internet radio as competitors to terrestrial, commercial broadcast radio. There is no basis for exclusion of these media. As the Commission has previously concluded, with specific reference to noncommercial

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[32] *Cross Ownership of Broadcast Stations and Newspapers*, Order and Notice of Proposed Rulemaking, FCC 01-262, slip op. at ¶ 15 (rel. Sept. 20, 2001).

[33] In the fall, XM Satellite Radio launched the first satellite-delivered digital audio radio service, providing 100 additional radio channels, including 12 all-news and 17 all-talk channels. On February 14, 2002, Sirius satellite radio commenced service, providing an additional 100 channels of radio service, including 14 all-news and 26 all-talk channels.

broadcast radio, such outlets should be included in the analysis "for purposes of measuring diversity" because they "represent additional independent voices."[34]

In the *NPRM*, the Commission queries "whether there are attributes of radio broadcasting that should lead us to define and measure diversity in radio differently from other media." The Commission points to two specific attributes that it suggests might distinguish radio – "its ability to reach mobile users and its audio only programming." It notes that these attributes "may give radio stations singular access to the public in certain situations, most notably when listeners are in their cars or at their offices or other places of employment."[35]

Even if it were correct that commercial radio broadcasters have unique access to in-car and at-work listeners, this would be of no significance, as there is no basis to conclude that these environments constitute the sole opportunity for any particular group to obtain news and opinion information. No one is engaged in commuting, traveling or working 24 hours per day, seven days a week. Furthermore, when driving or working people are (or should be) focused primarily on these important tasks, and not on listening intently to the radio as a source of diverse and antagonistic viewpoints.

As a factual matter, moreover, terrestrial commercial radio does not have unique access to either in-car or at-work listeners in the first instance. In automobiles, media options include noncommercial broadcast radio and satellite radio, and even text

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34 *Repeal of the "Regional Concentration of Control" Provisions of the Commission's Multiple Ownership Rules,* 100 F.C.C. 2d 1544, 1550 (1985).

35 *NPRM* at ¶ 32.

messaging available via mobile phones.[36] At work, people would just as likely have access to Internet radio as to conventional radio. More than half of Americans have Internet access at their workplace,[37] providing a conduit for many news and information sources, including streaming video and Internet radio programs.[38] In addition, the work environment is likely to provide access to newspapers, trade publications, dial-up news services[39] and even broadcast and cable television.

2. Empirical Data Shows That Consumers Rely On Radio Less Than Other Media For News, And That The Internet Has Become A Key Source For News.

Other evidence demonstrates that, especially with the rapid growth of the Internet in the last decade, and the continued presence of newspapers in the media marketplace, radio has taken a back seat as a source of news and public affairs. Studies cited by the Commission and others provide empirical data to support this trend. Just last Fall, for example, the Commission cited a 1998 survey which found that a majority of Americans cited either television or newspapers as their primary source of local news,[40] while just 11% cited radio stations.[41]

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36 Many Internet news sites provide e-mail alerts when there is breaking news.

37 The UCLA Internet Report 2001, *Surveying the Digital Future: Year Two, UCLA Center for Communication Policy*, at 17, *available at* www.ccp.ucla.edu/pdf/UCLA-Internet-Report-2001.pdf (last visited Mar. 25, 2002) [hereinafter *Surveying the Digital Future*].

38 The Internet provides access to traditional radio stations as well as Internet-only radio. One stunning, but not unusual, example is that of radiocrow.com. Radiocrow.com provides access to 217 public, community, news and information radio stations originating in the United States, foreign nations, and cyberspace. *See* www.radiocrow.com (last visited Feb. 25, 2002).

39 The *Washington Post*, for example, operates Post Haste (202-334-9000), a dial-up information service that includes access to AP Network News, as well as to a variety of other local and national reports.

40 It is important to note that to the average American, the word "television" encompasses both broadcast and cable television.

41 *Cross Ownership of Broadcast Stations and Newspapers*, Order and Notice of Proposed Rulemaking, FCC 01-262, slip op. at ¶ 14 n.49 (rel. Sept. 20, 2001) (citing RTNDA, *Americans Rely on*

The Internet also continues to change media landscape considerably – especially as it becomes a fixture in the average American's home and lifestyle. For Americans who have online access, the Internet has emerged as a medium of choice for news and information.[42] In June 2000, the Pew Research Center for the People and the Press found that when presented with a hypothetical terrorist attack on the United States, "[a]s many Americans would go to the Internet for more information on a terrorist attack as would choose network TV.... A similar proportion would turn on the radio."[43] For financial breaking news, eight times as many Americans would choose the Internet over network television and six times as many Americans would turn to the Internet over radio.[44]

Other studies confirm and amplify these findings, indicating that radio actually trails most other media as a source of news and information for the average American. During the last quarter of 2001, for example, Harris Interactive conducted a survey of the online sources that adults turned to for information in the weeks following the September 11th terrorist attacks. Television, the Internet, newspapers, and even conversations with others, were cited more frequently than radio as sources of

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Local Television News, Rate it Highly, and Consider it Fair, *available at* http://www.rtnda.org/research/survey.pdf).

[42] *More folks turning to web for attack news: TV is tops but internet gains, surpassing radio*, *available at* www.medialifemagazine.com (last visited Feb. 8, 2002).

[43] Pew Research Center for the People & the Press, *Internet Sapping Broadcast News Audience*, *available at* people-press.org/reports/print.php3?ReportID=36 (last visited Mar. 25, 2002).

[44] Pew Research Center for the People & the Press, *Internet Sapping Broadcast News Audience*, *available at* people-press.org/reports/print.php3?ReportID=36 (last visited Mar. 25, 2002).

information.[45] At the same time, fully 97% of online users viewed the Internet as an important source of information.[46]

Although the Commission has been hesitant in the past to accept the Internet as a source of news and information in the media marketplace because of concerns about the rate of usage and access by the public,[47] there is no basis for these concerns today. Approximately the same percentage of Americans have at-home access to the Internet as to cable television, which the Commission has long accepted as a source for diversity purposes in other broadcast ownership proceedings.[48] According to the UCLA Center for Communication Policy, more than 72% of Americans have Internet access,[49] and Internet users spend nearly ten hours per week online,[50] more than the time

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45 *More folks turning to web for attack news: TV is tops but internet gains, surpassing radio, available at* www.medialifemagazine.com (last visited Feb. 8, 2002).

46 *Surveying the Digital Future, supra* note 37, at 33.

47 "[A]t this time we believe it is *premature* to consider the Internet a 'voice' for purposes of our new rule. Although the Internet is growing in popularity, many still do not have access to this new medium...." *Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, 12953 (1999). According to a study conducted by Nielsen/NetRatings, the Internet has seen 63% growth in the two years immediately following this decision – July 1999 to July 2001. *Internet Captures 63 Percent Growth in the Past Two Years, According to Nielsen/NetRatings, available at* www.nielsen-netratings.com (last visited Feb. 24, 2002).

48 According to the Eighth Annual Report on competition in the video marketplace, 66.3% of Americans subscribe to cable. *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, slip op. at Table B-1 (rel. Jan. 14, 2002). This number has declined in recent years because some cable subscribers have moved to DBS. *Id.* at Table C-1.

49 *Surveying the Digital Future, supra* note 37, at 17. Estimates on home Internet access vary from 56.7% to 58%, but it is clear that the majority of Americans have home Internet access. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, slip op. at ¶ 13 (rel. Jan. 14, 2002) (58% have home access as of July 2001); *A Nation Online: How Americans Are Expanding Their Use of Internet*, 6, Figure 1-4 (2002), *available at* www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf (last visited Feb. 24, 2002).

50 *Surveying the Digital Future, supra* note 37, at 17.

the average American spends listening to radio.[51] According to MSNBC, a recent study by Arbitron Webcast Services shows that Internet users with broadband access spend even more time on-line – an average of one hour and 55 minutes each day.[52]

4. Cost Factors For Non-Broadcast Media Do Not Significantly Limit Their Availability As Information Sources.

In the *NPRM*, the Commission indicated that broadcast services have a special character because they are "available to all individuals in a community with the appropriate receiving equipment." The Commission contrasts this availability with "access to other forms of media," which, according to the Commission, typically require "the user to incur a recurring charge, generally in the form of a subscription fee." The Commission asks whether this distinction may result in less diversity for certain groups.[53] In fact, broadcast services are not entirely free. As the Commission indicates, they require a sometimes significant investment in receiving equipment, particularly for those located some distance from station transmitters. On the other hand, cable, Internet and other non-broadcast media are widely available and accepted across all income groups. Internet access is available for free in public settings, such as libraries and schools, to many unable or unwilling to pay entry costs, and it is also available for a minimal fee through cyber-cafes and printing businesses, such as Kinkos. Moreover, many Americans have access to the Internet at their place of employment free of charge. For those who do own a personal computer, online access services such as NetZero provide free Internet access.

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51 *Surveying the Digital Future*, *supra* note 37, at 32.

52 Jane Weaver, *High-speed Internet usage soars; Broadband bypasses dial-up for first time*, *available at* www.msnbc.com/news/719543.asp?cp1=1 (last visited Mar. 5, 2002).

53 *NPRM* at ¶ 34.

Subscriber fees do not keep individuals within any discrete income group from obtaining other electronic services, such as cable. A 1998 review of the evidence of cable subscribership conducted by two Commission staff members demonstrated that "the majority of households that do not subscribe to cable television services do so for other reasons than their ability to afford such services."[54] In fact, a 1995 study showed that low-income households are more likely to subscribe to cable television than to obtain telephone service.[55] Thus, low income does not deter spending on cable and may actually encourage it, as a relatively inexpensive form of entertainment. Internet access is typically less expensive than cable service, sometimes substantially so, and as noted above, can be obtained at no cost from some providers.

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There is no basis for the Commission "to define and measure diversity in radio differently from other media."[56] There is no unique characteristic of radio that should cause the Commission to view it with special concern, distinct from other media. Accordingly, the Commission's focus in this proceeding should be on the diversity of viewpoints that is reasonably available to the average American from all media in his or her local market. There is ample evidence that such viewpoint diversity, *i.e.,* access to multiple sources of local and national news and information, has exploded – particularly during the past decade.

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54 Robert Kieschnick & B.O. McCullough, *Why Do People Not Subscribe to Cable Television? A Review of the Evidence*, presented at the Twenty-Sixth Annual Telecommunications Policy Research Conference, Oct. 3-5, 1998, at 5, *available at* www.tprc.org/abstracts98/kieschnick.pdf.

55 Milton Mueller & Jorge Reina Schement, *Universal Service From the Bottom Up*, 12 INFO. SOC'Y 273 (1996).

56 *See NPRM* at ¶ 32.

III. As A Result Of The Dramatic Changes In The Media Marketplace, The Local Radio Ownership Rule Is No Longer Necessary To Protect The Public's Access To Diverse And Antagonistic Viewpoints And Should Be Repealed.

The Commission's chief objective in this proceeding should be to provide the thorough review and analysis that was lacking in the first two biennial reviews undertaken under Section 202(h) of the 1996 Act. Such review will ultimately establish that the local radio ownership rules have outlived any purpose that they once had, and that they should be repealed. This conclusion arises from the inescapable fact that Americans now have access to an almost limitless range of distinct and competing viewpoints available from many sources through a wide variety of media.

A. There Is No Valid Empirical Basis For Concluding That Ownership Caps Are Necessary To Promote Viewpoint Diversity.

In the *NPRM*, the Commission reiterates the conventional judgment concerning local broadcast ownership restrictions – that "the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect in a political, editorial, or similar programming sense, on public opinion at the regional level."[57] This statement begs the question whether numerical limits on ownership of particular facilities are *necessary* to prevent such influence and to promote actual viewpoint diversity, which is the avowed aim of the regulations. There is, in fact, no evidence that there is currently a dysfunction, bias or consolidation in the marketplace of ideas that requires government intervention in order to advance this goal.

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[57] *NPRM* at ¶ 29 (quoting *Amendment of Sections 73.35, 7.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations,* 45 FCC 1476, 1484 (1964)).

Rather, as described below, the evidence shows that the range of actual viewpoints reflected in the overall media marketplace is essentially limitless.

1. Changes In The Media Marketplace Have Resulted In A Dramatic Increase In The Number Of Outlets For News And Information That Are Available To The Public.

As the Commission recently noted, the "local media marketplace has changed dramatically"[58] in the past three decades. This marketplace is now characterized by a profusion of diverse perspectives. Consolidation has not resulted in a diminution of the number of voices heard in the media marketplace. In fact, the public now has access to diverse and antagonistic viewpoints in numbers unimaginable only a decade ago. Vigorous competition in the marketplace of ideas should assuage the Commission's public interest concerns and lead to the conclusion that the local radio ownership rule is unnecessary.

The public's access to diverse viewpoints in the media marketplace is increasing at an unprecedented rate. Traditional media such as broadcast television and newspapers have long provided the public with access to diverse viewpoints. While the technology has changed very little with regard to these media, the tremendous growth in the number of broadcast television stations locally and of broadcast networks nationwide, as well as the exponential increase in weekly and alternative newspapers, have increased substantially the number of voices heard via these media.[59] Multichannel video programming distributors ("MVPDs"), including cable and DBS, continue to increase

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[58] *In the Matter of Cross Ownership of Broadcast Stations and Newspapers*, Order and Notice of Proposed Rulemaking, FCC 01-262, slip op. at ¶ 8 (rel. Sept. 20, 2001).

[59] Newspaper Association of America, *Facts About Newspapers 2001*, *available at* naa.org/info/facts01/15_totalnondaily/index.html (last visited Feb. 25, 2002).

penetration rates into U.S. households. As of June 2001, 86.4% of American households subscribed to MVPDs, up more than ten percentage points from four years earlier.[60] DBS comprised nearly one-fifth of total MVPD subscribership, triple its share four years earlier.[61]

Audio services in addition to commercial broadcast radio provide the public with access to diverse viewpoints as well. Noncommercial radio is prevalent in the local market (though it is ignored in the *NPRM*). The initiation of XM Radio and Sirius's digital radio satellite service recently provided 200 new channels of radio programming via their satellite and terrestrial repeater networks to every American consumer.

The typical American consumer thus has access to a wide array of delivery services, including broadcast television, cable and DBS, satellite and noncommercial radio, and the Internet media, as well as VCRs or DVDs, newspapers and magazines. These conduits provide access to a host of different news and information sources with far more varied viewpoints than ever before. Just to cite a few examples,[62] cable/DBS delivers national programming news services such as CNN, MSNBC, FoxNews and CSPAN, as well as local news and information services such as News Channel 8 in the Washington, D.C. area.

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60 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, FCC 01-389, Table C-1 (rel. Jan. 14, 2002).

61 *Id.*

62 In addition to the examples cited herein, traditional sources of news and information also continue to expand. In television, new broadcast outlets have entered the field once dominated by the "big three" networks, a field considerably smaller as cable has siphoned off about half of the network's primetime audience share. *RAB*, *Media Facts* at 8 (2002), *available at* http://www.rab.com/STATION/mediafact/Mfacts02.pdf. In addition, weekly newspapers, the majority of which are free, "have emerged as significant sources of highly localized news and information." *Comments of the Newspaper Association of America*, MM Docket No. 01-235, at 14 (Dec. 3, 2001).

One manifestation of these changes in the marketplace is the broad manner in which the financial community now defines the broadcasting industry – to include not just terrestrial broadcasters, but also major satellite and cable companies, including AOL Time Warner, Echostar Communications, Cablevision Systems, Adelphia Communications, Comcast, and Cox Communications.[63] All of these companies are seen as providing the same mass market entertainment and information programming that was once provided only by FCC-licensed facilities. It is undeniable that FCC-licensed broadcast channels are no longer the sole electronic channels of communication with the general public.

David Pritchard, Professor of Journalism and Mass Communication at the University Wisconsin-Milwaukee, conducted an empirical study tracking and capturing the explosion of the public's access to media outlets over the last sixty years and particularly in the years since the enactment of the 1996 Act.[64] Professor Pritchard's study focuses solely on local media outlets available in a typical neighborhood within a community, and thus does not count national cable networks, newspapers or periodicals, or aggregate totals of neighborhood-oriented publications across an entire metropolitan area. Instead, the approach gives a very accurate picture of the local outlets of news and information that are readily available and relevant to a typical resident. The study provides evidence of enormous changes in the level of diversity over the last sixty years in each of five communities: Lisbon, North Dakota; Florence, South Carolina; Rockford, Illinois; Syracuse, New York; and New York, New York. The results of this study

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63 *Shareholder Scoreboard*, WALL STREET JOURNAL, Feb. 25, 2002, at B10.

64 David Pritchard, *The Expansion of Diversity: A Longitudinal Study of Local Media Outlets in Five American Communities* (2002), at Appendix A.

overwhelmingly demonstrate that the public has access to far more locally oriented media outlets than ever before and that these outlets have proliferated at an exponential rate following the 1996 Act. The average citizen in each community studied gained access to locally oriented news and information from more and more outlets over time. Not only did the market sustain this growth after the 1996 Act and the resulting consolidation, but the growth in media outlets providing local news and information to each community exploded during this period, regardless of the size of the community.[65] As Professor Pritchard's data indicates, there is no valid empirical basis for concluding that ownership caps are necessary to promote diversity. In fact, Professor Pritchard's study suggests that ownership caps may limit diversity.

2. The Internet Has An Especially Powerful Role In Providing Avenues For Diverse Viewpoints Using Text, Audio and Video.

The ever-increasing role of the Internet in providing access to diverse viewpoints cannot be underestimated. As the Supreme Court has noted, the Internet "constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers, and buyers. *Any person or organization with a computer connected to the Internet can 'publish' information.*"[66] With the advent of broadband, the capabilities created by Internet ubiquity extend to broadcasting audiences. Bill Rose, general manager and vice president of Arbitron Webcast Services noted that

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65 *Id.* at 22 ("The patterns in all of the five communities we studied were similar. In every case, the average annual gain in local media outlets increased modestly from one period to the next through 1995 (i.e., 1942-1962, 1962-1982, and 1982-1995). After the passage of the Telecommunications Act of 1996, the rate at which new local media outlets were created increased sharply in every community.").

66 *Reno v. ACLU,* 521 U.S. 844, 886 (1997) (emphasis added). The court went on to cite the lower court's findings that "web publishing is simple enough that thousands of individual users and small community organizations are using the Web to publish their own personal 'home pages,' the equivalent of individualized newsletters about the person or organization, which are available to everyone on the Web." *Id.* at n.9 (citing *ACLU v. Reno*, 929 F. Supp. 824, 837 (finding 42) (E.D. Pa. 1996)).

recent Arbitron study data demonstrated that "access to broadband truly changes people's media consumption patterns."[67]

The Internet provides a forum for literally millions of viewpoints. For example, virtually all major daily newspapers, including the *Washington Post,* the *New York Times*, the *New York Post* and the *Chicago Tribune* have Web sites that offer free, continually updated news and information. The Internet also provides access to Internet-exclusive online services such as Slate, Salon.com and the Drudge Report, a variety of sites focused on views from a particular part of the political spectrum, as well as a virtually countless number of Web sites targeted to special interests. More importantly, the Internet also provides a forum for voices that would have more limited opportunities to be heard in other media, including particular issue and ideological groups (*e.g.,* FreeRepublic.com and TomPaine.com) and individual pundits and opinion leaders.[68]

One way of illustrating the powerful role of the Internet in providing a conduit for disparate views is to employ an Internet search engine to seek out web sites and pages addressing a particular public issue. For example, a person with an interest in the topic of "media consolidation" might use the search engine provided by the Google website to seek out views on that issue. Such a search conducted on February 28, 2002 yielded pages from the following websites as the first five results returned:

> www.iwantmedia.com - described as "a Web site focusing on diversified media news and resources." The particular page returned by the search includes a diverse collection of links relating solely to media consolidation. Prominently featured are links to the FCC, Consumer's Union, the Media Access Project, the

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67 Jane Weaver, High-speed Internet usage soars; Broadband bypasses dial-up for first time, available *at* www.msnbc.com/news/719543.asp?cp1=1 (last visited Mar. 5, 2002).

68 Well-known writers such as Mickey Kaus (www.kausfiles.com), Andrew Sullivan (www.andrewsullivan.com) and Malcolm Gladwell (www.gladwell.com) have their own Web sites, for example.

Center for Digital Democracy, Fairness and Accuracy in Reporting, and American Resurrection (described as "an independent group whose first target is 'elite-controlled mass media'").

www.democraticmedia.org - the website of the Center for Digital Democracy ("CDD"). The page yielded includes a description of this rulemaking proceeding. The home page provides a Real Player video file featuring CDD's Executive Director Jeff Chester speaking about "preserving a diverse Internet."

www.salon.com - an article from June 2001 entitled "The Media Borg Wants You," which introduces "Salon's new series on the corporate consolidation of the information industries." The series introduction asserts that "info-giants have learned to stamp out their content products with mind-numbing uniformity and a relentless aversion to controversy."

www.fair.org - the website of Fairness and Accuracy in Reporting, which notes on its home page that it works "to invigorate the First Amendment by advocating for greater diversity in the press and by scrutinizing media practices that marginalize public interest, minority and dissenting viewpoints."

www.google.com - a link to Google's web directory for the topic of "Media Consolidation," which itself contains links to sites including the FCC, the Progress and Freedom Foundation, Media Central, Boston Review (a "political and literary forum" which features an on-line forum on the "Future of Media"),[69] and MediaChannel.org ("a nonprofit, public interest Web site dedicated to global media issues" which "exists to provide information and diverse perspectives and inspire debate, collaboration, action and citizen engagement").

Judging from these results,[70] there is ample reason to conclude that wide-ranging views are available in the media marketplace even on issues affecting the mass media themselves.

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69 The editors describe the views expressed in the forum, which respond to Robert McChesney's argument "that we need some creative policy initiatives to save democracy from our highly concentrated, commercial media." As the editors note, a variety of concurring and dissenting opinions are expressed – "Steve Ansolabehere rejects McChesney's perception of uniform media content: he sees greater diversity, and attributes it to deregulation . . . Andrew Shapiro, Doug Schuler, and Ralph Nader urge a closer look at McChesney's Internet-skepticism: according to Shapiro, 'The decentralized, interactive, many-to-many architecture of the Net could mean the end of Big Media's choke-hold on the information marketplace' . . . Nader emphasizes a larger role for antitrust in producing a democratic Internet, and Lawrence Grossman argues that we should focus on supplementing commercial media with a more vigorous public system, rather than regulating or busting up the current system." bostonreview.mit.edu/ndf.html#Media (last visited Feb. 28, 2002).

70 The first page of results generated by this search is attached to these comments as Appendix B.

These views are carried through traditional media as well, belying the notion that large group owners censor critical viewpoints or that group owners do not provide access to diverse and antagonistic viewpoints. For example, FAIR proclaims on its website that its founder, Jeff Cohen, "appears regularly as a panelist on 'Fox News Watch,' the media criticism program on the Fox News Channel," and "has been a frequent guest on national TV and radio, including 'Today,' 'Larry King Live,' 'Donahue,' C-SPAN and NPR"; "has served as the co-host of CNN's 'Crossfire'"; "and is quoted on issues of media and politics in such publications as the *New York Times*, *Washington Post* and *TV Guide*."[71] FAIR also has its own radio program, "CounterSpin," which airs on more than 125 noncommercial broadcast stations in the U.S. and Canada.[72]

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As Chairman Powell correctly noted a few years ago, "the reality is that outlets for expression are more plentiful now than at any time in our history."[73] The Commission's goal of the public's access to diverse viewpoints has been achieved, rendering the continued regulation of ownership in the local radio marketplace obsolete.

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[71] *See* EXTRA! The Magazine of FAIR, *available at* www.fair.org/extra/writers/cohen.html (last visited on Feb. 28, 2002).

[72] *See* EXTRA! The Magazine of FAIR, *available at* www.fair.org/counterspin/index.html (last visited on Feb. 28, 2002).

[73] Michael K. Powell, Remarks Before the Media Institute in Washington, D.C., "*Willful Denial and First Amendment Jurisprudence* (Apr. 22, 1998), *available at* www.fcc.gov/Speeches/Powell/spmkp808.html (last visited Jan. 22, 2002).

B. There Is No Nexus Between Broadcast Ownership Limitations And Increased Viewpoint Diversity.

As early as 1980, members of the FCC's staff strongly questioned the existence of a nexus between broadcast ownership limitations and the promotion of viewpoint diversity. At that time, even before the explosive growth of cable and satellite broadcasting and the dramatic evolution of the Internet, a special staff report concluded that:

> The Commission's rules respecting the number of Communications outlets one firm may own within a single local market . . . are arbitrary and capricious. They frequently impose uniform numerical limitations that have no apparent relationship to the distinct conditions of competition and diversity among the several services, and in the many markets affected by these rules. . . .[74]

The very concept of an ownership cap for the purpose of promoting viewpoint diversity implies that the average media company speaks with one monolithic voice. The Commission, however, has explicitly rejected this notion, finding in its 1984 review of the ownership regulations that "group owners do not impose a monolithic editorial viewpoint on their stations, but instead permit and encourage independent expression by the stations in response to local community concerns and conditions".[75]

The typical broadcast outlet, like many other media outlets, including newspapers, magazines, Internet websites, and cable systems, is a conduit for multiple viewpoints. Even a glance at a television or radio program guide, a newspaper op-ed

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[74] Network Inquiry Special Staff, Final Report, *New Television Networks: Entry, Jurisdiction, Ownership and Regulation*, at III-167 (1980). Although this report was undertaken specifically with respect to ownership regulation of the television industry, its substantive conclusions are no less applicable to the local radio limits.

[75] *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 20 (1984).

page, or a publisher's catalog will provide evidence that media outlets give time or space to many shades of opinion.

It is unlikely, in fact, that there are many broadcasting companies that are operated for ideological purposes, with all stations in a group hewing to a particular political philosophy in their programming and presentation of public issues. To the contrary, most broadcasting entities – and certainly the large media concerns that are, or are part of, publicly traded companies – are operated to maximize economic returns and shareholder value, and not to advance specific political views. Viewpoint diversity in the mass media is thus inherently driven by demand, and not by the views of the supplier.

As the Commission has noted, economic necessity is a powerful incentive to broadcasters to cover a variety of important public issues.[76] Radio broadcasters seeking to maximize profits will necessarily try to create programs that engage the interest of as many listeners as possible, which includes serving as a conduit for diverse and antagonistic views. As Chairman Powell has noted: "some amount of antagonism sells. Controversy and conflict are the stuff of [a] good story. If different viewpoints are to be found, I think they will be the products of the commercial market much more than by our rules . . . ."[77] Proof of this can be found in the large number of roundtable discussion programs, with both local and national content, that are aired on broadcast

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[76] *See Inquiry Into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145, 220 (1985) ("*1985 Fairness Report*") ("We note that other information systems, such as the print media, devote a significant amount of time to controversial issues in the absence of a government imposed obligation to do so. For these media, the incentive to cover such issues is not the fear of government sanction, but rather economic necessity. Similar incentives exist for over-the-air broadcasting.").

[77] *1998 Biennial Review*, *supra* note 8, at 11140 (Separate Statement of Comm'r Michael K. Powell).

television stations, and the numerous radio call-in and public affairs programs that air on news and talk formatted radio stations.

Moreover, it cannot be ignored that news-gathering and opinion making are uniquely individual enterprises. While there are many technologies that aid news-gathering, there is no industrial process or machinery that is a substitute for human endeavor in reporting and analyzing the news. For this reason, media companies are dependent on individual journalists and news personalities to deliver news and information to the public. Just as media outlets cannot emphasize some views to the exclusion of others without risking audience losses, so they cannot omit the work of individual reporters without losing their services to competitors, or having their stories appear through other channels.[78] Commercial incentives, coupled with the safeguard of competition regulation, are all that is necessary to protect the public interest in access to diverse viewpoints.

While Viacom cannot speak for all group owners, Infinity's practices show that there is no connection between corporate ownership of multiple stations, either within a market or nationally, and homogenization of news coverage within the station group. Choices concerning news and public affairs programming are not made at the corporate level, but are left to local managers and program directors to decide on a market-by-market and station-by-station basis. Infinity station employees are deeply

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[78] A now famous, or infamous, example of this is the story of Monica Lewinsky's relationship with former President Clinton. Although the story was developed for "more than a year" by Michael Isikoff of *Newsweek* magazine, it first appeared on the Drudge Report online. *Newsweek* editors decided to delay publication due to "the enormity of the charges" and "at the request of independent counsel Kenneth Starr to avoid compromising his investigation." A source at *Newsweek* leaked the story to the Drudge Report, however, where it appeared three days before publication anywhere else. *See* Howard Kurtz, *Newsweek's Melted Scoop*, WASHINGTON POST, Jan. 22, 1998 at C1, *available at* www.washingtonpost.com/wp-srv/politics/special/clinton/stories/kurtz012298.htm (last visited Mar. 27, 2002).

involved in their communities and use this knowledge to program their stations. In Hartford, Connecticut, for example, Infinity's WTIC(AM) decided that a local talk program, rather than the syndicated program, "Dr. Laura," featuring Dr. Laura Schlesinger, would better serve the community. On its own initiative, the station replaced "Dr. Laura" with "Connecticut Today," a local news program.[79] The Hartford managers and program directors made this decision, and this autonomy over editorial functions is echoed throughout the company. Infinity managers are often life-long residents of the communities in which they manage. Infinity recognizes that these long-standing local residents are best positioned to make the decisions that will impact their community and their stations.

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The most easily measured indicator of viewpoint diversity is the number of distinct outlets for information that can be accessed by individual members of the public. As shown in the empirical studies that Infinity and others have commissioned, the number of such outlets is growing exponentially in markets of all size throughout the country. Moreover, group owners do not speak with a monolithic voice, but instead provide conduits for many different perspectives as a means of maximizing their audience reach. Consolidation of ownership in one segment of the vast media marketplace therefore is not problematic. The underlying purpose of the Commission's local ownership regulation is being achieved in ways that could not have been dreamed of even a decade ago, through the explosion of a multitude of new informational and opinion sources.

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[79] *See* ctnow.com, *Radio Waves:'TIC Pulls Plug on Dr. Laura, available at* mv.ctnow.com/entertainment/tv/hc-laura.artmar02.story?coll=hc-headlines-tv (last visited Mar. 4, 2002).

IV. The Local Broadcast Ownership Rules Are Inconsistent With The First Amendment.

In the *NPRM,* the Commission requests comment on how use of structural regulations to promote diversity "comports with the values and principles embodied in the First Amendment of the Constitution,"[80] indicating sensitivity to the fact that requirements intended to promote free speech values must not trample free speech rights.[81] As the Supreme Court has declared, "the First Amendment must inform and give shape to the manner in which Congress [and the Commission] exercises its regulatory power in this area" of broadcast regulation.[82]

Judicial sanction of the Commission's various broadcast ownership limits rests, in part, on the notion that broadcast channels are scarce. The Supreme Court, however, has limited the reach of this rationale, while openly questioning its permanence and inviting Congress and the Commission to signal its abandonment. In fact, Congress and the Commission have indicated, each in its own fashion, that the scarcity rationale is outdated, stating respectively that it "no longer applies" (the House) and is "irrelevant" (the Commission). The Commission has also acted on its conclusion by allotting very substantial bandwidth to just two national satellite radio service providers without any discussion of spectrum scarcity or possible ownership limitations.

In the absence of scarcity, the local radio ownership rules should be subject to the same level of scrutiny applied to similar rules governing comparable media,

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[80] *NPRM* at ¶ 31.

[81] "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Telecommunications Research and Action Ctr. et al. v. FCC*, 801 F.2d 501, 507 (D.C. Cir. 1986).

[82] *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984).

such as cable. Based on past Commission efforts to justify the local ownership rules, these restrictions cannot survive either heightened level review or even less exacting rational basis scrutiny.

A. In The Past, The Courts And The Commission Have Applied Lesser First Amendment Protection To Broadcasters Premised On The So-Called "Scarcity" Rationale.

The present constitutional basis for imposition of structural regulations on local broadcast ownership originates with several cases decided during the 1940's, which affirmed the Commission's right to assign licenses for scarce broadcast facilities according to its reasonable determination of the public interest. In 1943 the Supreme Court found in *National Broadcasting Co., Inc., et al. v. U.S.* ("*NBC v. U.S.*"), a case weighing the validity of the FCC's Chain Broadcasting Rules, that, because "radio inherently is not available to all," the Commission was entitled to establish licensing restrictions consistent with the public interest, and limitations on assignment of additional licenses did not infringe upon "the constitutional right of free speech," which "does not include . . . the right to use the facilities of radio without a license."[83]

In 1978, the Supreme Court rendered its only other decision considering Commission regulation of broadcast ownership. In upholding the FCC's

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83 *Nat'l Broad. Co., Inc., et al. v. United States*, 319 U.S. 190, 226-27 (1943). Strictly speaking, this rationale applies only to the treatment of initial assignment of resources. It does not follow that because it is necessary to use a governmental mechanism to assign spectrum among mutually exclusive initial applicants, subsequent distribution must forever be restricted rather than being left to a free marketplace. To the contrary, once assigned, broadcast licenses could easily be treated just as any other economic asset, with harmful combinations appropriately constrained by the antitrust laws. *See, e.g.,* Ronald H. Coase, *The Federal Communications Commission,* 2 J.L. & ECON. 1 (1959). Indeed, fifteen years ago, the Commission noted that, even at that time, 71% of radio licensees had acquired their operating licenses on the open market, such that "in the vast majority of cases, broadcast frequencies are 'allocated' – as are the resources necessary to disseminate printed speech – through a functioning economic market. Therefore, after initial licensing, the only relevant barrier to acquiring a broadcast station is not governmental, but – like acquisition of a newspaper – is economic." *See Syracuse Peace Council,* 2 FCC Rcd 5043, 5055 (1987).

newspaper/broadcast cross-ownership ban in *FCC v. National Citizens Committee for Broadcasting, et al.* ("*NCCB*"), the Court relied on both the *NBC v. U.S.* case and its ruling a decade earlier in *Red Lion Broadcasting Co. v. FCC* ("*Red Lion*"). The Court applied the lowest level of constitutional scrutiny to the newspaper/broadcast cross-ownership rule, finding that "the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints."[84] This conclusion was squarely rooted in the so-called "scarcity doctrine" articulated in *Red Lion*.[85]

In *Red Lion*, decided in 1969, the Court considered the appropriateness of imposing content requirements on broadcast licensees under the Fairness Doctrine, which imposed an affirmative obligation on broadcasters to provide coverage of public issues, giving adequate time to diverse and opposing views.[86] Finding that "broadcasting is clearly a medium affected by a First Amendment interest," the Court stated that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them."[87] Citing the unique scarcity of broadcast licenses, the Court found that "*in the present state of commercially acceptable technology*," in which "only a tiny fraction of those with resources and intelligence can hope to communicate by radio," distinct constitutional treatment of broadcast licensees

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84 *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 796 (1978).

85 *Id.* at 798-800.

86 Like the structural regulations at issue here, the Fairness Doctrine was intended to ensure public access to diverse viewpoints. The Fairness Doctrine was eventually abandoned by the Commission due to both the lack of evidentiary support that its perpetuation would serve the public interest, and concerns that it was inconsistent with the First Amendment. *See Syracuse Peace Council,* 2 FCC Rcd 5043 (1987).

87 *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386 (1969).

was appropriate.[88] The Court thus concluded, "it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[89]

B. The Supreme Court Has Expressly Limited The Reach Of *Red Lion,* Openly Questioned Its Scarcity Underpinning, And Invited Its Abandonment.

The scarcity rationale underlying the *Red Lion* and *NCCB* decisions has been subject to repeated, increasing skepticism and criticism from academic commentators,[90] from the bench,[91] and from within the Commission itself.[92] Indeed, in both *Red Lion* and in other cases following its holding, the Supreme Court itself has

88 *Red Lion Broad. Co.*, 395 U.S. at 388 (emphasis added).

89 *Red Lion Broad. Co.*, 395 U.S. at 388.

90 *See, e.g.,* RODNEY M. SMOLLA, FREE AIR TIME FOR CANDIDATES AND THE FIRST AMENDMENT, at 5 (Media Institute 1998) ("Scarcity no longer exists. There are now many voices and they are all being heard, through broadcast stations, cable channels, satellite television, Internet sources such as the World Wide Web and e-mail, videocassette recorders, compact disks, faxes – through a booming, buzzing electronic bazaar of wide-open and uninhibited free expression."); Glen O. Robinson, *Essay: The Electronic First Amendment: An Essay For The New Age,* 47 DUKE L.J. 899, 909-910 (1998) ("Whatever credibility the scarcity rationale may once have enjoyed, it no longer enjoys it. Today, the scarcity argument for broadcast regulation is widely scorned, and it is clear that the 'natural' resource limits on broadcasting have been less constraining than the economic limits have been on nonbroadcast media.").

91 *See Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 158 n.8 (1973) (Douglas, J., concurring) ("Scarcity may soon be a constraint of the past, thus obviating the concerns expressed in *Red Lion*."); *Tribune Co. v. FCC*, 10 C.R. 710, 133 F.3d 61 (D.C. Cir. 1998) ("We are stuck with the scarcity doctrine until the day that the Supreme Court tells us that the *Red Lion* no longer rules the broadcast jungle."); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) (Edwards, J., dissenting) ("In my view, it is no longer responsible for courts to apply a reduced level of First Amendment protection for regulations imposed on broadcast based upon an indefensible notion of spectrum scarcity."); *Telecommunications Research and Action Ctr. et al. v. FCC,* 801 F.2d 501, 509 (D.C. Cir. 1986) ("Perhaps the Supreme Court will one day revisit [*Red Lion*] and either eliminate the distinction between print and broadcast media, surely by pronouncing *Tornillo* applicable to both, or announce a constitutional distinction that is more usable than the present one.").

92 *In the Matter of Guidance on the Commission's Case Law Interpreting 18 U.S.C. Section 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999 (2001) (Separate Statement of Comm'r Furchtgott-Roth) ("I believe that the lenient constitutional standard for reviewing broadcast speech, formally announced in *Red Lion*, rests on a shaky empirical foundation. Technology, especially digital communications, has advanced to the point where broadcast deregulation is not only warranted, but long overdue.") (footnote omitted).

stated that the outcome in *Red Lion* was fundamentally the product of circumstances and technology as they existed at the time.[93] The Court made quite clear that it was examining an electronic media marketplace that was limited to the then extant terrestrial use of the radio spectrum.[94]

Just a few years after *Red Lion*, the Court once again considered the appropriate First Amendment treatment of broadcasters given the "inherent physical limitation" of the broadcast spectrum. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, the Court noted that "[t]he problems of regulation are rendered more difficult because the broadcast industry is dynamic in terms of technological change; solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence."[95]

Since the decision in *CBS v. DNC*, which like *Red Lion* dealt with content regulation, the Court has heard just one case – *FCC v. National Citizens Committee for Broadcasting* – directly relating to a broadcast ownership restriction.[96] Although the broadcast/newspaper cross-ownership ban was upheld, the decision came twenty-five years ago, long before the growth of cable broadcasting was felt in the media marketplace, and before the advent of satellite radio, DBS, and the Internet.

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93 *See, e.g., Syracuse Peace Council*, 2 FCC Rcd 5043, 5048 (1987) (quoting *Meredith Corp. v. FCC*, 809 F.2d 863, 867 (D.C. Cir. 1987) ("as the Court in *Meredith v. FCC* noted, the *Red Lion* decision 'was expressly premised on the scarcity of broadcast frequencies "in the present state of commercially available technology" as of 1969' ")), *aff'd Syracuse Peace Council v. FCC*, 867 F.2d 654, 684 (D.C. Cir. 1989) (Starr, J., concurring) ("The governing constitutional doctrine therefore recognizes that the communications marketplace may be sufficiently responsive to the public's need for controversial issue programming so that government regulation is unnecessary.").

94 *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400 (1969).

95 *Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 102 (1973).

96 *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978).

By 1984, however, the Court indicated in *FCC v. League of Women Voters of California* that it had begun to question the presumption of scarcity in light of "the advent of cable and satellite television technology," and the growing criticism of the "scarcity doctrine."[97] The Court stated that it was not prepared to reconsider its "longstanding approach without some signal from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required."[98] Since then, both the Commission and Congress have done more than simply signal that technological developments have rendered the scarcity justification obsolete, they have abandoned scarcity as a premise for broadcast regulation.

C. Both The Commission And Congress Have Rejected The Scarcity Rationale.

In August 1985, a little more than a year after the *League of Women Voters* decision, the Commission responded to the Court's discussion of *Red Lion*, in connection with its reevaluation of the Fairness Doctrine, and acknowledged the widespread criticism of the scarcity rationale:

> Our reading of this language is that the decision in *Red Lion*, as well as the level of constitutional scrutiny applied to content regulation of broadcast speech, could change if the factual predicates which the Supreme Court relied upon in that case have changed. As a consequence, while we recognize that the Supreme Court's decision in *Red Lion* is controlling law unless the Court expressly states otherwise, we do not agree with the position of some commenters that the mere recitation of the Court's decision in *Red Lion* is sufficient to definitively resolve the complex constitutional issues presented by the doctrine.[99]

97 *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 376-77 n.11 (1984).

98 *Id.*

99 *1985 Fairness Report*, 102 F.C.C.2d 145, 153 (1985).

The Commission went on to consider carefully the changes in the media marketplace that had occurred over the preceding decade, concluding that there had been substantial change, "as many of the 'future' electronic technologies" had by that time "become contributors to the marketplace of ideas."[100] As a result, the Commission concluded that "the dynamics of the information services marketplace overall insures that the public will be sufficiently exposed to controversial issues of public importance."[101] Following up on the logical implications of this assessment, the Commission stated succinctly two years later, in its decision abandoning enforcement of the Fairness Doctrine, that "in analyzing the appropriate First Amendment standard to be applied to the electronic press, the concept of scarcity – be it spectrum or numerical – is irrelevant."[102]

Similarly, Congress' 1996 directive to the Commission to review the appropriateness of its ownership restrictions on a biennial basis was premised on specific findings contained in the 1995 House Report on the original version of the legislation that passed the House in August 1995. That Report states unequivocally that, "[t]he audio and video marketplace . . . has undergone significant changes over the past fifty years and the scarcity rationale for government regulation no longer applies."[103]

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100 *Id.* at 197.

101 *Id.*

102 *See Syracuse Peace Council*, 2 FCC Rcd 5043, 5055 (1987).

103 H.R. REP. NO. 104-204, at 54 (1995).

D. The Commission's Recent Allocation of Spectrum For New Broadcast Service Demonstrates That Spectrum Scarcity Is No Longer Seen As A Justification For Ownership Limitations.

Even to the extent that the Commission and the Court may have relied on the inherent uniqueness and limitations of broadcast spectrum use – *i.e.,* spectrum or "allocational" scarcity – rather than simply numerical scarcity of mass media outlets, such a basis for the distinct structural regulations applicable to radio broadcast licenses could not be said to address rationally the problem of scarce opportunities for broadcast use of the spectrum resource – assuming *arguendo* that such scarcity exists – unless it constrains equally the total amount of bandwidth that a single entity can control. The Commission's regulations do not come close to achieving an even-handed approach.

Under the present local ownership limitations, the maximum amount of radio spectrum that a single entity can control for service in a defined market is 1.03 MHz, comprised of a maximum of eight channels (five FM stations, each 200 kHz, and three AM stations, each 10 kHz). The entire spectrum set aside by the Commission for terrestrial radio broadcasting is 21.17 MHz.[104] This spectrum has been allotted on a local basis to specific communities pursuant to rather complicated technical rules that allow for multiple classes of stations based on transmitting power, antenna height and other factors.[105] As a result of these rules, less than the full quantity of spectrum can be used within each geographic area in order to maintain the necessary separations among facilities operating on the same or adjacent channels. Thus, although there are

104 The AM spectrum consists of 117 ten kiloHertz channels between 535 and 1705 kHz, and the FM spectrum consists of 100 two hundred kiloHertz channels between 88 MHz and 108 MHz.

105 *See, e.g.,* 47 C.F.R. §§ 73.1 *et seq.* (AM) and §§ 73.201 *et seq.* (FM).

theoretically 100 channels available in the FM band and 117 channels in the AM band, far fewer than this will be usable within a given geographic market.

The allocation of spectrum for terrestrial radio broadcasting, and the limited amount of spectrum that single broadcasting entity can control in each market, contrasts markedly with the more recent allocation and assignment decisions made concerning satellite radio. About a year after the current local radio ownership limits were adopted, the Commission adopted licensing and service rules for satellite delivered radio in the bands 2310-2335 MHz. The Commission decided to license just two service providers in this spectrum on a national basis, each with access to 12.5 MHz of spectrum, or approximately two-thirds the amount of spectrum allocated for the entire terrestrial radio broadcasting industry. The Commission's conclusion was premised on the ability to use this quantity of spectrum to provide between 19 and 44 channels of programming nationally, and thus in every local market. Through use of compression technology, however, the two satellite DARS providers that were ultimately licensed, and which are now operating, each provide approximately 100 channels using their 12.5 MHz licenses.

Each of the two satellite DARS providers has access to more than twelve times the bandwidth and twelve times the channel capacity as terrestrial broadcasters, and each operates on a nationwide basis with access to every local market.[106] In addition to the disparity in spectrum assigned to DARS providers, there are no structural limits that apply to this service. As a result, while there is a barrier to a terrestrial broadcaster

[106] Although radio broadcasters may have hundreds of licenses throughout the country, they are simply reusing the same channels in different markets, channels to which other operators have access in other geographic areas. The satellite DARS licensees are simultaneously able to provide service on each of their channels in every market in the country, and thus each have 12.5 MHz of spectrum in each and every market vs. a maximum of 1.03 MHz in any market for terrestrial service providers.

controlling any more than 1.03 MHz of spectrum in any one market, so that it would be barred from acquiring even 10 kHz of additional spectrum in the form of another AM broadcast station, there is no rule that would prevent a DARS licensee, which already controls 100 channels and 12.5 MHz of spectrum in each and every local marketplace, from acquiring another 1.03 MHz of bandwidth in every market in the country. Indeed, there is no structural barrier to a merger of the two DARS licensees themselves, which would consolidate 25 MHz of spectrum in the hands of one entity.

In other words, in 1997, following the adoption of the current local radio ownership rule, the Commission was sufficiently unconcerned about concentration of spectrum in the hands of two DARS licensees that it did not even consider the imposition of structural limits on DARS ownership. Given the inherent wide-area nature of satellite service delivery, and the then-existing eight station local ownership cap on terrestrial broadcasters, the Commission might plausibly have determined to assign DARS licensees no more than 5 MHz,[107] at the most, on the theory that this quantity of spectrum would have permitted each licensee to operate a minimum of approximately eight stations in each market.[108] Instead, however, the Commission found that it was necessary to allot each satellite DARS provider 12.5 MHz of spectrum to ensure that each licensee would be able "to successfully implement an economically viable satellite DARS system."[109] The Commission found "that licensing less than 12.5 MHz would be insufficient to

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107 The Commission rejected such a proposal advanced by the National Association of Broadcasters. *See* NAB Comments, IB Docket No. 95-91 at 60.

108 In fact, based on the actual capacity derived from the DARS spectrum, such a spectrum assignment would have yielded as many as 40 channels per operator – approximately five times the channel capacity and five times the bandwidth available to local terrestrial broadcasters.

109 *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5776 (1997).

provide a critical mass of channels required for economic viability and could lead to significant power and cost constraints."[110]

The Commission did not cite spectrum scarcity as a concern anywhere in its satellite DARS service rules order, and its approach indicates that it had no concern about placing a large amount of spectrum in the hands of a single licensee. Instead, its chief concern was ensuring that each DARS licensee would have sufficient bandwidth to be a viable competitor in a marketplace that included cable-delivered digital audio services.[111] One might logically expect the Commission to have the same concern with respect to terrestrial broadcasters that have to compete with both of these multi-channel providers.

The Commission's recent approach to assignment of spectrum for satellite DARS cannot be reconciled with continued arbitrary constraints on local terrestrial broadcast ownership. If spectrum scarcity were still considered a constraint affecting viewpoint diversity, then the Commission could not reasonably have allocated so much newly available spectrum to just two entities on a nationwide basis. It must therefore be recognized, based on the Commission's recent handling of spectrum allotment decisions, that the impact of spectrum scarcity on the marketplace of ideas is no longer a matter of Commission concern.

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110 *Id.*

111 *Id.* at 5772-73.

E. In The Absence Of Scarcity, Content-Neutral Limitations On Broadcast Speech Are Properly Subject To Heightened Scrutiny, A Level Of Review That The Local Radio Ownership Limitations Cannot Withstand.

The Supreme Court has continually refined its analytical framework for evaluation of restrictions on free speech, establishing tests that, regardless of the validity of the scarcity rationale, would be applied to the broadcast ownership regulations, if subjected to legal challenge.[112] In particular, as Justice Breyer has stated:

> The history of this Court's First Amendment jurisprudence . . . is one of continual development, as the Constitution's general command that "Congress shall make no law . . . abridging the freedom of speech, or of the press," has been applied to new circumstances requiring different adaptations of prior principles and precedents. . . . Over the years, this Court has restated and refined these basic First Amendment principles, adapting them more particularly to the balance of competing interests and the special circumstances of each field of application.[113]

Having itself abandoned the scarcity rationale as a basis for imposing special regulations upon radio broadcasters, both explicitly, as a matter of overarching policy, and implicitly, in actual practice, the Commission should now take this opportunity to recognize the full import of these judgments. Absent the scarcity justification, there is no longer any reason for according broadcasters second-class status under the First Amendment.[114]

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112 It is of more than passing interest that the original cases establishing the scarcity rationale for distinct First Amendment treatment of broadcast licensees (*Nat'l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943) and *Associated Press et al. v. United States,* 326 U.S. 1, 20 (1945)) are close contemporaries of the Court's decision in *Valentine v. Chrestensen,* 316 U.S. 52, 54 (1942), wherein the Court held broadly that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." Beginning with its decision in *Va. Bd. of Pharmacy et al. v. Va. Citizens Consumer Council,* 425 U.S. 478 (1976), decided seven years *after Red Lion*, the Court has completely abandoned this posture with respect to commercial advertising, and has developed a four-prong test applying intermediate scrutiny to limits on commercial speech. *See Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.,* 447 U.S. 557 (1980).

113 *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC* , 518 U.S. 727, 740 (1996) (plurality opinion).

114 The Supreme Court has stated that it considers four distinct factors in determining whether to overrule its own precedent. These factors include "whether related principles of law have so far developed

Not only have the Commission and Congress respectively concluded that the scarcity rationale is "irrelevant" and "no longer applies," it is beyond doubt that the delivery of audio, video, and text information directly to individuals is no longer constrained by the limits of the broadcast spectrum. Speakers have a plethora of alternative means to address the public without obtaining a government broadcast license.[115] For this reason, there is no longer any basis for treating broadcasters in a different manner from those that have equal or greater access to outlets in the media marketplace, such as newspaper owners, cable operators and satellite licensees. As incredible as it is "to maintain that the First Amendment changes as you click through the channels on your television set,"[116] it is equally untenable to insist that First Amendment protection changes for audio channels depending on whether they are received from a terrestrial AM or FM licensee, a satellite DARS operator, a digital cable audio service, or an Internet website.

Just recently, in *Fox Television Stations v. FCC*, the D.C. Circuit cast doubt on the notion that the same level of scrutiny applied to other speakers might now

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as to have left the old rule no more than a remnant of abandoned doctrine," and "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *See Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (citations omitted). Both of these factors are implicated by the changes in technology, the media marketplace, and First Amendment law since the time that *NBC v. U.S.* and *Red Lion* were decided.

115 "[I]ndividual members of the listening or viewing public . . . may express their viewpoints on controversial issues in any number of ways that do not involve applying for and receiving a broadcasting license, [therefore] it seems odd (and inaccurate) to equate scarcity in licenses with scarcity in the marketplace of ideas." *Syracuse Peace Council*, 867 F.2d at 683 (Starr, J., concurring). In the ensuing years, the abundance of outlets for viewpoint expression has continued to grow exponentially.

116 *See* Michael K. Powell, Remarks Before the Freedom Forum, Arlington, Virginia (Apr. 27, 1998) (as prepared for delivery), *available at* www.fcc.gov/speeches/powell/spmkp809.html.

be applied to broadcast speech.[117] The court's conclusion, however, was premised on the mistaken assessment that "the Supreme Court has already heard the empirical case against [scarcity] and still 'declined to question its continuing validity.'"[118] This statement was based on the Court's 1994 decision in *Turner Broadcasting System, Inc. v. FCC* ("*Turner I*"), and implies that the Supreme Court in *Turner I* both reconsidered and reaffirmed the approach followed in *Red Lion*. In fact, it did neither. All that the Court did in *Turner I*, in the course of determining the appropriate First Amendment treatment of cable operators, was review the historical basis for the distinction in First Amendment treatment between broadcasters and other speakers.[119] It did not "hear" the case against scarcity in any sense of that word, as it did not render any judgment on the current merits of the scarcity rationale. The Court's actual discussion was limited to explaining why scarcity did not apply in the context of cable television, responding to the Government's argument that cable should receive the same relaxed First Amendment protection as broadcasting has.

The Court in *Turner I* did not question the validity of *Red Lion* with respect to broadcasting simply because that issue had no bearing on the outcome of the case.[120] All that was necessary for the Court to determine was that the broadcast cases were "inapposite" to cable.[121] It bears noting that the Court nonetheless cast a skeptical

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117 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 2002 U.S. App. LEXIS 2575 (D.C. Cir. Feb. 19, 2002).

118 *Id.* at 18 (citing *Turner I*, 512 U.S. at 638).

119 *Turner I*, 512 U.S. at 637-39.

120 In taking this approach, the Court was simply following the usual judicial course of not deciding issues that are not before the court.

121 *Turner I*, 512 U.S. at 639.

glance at *Red Lion* by stating its conclusion in the following manner: "[T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, *whatever its validity in the cases elaborating it*, does not apply in the context of cable regulation."[122]

As noted by Chairman Powell and then Commissioner Furchtgott-Roth in 1998, the most that one can conclude from *Turner I* with respect to the scarcity rationale is that "the Court did not overrule *Red Lion*," and that it declined to do so in a circumstance "in which no party advocated such a result, that did not involve broadcast regulation, and in which the continuing validity of *Red Lion* was simply not essential to the outcome."[123] Accordingly, the court in *Fox* was incorrect in assuming that the Supreme Court's decision in *Turner I* reaffirmed the scarcity rationale and precluded any questioning of its present validity.

Because, as discussed extensively above, there is no continuing basis for concluding that viewpoint or spectrum scarcity exists, the Commission should assume in this proceeding that its regulations will ultimately be subject to more exacting review. As Chairman Powell has characterized it: "[W]illful denial of reality in order for government to retain the power to control speech, unimpeded by the First Amendment, is, to my mind, a subversion of the Constitution."[124] The courts have consistently found that content neutral structural regulations applicable to other media are subject to heightened

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122 *Id.* at 637 (emphasis added).

123 *Commission Proceeding Regarding the Personal Attack and Political Editorial Rules*, 13 FCC Rcd 21901 (1998) (Joint statement of Comm'rs Powell and Furchtgott-Roth).

124 Michael K. Powell, Remarks Before the Media Institute in Washington, D.C., *The King's Ransom: The Dangers of Content Regulation*, (Oct. 20, 1999) (as prepared for delivery), *available at* www.fcc.gov/speeches/powell/spmkp905html.

scrutiny rather than rational basis review.[125] This same standard should therefore be applied in considering the appropriateness of the broadcast ownership rules.

F. The Local Radio Ownership Rule Cannot Withstand Either Intermediate Or Rational Basis Review.

Under intermediate scrutiny, the Commission must be able to demonstrate that the local radio ownership rule is (1) rooted in an important governmental interest not related to the suppression of free speech (*i.e.,* the achievement of viewpoint diversity), (2) that the rule promotes this interest, and (3) that the rule does not burden substantially more speech than necessary to further this interest.[126] The Commission must demonstrate that "the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[127] The FCC must "justify the limits it has chosen as not burdening substantially more speech than necessary," and it "must show a record that validates the *regulations* not just the abstract statutory authority" to impose them.[128] Especially when the Commission adopts policies based upon predictive judgments, it bears a responsibility to revisit and reevaluate these policies as time goes by to determine whether they have the intended effect, *i.e.,* "whether they actually produce the benefits the Commission originally predicted they would."[129]

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[125] *See, e.g., C&P Tele. Co. v. United States*, 830 F. Supp. 909, 931 (E.D. Va. 1993), *aff'd* 42 F.3d 181 (4th Cir. 1994); *USWest, Inc. v. FCC*, 48 F.3d 1092 (9th Cir. 1994); *Turner I*, 512 U.S. 622*; Turner Broad. Sys. v. FCC*, 520 U.S. 180 (1997) *("Turner II").*

[126] *See, e.g., Time Warner Entm't Co., L.P. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*"), *citing Turner II*, 520 U.S. at 189.

[127] *Turner I,* 512 U.S. at 664.

[128] *Time Warner II* , 240 F.3d at 1130.

[129] *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993).

Yet, as discussed in Section I, the Commission has never undertaken the difficult task of evaluating the nexus, if any, between the numerical limits contained in the current local radio ownership rules and its goal of promoting viewpoint diversity. As one commentator has suggested, the Commission's numerical ownership limits "are designed to prevent incipient undesirable concentrations in media markets," but the approach has been undertaken "without proof of any undesirable effects" arising from multiple station ownership.[130]

In particular, the Commission has never developed any data suggesting that the local radio ownership limits have enhanced viewpoint diversity, or that past relaxations of the rule have had a negative impact. Indeed, the Commission has concluded "that it was not necessary to find specific evidence of anticompetitive abuses in order to adopt local ownership restrictions."[131] The limits are therefore based on "mere conjecture," rather than any specific finding of need or demonstration of efficacy.[132] The *Fox* court has made manifest that more is required in order to satisfy even the minimal standard of review applicable to any agency regulation. Moreover, the Supreme Court has made clear that "when trenching on first amendment interests, even incidentally, the government must be able to adduce either empirical support or at least sound reasoning on behalf of its measures."[133]

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130 Jonathan Emord, *The First Amendment Invalidity of FCC Ownership Regulations*, 38 CATH. U. L. REV. 401, 465 (1989).

131 *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules,* 4 FCC Rcd 1741, 1745 (1989).

132 *See Time Warner II*, 240 F.3d at 1130.

133 *Turner I,* 512 U.S. 622, 666 (1994) (quoting *Century Communications Corp. v. FCC*, 835 F.2d 292, 304 (D.C. Cir. 1987)).

Because there has never been any evidence that local radio ownership limits actually address a failure in the viewpoint marketplace, these regulations cannot pass muster in today's marketplace under the intermediate level of First Amendment scrutiny generally applicable to content-neutral regulations, or even the relaxed "rational basis" review that the Court has previously applied to restrictions on broadcasters. Absent such an empirical, soundly reasoned basis, the rules cannot stand. The present rules are scarcely tailored at all, let alone narrowly circumscribed to achieve the specified diversity goal. To a great extent, the limits are "one size fits all," assuming without basis both that all markets within broadly defined size categories have common characteristics justifying identical treatment, and that numerical caps on group ownership will promote the airing of more varied views in the media marketplace.

V. The Repeal Of The Local Radio Ownership Rule Would Not Harm Competition In Local Markets.

In the *NPRM*, the Commission poses a broad variety of questions directed to competition. At the beginning of its discussion, however, the Commission asks whether its "authority to regulate the radio market" would justify "basing regulation on the level of competition in the radio advertising market?" The Commission also asks whether its interest in competition is, or has been, merely "a proxy for ensuring an appropriate level of diversity in a local community?"[134]

The answer to the first question is "no" because the answer to the second question is "yes." While the Commission has historically made reference to promoting competition as a goal of its ownership policies, it has done so because of its concern that

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[134] *NPRM* at ¶ 40.

concentration in the broadcasting market could limit diversity in the marketplace of ideas as a whole. Therefore, "competition" has indeed been a proxy for promoting diversity. Because the Commission has no independent antitrust or competition enforcement authority, its regulatory interest in competition is limited to addressing this diversity concern. With the present high level of diversity in the marketplace, there is no need for continued Commission structural regulation to promote this goal. The Commission should not now turn to regulation of competition alone as a separate justification for imposing numerical ownership limits in local markets.

Furthermore, repeal of the Commission's local radio ownership regulations will not have any adverse impact on listeners because the radio marketplace will still be subject to antitrust review and enforcement by agencies directly charged with undertaking such important tasks. Absent a clear justification for imposing numerical requirements to promote diversity, there is simply no reason for the Commission to engage in a duplicative and, most likely, overreaching competition analysis of radio industry transactions. This important regulatory concern is committed to the jurisdiction of other expert agencies – the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"). These agencies are in much better position to make judgments in this area, and to remedy any anti-competitive misconduct, because they have the professional staff, regulatory authority, institutional experience and established review guidelines necessary to do the job.

In any case, there is no evidence that the consolidation that has taken place to date in the radio industry has had any adverse consequences to the public interest. As detailed below, empirical data demonstrates that there is no correlation between local market concentration and increases in advertising rates since the 1996 Act, while at the same time the changes over the last half decade have promoted economic efficiencies leading to improved program service, including greater format diversity.

A. Analysis of Economic Competition Has Not Historically Been A Separate Focus Of The Commission's Regulation Of Local Radio Ownership.

Although the courts have upheld the Commission's authority to examine both diversity and competition issues in evaluating the need for broadcast ownership regulation,[135] the relationship between these areas of concern must be put in context. The Commission has consistently seen its mission as one of ensuring diversity of viewpoints by preventing monopolistic control of media facilities. Rather than being concerned with the overall economic impact of market power upon all affected parties, the Commission has been concerned largely with the harmful impact that undue media concentration would have upon citizen consumers in the marketplace of ideas. The agency's concern with competition therefore should be only as a finely calibrated proxy for promoting diversity, rather than a wholly separate basis for imposing structural regulation.

The Commission's consideration of general "competitive" concerns in evaluating broadcast transactions dates to several years before the enactment of the multiple ownership rules.[136] The history of the Commission's enforcement of its radio regulations since that time demonstrates that the Commission's consideration of competition has always differed from a traditional antitrust analysis. As the Commission

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135 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 2002 U.S. App. LEXIS 2575 (D. C. Cir. Feb. 19, 2002).

136 *See, e.g., Genesee Radio Corp.*, 5 F.C.C. 183 (1938).

explained a quarter century ago, it analyzes "basic media ownership questions in terms of [its] primary concern – diversity in ownership as a means of enhancing diversity in programming service to the public – rather than in terms of a strictly anti-trust approach."[137]

1. The Commission Is Not An Antitrust Enforcement Agency.

As a threshold matter, the courts and the Commission have long recognized that the FCC has no authority of its own to decide antitrust issues.[138] Competition analysis in connection with broadcast license transfers only lies within the authority of the Commission to the extent that the Commission determines that any action taken or denied on that basis will enhance the benefits to the community of listeners, viewers, and readers by promoting diversity.[139]

In hearings on what were to become sections 13 and 15 of the Radio Act of 1927,[140] the drafter of these sections, Congressman White, stated that the Secretary of Commerce[141] would have no discretion to deny a license to an applicant on the basis that

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137 *Amendment of Sections 73.34, 73.240 and 73.636 of the Rules and Regulations Relating to the Multiple Ownership of Standard, FM and Television Broadcast Stations*, 50 F.C.C.2d 1046, 1078-79 (1975).

138 *See United States v. Radio Corp. of Am.*, 358 U.S. 334, 346 (1958).

139 *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 795 (1978) ("The First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. . . while the Commission does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making license decisions pursuant to the public interest standard.").

140 Later sections 311 ("Special Requirements with Respect to Certain Applications in the Broadcasting Service") and 313 ("Application of Antitrust Laws; Refusal of Licenses and Permits in Certain Cases"), respectively, of the Communications Act of 1934.

141 As drafted at that time, the Secretary of Commerce would have primary responsibility to administer the Act. *Radio Corp. of Am.*, 358 U.S. at 341 n.8.

the Secretary believed the applicant to be in violation of the antitrust laws.[142] Underscoring this congressional withholding of discretion, the House defeated an amendment to section 13 that would have required the Commission to refuse a license to any applicant it found to be "'unlawfully monopolizing' radio communication."[143] When the Senate considered the bill, a discussion of the Commission's role in evaluating monopolies ensued wherein Senator Dill, the member in charge of the bill in the Senate, stated: "The bill provides that in case anybody has been convicted under the Sherman antitrust law or another law relating to monopoly he shall be denied a license;[144] *but the bill does not attempt to make the commission the judge as to whether or not certain conditions constitute a monopoly. . .* "[145] The Commission therefore was simply empowered to deny licenses to companies that had previously engaged in anticompetitive conduct. [146]

With few exceptions, the provisions of the Radio Act of 1927 were subsumed into the Communications Act of 1934, the avowed purpose of which "was to secure the maximum benefits of radio to all the people of the United States."[147] In

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142 *Radio Corp. of Am.*, 358 U.S. at 341 (citing *Hearings Before the House Committee on the Merchant Marine and Fisheries on H.R. 2289*, 69th Cong. 27).

143 *Radio Corp. of Am.* 358 U.S. at 342 (citing 67 CONG. REC. 5501-5504, 5555).

144 The sole change Congress made to these sections of the Radio Act of 1927 when they were incorporated into the Communications Act of 1934 was to "authorize rather than require the revocation of a license by the Commission after a court had found a radio broadcaster in violation of antitrust laws, but had not ordered its license revoked." *Id.* at 343.

145 *Radio Corp. of Am.*, 358 U.S. at 343 (1958) (emphasis added) (citing 67 CONG. REC. 12,507).

146 *See, e.g., Mansfield Journal v. FCC*, 180 F.2d 28, 31-32 (1950) (denying a broadcast license based upon actual evidence of anticompetitive conduct by the applicant directed toward suppressing competition in the dissemination of news and information).

147 *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 217 (1943).

furthering this statutory purpose, the Commission examines the competitive effects of a proposed transaction only in light of the impact on the community, not to protect the private interests of one broadcaster or business over another. As the Commission noted in 1928: "The emphasis must be first and foremost on the interest, the convenience, and the necessity *of the listening public, and not on the interest, convenience, or necessity of the individual broadcaster, or the advertiser*."[148]

The Commission has thus long recognized that its purpose is not to tread on the mission of the antitrust and competition enforcement agencies, but to undertake a fundamentally different analysis:

> The distinction between our approach and the Justice Department's is best put this way. Justice and others applying traditional anti-trust criteria are primarily interested in preserving competition in advertising. They place a greater emphasis on public policies underlying the need to preserve competition than on diversity aspects and for their arguments they use analytic tools taken from economic studies of market share and the like. Conversely, the diversity approach would examine the number of voices available to the people of a given area. The premise is that a democratic society cannot function without the clash of divergent views. It is clear to us that the idea of diversity of viewpoints from antagonistic sources is at the heart of the Commission's licensing responsibility.[149]

This statement makes clear that the Commission's competition inquiry has no basis outside the context of promoting viewpoint diversity.

[148] *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940) (emphasis added) (citing Second Annual Report, Federal Radio Commission, 1928, 169-70).

[149] *Amendment of Sections 73.34, 73.240 and 73.636 of the Rules and Regulations Relating to the Multiple Ownership of Standard, FM and Television Broadcast Stations*, 50 F.C.C. 2d 1046, 1079.

2. Commission Evaluation Of Competition Is Inextricably Intertwined With Its Mandate To Promote Public Access To Diverse Views.

As described in the Commission's first Biennial Review, diversity and competition are closely interwoven,[150] in that competition may play a role in maintaining a diversity of viewpoints and may affect a market participant's ability to provide best practicable service to the community. The Commission has previously described this relationship by stating, "anti-trust policy has been recognized as a correlative source of authority for [the Commission's] diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices"[151] But the Supreme Court has highlighted the distinction between the prohibition on Commission regulatory action for the sole purpose of protecting market participants from competition and its affirmative mandate to consider competition's effect on the public interest generally:

> This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public....[152]

That is, competitive issues are only relevant to the Commission's review if there is reason to believe that service to the public is at risk.

This emphasis has been evident from the Commission's first adoption of anti-duopoly restrictions. In the *Genesee* case in 1938, the Commission focused solely

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150 *See 1998 Biennial Review*, *supra* note 8, at 11061.

151 *Amendment of Sections 73.34, 73.240 and 73.636 of the Rules and Regulations Relating to the Multiple Ownership of Standard, FM and Television Broadcast Stations*, 50 F.C.C.2d 1046, 1049 (1975).

152 *FCC v. Sanders Bros. Radio Corp.*, 390 U.S. 470, 475-76 (1940).

on the issue of "program service," expressing concern that granting a second AM license to the current licensee of the only AM station in a market would not provide "service better in kind or quality, or more diversified or serving a wider range of interests than that now offered."[153] From a competition standpoint, the concern expressed was simply that co-owned stations "would not be engaged in actual or substantial competition with each other *in the rendering of service*." Moreover, the only economic issue raised was whether the dominance of a duopoly licensee might "prevent the future entry into the field by an applicant who would offer a *new, different, improved and competitive service*."[154] Thus, the Commission's concern was entirely about the quality of service offered to the public, *i.e.,* the promotion of diverse viewpoints and programming, and not with the promotion of competition in a purely economic sense.

As the legislative history, judicial interpretation, and genesis of the broadcast ownership rules establish, use of the term "competition" as an appropriate goal of the broadcast ownership rules has referred to the goal of the promotion of competition in the marketplace of ideas, not ad rate competition or other economic impact. That being the case, it is evident that the Commission has indeed been interested in competition only "as a proxy for ensuring an appropriate level of diversity in a local community," as it suggests in the *NPRM*.[155] Academic observers have echoed this assessment, noting that the FCC's structural regulations can only produce public benefits

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153 *See Genesee Radio Corp.*, 5 F.C.C. 183, 186 (1938).

154 *Id.* (emphasis added).

155 *NPRM* at ¶ 40.

"to the extent that the agency can identify, and seek to foster, diversity values that competition does not adequately promote."[156]

Because there is no longer any need to maintain structural limits in order to promote diversity in the marketplace of ideas, the Commission should not take up protection of economic competition as an alternative justification for these structural requirements. As shown in the following sections, no purpose would be served by such a shift, while at the same time it would likely impede the benefits of consolidation and result in inefficient redundancy in governmental review of media mergers.

B. The Commission Has No Evidence That The Current Local Ownership Rule Addresses Any Competition Problem In Local Markets.

As discussed above, in endeavoring to evaluate economic competition in the context of the license transfer process, the Commission steps outside the bounds of its statutory delegation of power, judicial authorization, and its own historical interpretation of its role in evaluating diversity and competition in the media marketplace. Whatever the ends of the Commission's regulation of local radio ownership – whether to satisfy the Commission's public interest mandate, or for the possibly *ultra vires* purpose of enforcing the antitrust laws – the limit itself is an arbitrary construct, with no demonstrable relationship to identified marketplace ills. Although the Commission repeatedly laments the potential evils of consolidation and market power in justifying its regulations, it has never stated any factual basis whatsoever for its belief that consolidation of the broadcast industry short of that customarily prevented by the nation's

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156 THOMAS G. KRATTENMAKER & LUCAS A. POWE, JR., REGULATING BROADCAST PROGRAMMING 87 (1994) [hereinafter KRATTENMAKER & POWE].

antitrust enforcers could harm the public interest.[157] Instead, it has merely recited a litany of statistics on station acquisitions, which simply demonstrate that trading in broadcast properties has been active, and that some consolidation has occurred.[158] As the United States Court of Appeals for the District of Columbia Circuit recently noted when discussing the Commission's similar justification for retaining the national television ownership cap, "such figures alone, without some tangible evidence of an adverse effect on the market, are insufficient to support retention" of the limitations.[159]

Even if a court were inclined to accept that the Commission's determination that consolidation is *per se* harmful to the public interest, Congress has enacted a statute that specifically adds to the Commission's burden of proof in evaluating its broadcast ownership rules. As discussed in depth in Section I, above, Section 202(h) of the 1996 Act commands that the Commission "shall determine whether any of such rules are necessary in the public interest as a result of competition."[160] This language clearly places the burden of justifying the retention of an ownership rule on those who would maintain the current regulations.[161] The Commission has not obtained any evidence to demonstrate that consolidation in the industry has harmed the public interest,

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157 "Our economic concerns have been aimed at precluding broadcasters from 'dominating television and radio markets and wielding power to the detriment of small owners, advertisers, and the public interest.' Our concerns in this area *have not been based upon any evidence* that group ownership would necessarily lead to anticompetitive practices in local markets, however, but upon the *potential* for such practices to occur." *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1724 (1989) (internal citations omitted) (emphasis added).

158 *1998 Biennial Review*, *supra* note 8, at 11064-66.

159 *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 2002 U.S. App. LEXIS 2575 (D.C. Cir. Feb. 19, 2002).

160 Telecommunications Act of 1996, Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996) (emphasis added).

161 *See Fox Television Stations, Inc.*, 2002 U.S. App. LEXIS 2575.

as it has assumed, and therefore this burden has not been met. Thus, the rule must be eliminated.

C. The Common Ownership Of Radio Stations Advances The Public Interest Through Economic Efficiencies And Other Benefits.

Not only does the Commission lack any evidence that group ownership harms the public interest in any way, it has recognized evidence showing that consolidation provides significant benefits to listeners and promotes economic efficiencies. It has specifically recognized "that allowing common ownership of stations in closer proximity would produce cost savings and efficiencies that may benefit the public interest."[162]

As a practical matter, in the present uncertain economic climate, the Commission may do actual damage to broadcasters by declining to repeal unnecessary regulations "[b]y artificially denying stations efficiencies that could be realized through consolidation of facilities, managerial and clerical staffs, sales, bookkeeping, promotion, production, news and other aspects of station operation, the local ownership restrictions increase the costs of doing business at a time when cost-savings may well be critical to survival."[163] As the Commission noted in 1984, "group owners do not impose a monolithic editorial viewpoint on their stations, but instead permit and encourage independent expression by the stations in response to local community concerns and

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162 *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1726 (1989).

163 *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2774 (1992).

conditions."[164] Public interest benefits may therefore be realized through group ownership without sacrificing independent editorial control.

As explained in Section III.B., above, each of Infinity's stations make independent decisions with respect to news, public affairs, and general programming. Infinity's operational structure allows the stations to pass along the advantages of group ownership to the public in the form of more diverse and better quality programming while retaining independent editorial control. The local radio ownership rules only serve to stymie the greater public interest benefits that could be realized without the artificial constraints of the rules.

1. The Economic Resources Of Group Owners Allow Stations To Take Risks In Format And Content, Afford Higher Quality Programming, And Allow Struggling Stations And Formats To Survive And Prosper.

The Commission has long recognized the economic efficiencies of group ownership. The economic efficiencies of common ownership allow a group owner to increase its profits, and develop the financial resources needed to take risks in format and content to the benefit of the public. In modifying the radio "duopoly" rule in 1989, the Commission noted that allowing for group ownership of radio stations in the same market "could enable broadcasters to realize cost savings by consolidating general and administrative functions such as accounting, billing, and payroll. Similarly, there could be cost savings in advertising and promotion through the use of a common sales force, and some studio facilities may be shared...."[165] The economic cushion resulting from

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164 *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 20 (1984).

165 *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1727 (1989). The Commission noted these efficiencies in other proceedings as

these savings allows group owners to move beyond programming for mere day-to-day survival in the marketplace, allowing the leeway necessary to take risks in format and content.

The ability to take advantage of these efficiencies provides group owners with additional economic resources that they put toward producing higher quality programming. Improved access to capital allows a group owner to develop quality programming and talent, the expense of which a single or smaller group owner could not afford. As the Commission found in 1984, group ownership has distinct advantages "in enriching the variety of information available in the local community" potentially allowing owners "to devote more resources to newsgathering and other activities which improve the quality of the programming presented."[166]

Infinity's resources have allowed its stations to develop local talent as well as woo the highest quality on-air talent to its stations. In addition, as was the case for WTIC(AM) in Hartford, Connecticut,[167] a station has used its economic position to build up local programming and maintain a full local news staff on a station once populated almost solely with national syndicated programs.

Group ownership also allows Infinity's stations to get up-to-the-minute quality news and information to local citizens in the event of an emergency. Feeds from sister stations can provide live news on both local and national crises. Infinity's music-formatted Dallas stations note that in a weather or other local emergency, they can obtain

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well. *See, e.g., Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17 (1984).

[166] *Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 38 (1984).

[167] *See supra* discussion at Section III.B..

immediate coverage of the emergency situation from their sister news station – benefiting their listeners that do not typically tune in a news station. In addition, on September 11, Infinity's KLUV-FM, Dallas, an oldies station, received a live feed from WINS, an Infinity station in New York, providing Dallas citizens with live, current news from the site of the attack. Indeed, because of the economic efficiencies of consolidation, WINS had the financial resources to enable it to broadcast for six days without advertising spots after September 11th. Individual station owners likely could not afford such a loss of revenue. Group ownership allowed this Infinity station to provide its listeners with the uninterrupted, around-the-clock coverage necessary to serve its listeners. The common ownership of Infinity stations allows non-news stations to provide potentially life-saving information to the public in a crisis and allows news stations to meet the needs of their communities and the nation at the expense of the stations' individual revenues.

This economic stability allows Infinity to support its struggling stations and provide for a greater chance of recovery and, therefore, survival of another format and additional viewpoints in the market. Whereas an individual or small-group owned station may have to cut back on programming expenses during difficult economic times, Infinity's economic efficiencies provide the means for a station to weather the storm. In an economy recently weakened by recession, group ownership has provided the support necessary for stations to remain vibrant voices in their communities.

2. Common Ownership Allows Group Owners To Pass The Benefits Of Economic Efficiencies On To The Public Through Charitable And Community Events.

Common ownership allows radio stations to benefit the community through improved programming and charitable and community events. Infinity's stations use their ability to promote events on several stations, access to greater numbers of listeners, and opportunity to share costs across several stations to benefit the community through charity events and job fairs. For example, Infinity's Buffalo stations joined together to conduct and promote a "Lights in the Park" holiday lighting display to raise $50,000 for the United Way. Infinity's radio stations in Sacramento have joined together to raise over $400,000 for the Make-A-Wish Foundation as well as to collect food and coats for local families. The Sacramento group also hosts a semi-annual job fair attended by multiple employers, schools, and armed forces representatives. This commitment to the community is echoed throughout Infinity's stations nationwide, and consolidation has provided the means to benefit the community in this way.

Without consolidation, Infinity's stations would not be able to conduct charitable events as often or as successfully as they currently do. In fact, an individual or small group owner may not have the economic resources, audience reach, or production efficiencies to host any charitable events. The resources derived from facilities, back office, and engineering consolidation may be put toward funding charitable events like the ones discussed above. The group owned stations can promote the event on each commonly owned station, reaching a much larger audience. In addition, the group can share the cost of the events among them and develop relationships with the venues and suppliers to reduce cost based on continued usage. Separately owned stations would not and could not combine and cooperate in this manner. Consolidation of ownership allows the public to reap the benefits of charitable and community events.

3. The Need To Effectively Compete Without Harming Other Commonly Owned Stations Leads To Diverse Formats And Coverage Of Different Market Segments.

For the last fifty years, economic review of the broadcasting industry has recognized that market power in any locality may lead to more diverse and qualitatively "better" programming.[168] As Judge Posner has observed, "[I]t has long been understood that monopoly in broadcasting could actually promote rather than retard programming diversity."[169] The basis for this theory is very simple. A broadcaster generates revenues based on the popularity of its programming. Thus, that broadcaster has an incentive to develop programming that will appeal to the broadest market. Although a local media market consisting solely of single-station owners will likely demonstrate intense competition in programming appealing to the desires of the masses, owners in such communities will ignore niche markets for fear of losing revenue necessary for survival. If, however, an owner has several stations in a market, that owner has an incentive to diversify the programming of its stations so as to avoid cutting into its own revenue.

The empirical evidence bears this theory out. In connection with his study of the radio advertising market, Professor Jerry Hausman also examined the effect of consolidation on format diversity. This study used data on the radio formats available in over 240 Arbitron radio markets in the years 1993, 1997 and 2001.[170] Professor Hausman found that there is "a positive and significant relationship between

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168 *See, e.g.,* Peter O. Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194, 219-21 (1952). The Commission noted this theory in the *NPRM*. *NRPM* at ¶ 37 (citing *Review of the Commission's Regulations Governing Television Broadcasting*, Further Notice of Proposed Rulemaking, 10 FCC Rcd 3524, 3551 (1995)).

169 *Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1054-55 (7th Cir. 1992) (Posner, J.).

170 *See* Hausman Decl. I at 2 (¶ 7), attached hereto as Appendix C.

consolidation and format variety," such that a decrease in the number of owners tends to produce some increase in format variety.[171]

Greater resources also allow for innovation in station formats. A large group owner can afford to address the needs of a promising niche market, as that owner can make up losses inherent in the operation of a station that serves an untested market with the gains from "mainstream" programming. In Seattle, for example, an Infinity station switched from a country format to an 80s format in December 1999. At the time, the 80s format was new and untested and the country format was a proven moneymaker for the station. The general manager of the station noted that in her belief, if the station had been independent, "it would have stayed country because the risk was too high and the station was making money." Because of consolidation, the station could take a chance on a niche format that the general manager felt would appeal to an underserved portion of the local community. An Infinity station in San Francisco took an even greater risk in format earlier this year – creating what some have called "the first new music format in 15 years."[172] The station now plays a broad range of music, including international talent and artists who have never been played on American commercial radio before. In short, group ownership promotes numerous public interest benefits through reduction in costs, funding for expensive or risky programming, and program diversity. These benefits far outweigh the speculative and unfounded alleged harms to the public interest from group ownership.

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171 *Id.* at 13, 14 (¶¶ 33, 36).

172 *Here's what Infinity's trying to do with the new 'Wave,'* M STREET DAILY, Jan. 3, 2002, at 1.

4. Group Ownership Benefits Advertisers Through Customization Of Service And Targeted Marketing Packages.

Advertisers also benefit from the consolidation of radio stations. Consolidation allows Infinity clusters to customize their service to advertiser clients. An advertiser may choose whether it wishes to advertise on one, some, or all Infinity stations in a cluster. Infinity stations, however, do not force a cluster sale, letting the advertisers needs dictate the sale. Infinity stations allow the advertiser to choose whether it would like to work with a sales representative that represents all of the stations in the market or work with the sales representatives at each individual stations. Group ownership allows Infinity's sales team to tailor sales to the needs of the advertising client. Infinity clusters afford an advertiser with the ability to achieve the ideal demographic reach through a single sales representative and agreement without forcing that advertiser to buy time on undesirable stations or preclude its ability to work with individual station representatives.

D. If Anticompetitive Behavior Does Occur, The Department Of Justice Or The Federal Trade Commission Are Best Equipped To Remedy Such Misconduct.

While the First Amendment precludes undue restraint on media outlet ownership, it provides no shelter to media companies from the reach of antitrust enforcement. The courts have stated unambiguously: "[T]he First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity."[173] Therefore, the elimination of *per se* numerical limits on radio broadcast ownership will not leave the American listening public at the mercy of runaway consolidation. Like all entities engaged in commerce,

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173 *Associated Press et al. v. United States,* 326 U.S. 1, 20 (1945).

media companies, broadcast and non-broadcast, are subject to restraints under the federal antitrust laws on anticompetitive consolidation and behavior.[174]

In the *NPRM*, the Commission nonetheless proposes to analyze competition on its own, and to do so by taking into consideration the same factors and information employed by the DOJ and the FTC.[175] Adoption of this approach would be a misuse the resources and expertise of the Commission, and it would duplicate the missions of the DOJ and the FTC. The Commission itself has previously recognized the distinct advantages in allowing the DOJ and the FTC to retain their shared jurisdiction over competition matters:

> [I]n view of the many problems confronting this agency, with its limited staff resources, in its own areas of exclusive jurisdiction (e.g., licensing, renewal, transfers, fairness, equal time, etc.), it would make no sense for us to duplicate the function of the courts or other agencies having antitrust jurisdiction and expertise by ourselves investigating and adjudicating every alleged violation.[176]

This rationale applies even more strongly to the present circumstance, where the Commission's inquiry would relate not to actual allegations of anticompetitive conduct but to a *predictive* analysis concerning *potential* anticompetitive impact of proposed combinations.

Because it has no mandate to regulate competition alone, the Commission should defer to agencies that do. As the courts have recognized with respect to the video programming market, "the federal agencies charged with enforcement of the antitrust

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174 *See, e.g.*, KRATTENMAKER & POWE, *supra* note 156, at 86-87 ("antitrust law protects against anticompetitive erosion of broadcast program diversity, just as it protects against such reduction of diversity in other product markets, like computers or pencils").

175 *See NPRM* at ¶¶ 41-50.

176 *Robert V. Cahill, Esq.*, 37 R.R.2d 197 (1976) (citing *Consumers Association of the District of Columbia*, 32 F.C.C.2d 400 (1971)).

laws stand ready to guard against anti-competitive behavior . . . just as in any other industry."[177] Among other advantages of the antitrust enforcement agencies, including their seasoned professional staffs, is their possession of specific regulatory tools designed to facilitate their pro-competitive mission[178] The DOJ and the FTC have the necessary resources to conduct flexible and tailored reviews according to specific circumstances in any affected market. An inflexible, bright-line approach will unnecessarily preclude potentially beneficial transactions that would survive a more finely calibrated analysis.

In the absence of any demonstrated need to apply structural controls for the purpose of promoting diversity, the Commission can rely on the nation's expert competition regulators to enforce regulations that apply, without differentiation, to all commercial entities. In today's richly diverse media environment, regulation of economic competition by the DOJ and the FTC provides all the protection needed to safeguard the public.

Moreover, in a time of budgetary restraint and shifting national priorities, it would be particularly unwarranted for the Commission to abandon the approach that distinguishes its regulatory mission from the antitrust enforcement agencies, and to add staff in an effort to expand its analysis beyond diversity into areas in which it has neither historic expertise nor statutory jurisdiction. As the Commission observed in 1978 in the context of license renewals:

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177 *C&P Tele. Co. v. United States,* 830 F. Supp. 909, 931 (E.D. Va. 1993), *aff'd* 42 F.3d 181 (4th Cir. 1994).

178 *See, e.g.,* FED. TRADE COMM'N BUREAU OF COMPETITION, A STUDY OF THE COMMISSION'S DIVESTITURE PROCESS 8 (1999) ("Evidence that most [FTC]-ordered divestitures have contributed to the maintenance or reestablishment of a competitor supports the usefulness of the [FTC]'s divestiture remedies.").

> This Commission has neither the expertise nor the statutory authority to enforce [the antitrust] laws in its regulation of the broadcast industry. In our view, enforcement of the Sherman Act and similar antitrust statutes rests properly with other federal agencies entrusted with the expertise and jurisdiction over these matters. We believe it inappropriate for the Commission to duplicate the function of the courts or other agencies having antitrust jurisdiction and expertise.[179]

It would therefore be unwarranted for the Commission to adopt its own "market share limit" on radio ownership, as suggested in the *NPRM.*[180] The initial determination of whether an acquisition would have distorting effects in a particular market is best left to the DOJ (or the FTC), which make these determinations on a case-by-case basis.

To date, the Commission's experience with analyzing competitive issues has not been encouraging. As the Commission itself notes in the *NPRM,* its present "framework for analyzing proposed radio combinations particularly has led to unfortunate delays that do not serve well the interests of the agency, the parties, or the public."[181] Given the broad negative impact the Commission identifies in processing "flagged" assignment and transfer applications, these delays are more than "unfortunate." Moreover, the delays are largely attributable to the fact that the Commission is undertaking types of economic analysis that it has never done before, employing methods that the DOJ and FTC have painstakingly developed and applied over many years.[182] The Commission cannot reasonably expect to expand the scope of its review into these areas and match, let alone improve upon, the expert, efficient and thorough review that

179 *Newhouse Broad. Corp.,* 62 F.C.C. 2d 271, 276 (1976).

180 *See NPRM* at ¶¶ 63-64.

181 *NPRM* at ¶ 19.

182 *See* Dep't of Justice and Fed. Trade Comm'n, *1997 Horizontal Merger Guidelines* (adapted from guidelines previously published in 1984 and 1992).

these agencies provide. Adoption of a generalized FCC review based on market concentration principles would only further ensnare the agency in a quagmire of new and unnecessary regulatory review, with adverse consequences in terms of clarity and efficiency for the Commission, the entities it regulates, and the public it serves.

E. Available Empirical Data Show That Consolidation To Date Has Not Had An Adverse Impact On The Advertising Market.

Finally, assuming, *arguendo,* that the Commission might appropriately regulate solely for the purpose of promoting competition, it is nonetheless evident from available data that there is no need the Commission to engage in such regulation to protect the public interest. Specifically, empirical data show that there is no statistical correlation between local radio market concentration and increases in radio advertising rates. This conclusion is supported by a recent study by Professor Jerry Hausman, an economist at MIT, which is included as Appendix C to these Comments. Professor Hausman has done significant prior research relating to the telecommunications industry, and has previously submitted declarations to the Commission regarding the competitive impact of Commission policies concerning satellite direct-to-home, DBS, cable television, and broadcast television markets.[183]

Professor Hausman conducted an econometric study concerning changes in advertising rates from 1995 to 2001 in 37 Arbitron radio markets of varying sizes.[184] Data was collected from 121 stations in these markets.[185] As noted in the study, if

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183 *See* Hausman Decl. I at 1-2 (¶¶ 3-4), attached hereto as Appendix C.

184 Eighteen of the markets are in the top 50 Arbitron markets, nine are in Arbitron markets 51-100, and ten are in Arbitron markets below 100. *See* Hausman Decl. I at 5 (¶ 12).

185 *Id.* at 4 (¶ 12).

increases in local market concentration produced increases in advertising prices, then the upward change in prices would be greater in markets that experienced substantial concentration as compared to those where little or no consolidation occurred. In fact, as Professor Hausman states, "[t]his pattern is exactly the opposite of the pattern actually observed" in his data – "the average price change is lower in markets with larger changes in concentration." This result is duplicated using two different means of measuring market concentration. In each case, markets with greater increases in concentration "have a slightly lower average changes in price than the markets where concentration does not change."[186]

Accordingly, Professor Hausman concludes "that changes in market concentration did not have a significant effect on radio advertising prices in the period 1995-2001. Instead, changes in television advertising prices, newspaper advertising prices, and population were the main determinants of the changes in radio advertising prices over this time period."[187] Thus, there is significant evidence that no harm has occurred to the economic actors most likely to be adversely impacted by radio industry consolidation.[188]

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186 *Id.* at 7 (¶¶ 19-20).

187 *Id.* at 11 (¶ 29).

188 Because both broadcast radio and broadcast television are advertiser supported and free to listeners and viewers, there is no potential direct adverse economic impact to the public from consolidation. The group most directly affected would be the companies that use radio as an advertising medium.

VI. Conclusion.

For all of the foregoing reasons, the Commission should take action in this proceeding to repeal the numerical limits on local radio station ownership. Such action would promote the public interest and facilitate equal First Amendment and regulatory treatment for radio broadcasters vis à vis other means of delivery of news, information and entertainment to the American public. Commission-imposed structural barriers are no longer necessary as a means of promoting or protecting viewpoint diversity. With respect to competitive concerns, adverse consequences in individual local markets can best be prevented through the DOJ's and the FTC's enforcement of the antitrust laws and other statutes regulating fair competition in the economic marketplace. The Commission need not and should not attempt to duplicate the missions of these agencies.

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