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

In the matter of	)	
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
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

NOTICE OF PROPOSED RULE MAKING

Adopted: September 12, 2002 **Released: September 23, 2002**

Comment Date: 60 days after Commission release of the Media Ownership Working Group Studies
Reply Comment Date: 90 days after Commission release of the Media Ownership Working Group Studies

By the Commission: Commissioner Copps concurring and issuing a statement, Commissioner Martin approving in part, concurring in part and issuing a statement.

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I. INTRODUCTION

1. This Notice of Proposed Rulemaking ("*Notice*") initiates a comprehensive review of the Commission's media ownership rules. The law governing our media ownership policies and the media market has undergone substantial changes since our ownership rules were adopted. As a result, this proceeding will include a careful analysis of our policy goals and the development and implementation of a regulatory framework that best serves to achieve those goals.

2. The Commission has long regulated media ownership as a means of promoting diversity, competition, and localism in the media without regulating the content of broadcast speech. The Commission has adopted these regulations pursuant to sections 307, 308, 309(a), and 310(d) of the Communications Act, which authorize the Commission to grant and renew broadcast station licenses in

the public interest.[1] The existing rules were adopted largely on a rule-by-rule basis and evolved incrementally over the years. During these evolutions, courts generally approved our rules as long as they were rationally related to achieving their stated purpose and our decisions complied with administrative procedure requirements.

3. The Telecommunications Act of 1996 ("the Act")[2] fundamentally changed broadcast[3] ownership law. Section 202(h) of the 1996 Act directs the Commission to re-examine its broadcast ownership rules every two years and repeal or modify any regulation it determines to be no longer in the public interest. Recent court decisions have held that section 202(h) changes the way the Commission must evaluate its broadcast ownership rules. The courts have stated that section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules. The court decisions interpreting section 202(h) require a Commission decision to retain or modify its media ownership regulations, in its biennial review, to be based on a solid factual record and a consistent analytical framework.

4. The regulatory structure best suited to promote the public interest is not static. Thus, the Commission's media ownership rules must be reassessed on an ongoing basis to ensure that they are grounded in the current realities of the media marketplace. It is only through this reevaluation that the Commission can be assured that its media ownership rules actually advance, rather than undermine, our policy goals. In this regard, we recognize that the marketplace has changed dramatically over the last few decades, with both greater competition and diversity, and increasing consolidation.

5. In conducting this reassessment of our broadcast ownership regulatory framework, we must clearly define our objectives as we strive to promote the public interest. The Commission's ownership policies traditionally have focused on advancing three broadly defined goals: (1) diversity, (2) competition, and (3) localism. This proceeding will review these policy objectives in light of the current media marketplace and determine whether Commission intervention is necessary to achieve these objectives. In addition, we will consider whether there are additional objectives that the Commission should strive to achieve through our media ownership rules. One such goal may be increased innovation of media platforms and services. In defining these objectives, this proceeding will consider whether the Commission should prioritize these policy objectives and, if so, how. By determining the relative weight of each objective, the Commission will be well positioned to address those instances in which there is tension between our policy goals.

6. This *Notice* initiates review of four ownership rules: the national television multiple ownership rule;[4] the local television multiple ownership rule;[5] the radio-television cross-ownership rule;[6]

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[1] 47 U.S.C. §§ 307, 308, 309(a), 310(d).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[3] By "broadcasters" we refer to UHF and VHF television and AM and FM radio licensees, and not to cable operators, Direct Broadcast Satellite ("DBS") operators, or satellite Digital Audio Radio Service operators.

[4] 47 C.F.R. § 73.3555(e). The national TV ownership rule prohibits any entity from controlling television stations the combined audience reach of which exceeds 35% of the television households in the United States.

[5] 47 C.F.R. § 73.3555(b). The local TV ownership rule allows the combination of two television stations in the same Designated Market Area ("DMA," as determined by Nielsen Media Research or any successor entity), provided: (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and noncommercial television stations would remain in that market after the combination. For this rule, a "voice" includes only broadcast television stations in the market.

[6] 47 C.F.R. § 73.3555(c). The radio/TV cross-ownership rule generally allows common ownership of one or two TV stations and up to six radio stations in any market where at least twenty independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market where at least ten independent "voices"

(continued....)

and the dual network rule.[7] The first two rules have been reviewed and remanded to the Commission by the U.S. Court of Appeals for the District of Columbia Circuit. We address the issues on remand in this proceeding.[8]

7. The Commission previously has initiated proceedings on the local radio ownership rule[9] and the newspaper/broadcast cross-ownership rule.[10] The local radio ownership rule sets forth the number of radio stations that an entity may own in a single radio market.[11] The local radio ownership proceeding examines the effects of market consolidation, the proper definition of a radio market, and possible changes to our local radio ownership rules and policies to reflect the current radio marketplace. The newspaper/broadcast cross-ownership rule, which prohibits the common ownership of a daily newspaper and a broadcast station in the same market,[12] is currently under review in the newspaper/broadcast cross-ownership proceeding. Comments filed in those proceedings will be incorporated in this proceeding. We seek additional comment on those rules to the extent necessary to address issues raised for the first time in this *Notice*.[13]

8. Our local ownership rules, which include the newspaper/broadcast cross-ownership

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would remain post-combination; and one TV and one radio station notwithstanding the number of independent "voices" in the market. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For this rule, a "voice" includes independently owned and operating same-market, commercial and noncommercial broadcast TV, radio stations, independently owned daily newspapers of a certain circulation, and cable systems providing generally available service to television households in a DMA, provided that all cable systems within the DMA are counted as a single voice.

[7] 47 C.F.R. § 73.658(g). The dual network rule permits a television broadcast station to affiliate with a network that maintains more than one broadcast network, unless the dual or multiple networks are created by a combination between ABC, CBS, Fox, or NBC.

[8] *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (*"Fox Television"*), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002) (*"Fox Television Re-Hearing"*), addressed the national TV ownership rule. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) (*"Sinclair"*), rehearing denied Aug. 13, 2002, addressed the local TV ownership rule.

[9] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, MM Docket No. 01-317, *Definition of Radio Markets*, 16 FCC Rcd 19861 (2001) (*"Local Radio Ownership NPRM"*). Comments and replies in this proceeding were due, respectively, on March 27, 2002 and May 8, 2002.

[10] *Cross-Ownership of Broadcast Stations and Newspapers*, MM Docket No. 01-235, *Newspaper/Radio Cross-Ownership Waiver Policy*, MM Docket No. 96-197, Order and Notice of Proposed Rule Making, 16 FCC Rcd 17283 (2001) (*"Newspaper/Broadcast Cross-Ownership NPRM"*). Comments and replies in this proceeding were due, respectively, on December 3, 2001 and February 15, 2002.

[11] 47 C.F.R. § 73.3555(a). The rule was amended to comply with Section 202(b) of the 1996 Act.

[12] 47 C.F.R. § 73.3555(d).

[13] We do not contemplate a change in the broadcast attribution rules, except to the extent that the single majority shareholder exemption is under consideration in the cable proceeding. *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, CS Docket No. 98-82, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17,312 (2001). We note in this regard that the attribution rules do not themselves prohibit or restrict ownership of interests in any entity, but rather determine what interests are cognizable under those ownership rules. Furthermore, the focus of the biennial review process is whether the ownership rules "are necessary in the public interest as the result of competition." The media attribution limits are set at the level the Commission believes conveys influence over the affairs of the company in which the interest is held. This level is not related to any changes in competitive forces, and hence the limits are not reviewed on a biennial basis.

rule,[14] the local TV ownership rule,[15] the radio/TV cross-ownership rule,[16] and local radio ownership rule,[17] are interrelated. Each is intended to foster competition and diversity in the local media marketplace. As a result, it is appropriate for the Commission to consider these rules collectively, as any change to one rule may affect the need for other rules to be retained, modified, or eliminated. In addition, by evaluating our local ownership rules collectively, we facilitate consistent analysis of policy questions that are common to multiple rules. For example, all of our local rules are predicated to some extent on assumptions about the types of media that Americans rely on for news and current affairs. We are better able to analyze and apply our findings in areas such as these by considering the rules collectively rather than separately. Assessing these rules collectively also avoids the problem in sequential decision making whereby early decisions can inadvertently predetermine -- or preclude certain approaches in -- later decisions.

II. LEGAL FRAMEWORK FOR BIENNIAL OWNERSHIP REVIEW

9. Section 202(h) of the 1996 Act provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[18]

10. The 1996 Act repealed the prohibition on common ownership of cable and telephone systems,[19] overrode the few remaining regulatory limits upon cable/network cross-ownership,[20] eliminated the national and relaxed the local restrictions upon radio ownership,[21] eased the "dual network" rule for television,[22] and directed the Commission to eliminate the cap upon the number of television stations any one entity may own[23] and to increase to 35 from 25 the maximum percentage of American households a single TV broadcaster may reach.[24] These enactments, together with section

[14] 47 C.F.R. § 73.3555(d).

[15] 47 C.F.R. § 73.3555(b).

[16] 47 C.F.R. § 73.3555(c).

[17] 47 C.F.R. § 73.3555(a).

[18] 1996 Act, § 202(h). Section 11 of the Communications Act of 1934, as amended ("the 1934 Act"), provides for the biennial review of regulations that apply to the operations or activities of any provider of telecommunications services. Pursuant to section 11, the Commission "shall determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition." Section 11 further requires that the Commission "shall repeal or modify any regulation it determines to be no longer necessary in the public interest." 47 U.S.C. § 161.

[19] The 1996 Act repealed former § 613(b), which prohibited a common carrier from providing video programming directly to subscribers in its telephone service area. *See* 1996 Act, § 302(b)(1). Section 652 of the Act (47 U.S.C. § 572) now contains the prohibition of buyouts vis-a-vis cable systems and local exchange carriers.

[20] 1996 Act, § 202(f)(1).

[21] 1996 Act, §202(a), (b).

[22] 1996 Act, §202(e).

[23] 1996 Act, §202(c)(1)(A).

[24] 1996 Act, §202(c)(1)(B).

202(h), "set in motion a process to deregulate the structure of the broadcast and cable television industries" as both competition and diversity among media voices increase.[25]

11. This is our third biennial review. As a result of the 1998 biennial review proceeding, the first review, the Commission relaxed the dual network rule,[26] eliminated the experimental broadcast station multiple ownership rule,[27] and initiated a proceeding with respect to the newspaper/broadcast cross-ownership rule.[28] The Commission decided to retain the local radio ownership rule,[29] the national TV ownership rule (including the UHF discount),[30] and the cable/broadcast cross-ownership rule.[31] Prior to completing the 1998 biennial review, the Commission had substantially relaxed the local TV ownership and radio/TV cross-ownership rules in the separate local television ownership proceeding.[32] In the 2000 biennial review proceeding, a Commission-wide comprehensive proceeding, the Commission endorsed the results of the 1998 biennial review of its broadcast ownership rules.[33]

12. Court Decisions Reviewing 1998 Biennial Review. The Commission's decisions in the *1998 Biennial Report* relating to the cable/broadcast cross-ownership rule and the national TV ownership rule were challenged in the United States Court of Appeals for the District of Columbia Circuit.[34] In *Fox Television*, the court vacated the cable/broadcast cross-ownership rule, and remanded the decision to retain the national TV ownership rule, holding that the Commission's decision to retain these rules was arbitrary and capricious and contrary to section 202(h) of the 1996 Act.[35] The court stated that the Commission had "no valid reason to think the [national TV ownership rule] is necessary to safeguard competition"[36] or "to advance diversity"[37] and had given no reason to depart from the conclusion the Commission had reached in 1984 that the rule was no longer necessary.[38] The court observed that the Commission had provided no analysis of the state of competition in the television industry to justify its decision to retain the national TV ownership rule. In addition, the court faulted the Commission's decision to retain the national TV ownership rule while it observed the effects of changes in the local TV

[25] *Fox Television*, 280 F.3d at 1033.

[26] *Amendment of Section 73.658(G) of the Commission's Rules – The Dual Network Rule,* 16 FCC Rcd 11114, 11131 (2001) ¶ 37 ("*Dual Network Order*").

[27] *Elimination of Experimental Broadcast Ownership Restrictions*, 16 FCC Rcd 7457 (2001).

[28] *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 15 FCC Rcd 11058, 11099-109 (2000) ¶¶ 79-95 ("*1998 Biennial Report*"); *Newspaper/Broadcast Cross-Ownership NPRM, supra* note 10.

[29] 47 C.F.R. § 73.3555(a); *1998 Biennial Report*, 15 FCC Rcd at 11086-87, ¶ 50.

[30] 47 C.F.R. § 73.3555(e); *1998 Biennial Report*, 15 FCC Rcd at 11072, 11078, ¶¶ 25, 35.

[31] 47 C.F.R. § 76.501(a); *1998 Biennial Report*, 15 FCC Rcd at 11114, ¶ 102. As discussed below, the cable/broadcast cross-ownership rule has been vacated by the Court of Appeals in *Fox Television*. The Commission will implement the court's order in a separate order.

[32] *See Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903 (1999) ("*Local TV Ownership Report and Order*"), *clarified in* Memorandum Opinion and Second Order on Reconsideration, 16 FCC Rcd 1067 (2001) ("*Local TV Ownership Reconsideration Order*"), *on appeal, Sinclair, supra* note 8.

[33] *Biennial Regulatory Review 2000,* 16 FCC Rcd 1207 (2001).

[34] *Fox Television, supra* note 8.

[35] *Fox Television,* 280 F.3d at 1048, 1053.

[36] *Id.* at 1042.

[37] *Id* at 1043.

[38] *Id.* at 1043-45.

ownership rule. The court concluded that this "wait-and-see" approach could not be squared with section 202(h), which "carries with it a presumption in favor of repeal or modification of ownership rules."[39]

13. In retaining the national TV ownership rule, the Commission, in part, reasoned that the rule was necessary to strengthen the bargaining power of the network affiliates, thereby promoting localism and diversity. Although the court in *Fox Television* rejected the networks' argument that this justification was inconsistent with the requirements of section 202(h), the court determined that the Commission's reliance on this justification was invalid because it did not have sufficient record support. In particular, the court held that the Commission had failed to justify its departure from the *1984 Multiple Ownership Order*, where the Commission said it "had no evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming."[40] Nonetheless, the court held that the Commission could conceivably distinguish -- as incorrect or inapplicable because of changed circumstances – its views in the *1984 Multiple Ownership Order*. The court also noted that the Commission did advert to possible competitive problems in the national markets for advertising and program production, and that the intervenors, including the National Association of Broadcasters and National Affiliated Stations Alliance, made a plausible argument that the national television ownership rule furthers competition in the national television advertising market.[41]

14. Based on these findings, the court remanded for further consideration the issue of whether to repeal or modify the national TV ownership rule, holding that "the probability that the Commission will be able to justify retaining the Rule is sufficiently high that vacatur of the Rule is not appropriate."[42] The court also held that the Commission's decision to retain the national TV ownership rule did not violate the First Amendment, reaffirming that the review of broadcast regulations under First Amendment jurisprudence is more deferential than review of cable or print media regulations.[43] The court also rejected the networks' claim that section 202(h) does not allow the Commission to regulate broadcast ownership in the interest of diversity alone. The court held that in the context of broadcast regulation, the public interest has historically embraced both diversity and localism, that protecting diversity is a permissible policy for the agency to seek to advance, and that nothing in section 202(h) indicated that Congress had departed from that approach.[44] The court then held that whatever the virtues may be of a free market in television stations, "Congress may, in the regulation of broadcasting, constitutionally pursue values other than efficiency -- including in particular diversity in programming, for which diversity of ownership is perhaps an aspirational but surely not an irrational proxy."[45]

15. The court also, in *Fox Television*, vacated the cable/broadcast cross-ownership rule, finding that the Commission had failed to justify its retention of the rule as necessary to safeguard competition. In the *1998 Biennial Report*, the Commission attempted to justify the retention of the rule by arguing that a cable operator that also owns a broadcast station has the incentive to discriminate against other broadcasters by: (1) offering joint advertising sales and promotions, and (2) not carrying, or carrying on undesirable channels, broadcast signals of competing stations. The court found that the

[39] *Id.*, 280 F.3d at 1042, 1048.

[40] *Fox Television*, 280 F.3d at 1043, *quoting Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 17, 35 (1984) ¶ 53 ("*1984 Multiple Ownership Order*").

[41] *Fox Television*, 280 F.3d at 1048-49.

[42] *Id* at 1049.

[43] *Id.* at 1047.

[44] *Id.* at 1042.

[45] *Id.* at 1047.

Commission had not shown a substantial enough probability of discrimination to deem reasonable a broad cross-ownership rule, especially in light of: (1) existing conduct rules, such as must-carry, ensuring access to cable systems, and (2) competition from DBS providers, which would make discrimination against competing broadcasters unprofitable. Further, the court found that the Commission had failed to justify its departure from a 1992 Report and Order,[46] in which it had concluded that the rule was not necessary to prevent carriage discrimination. The court also found that the Commission had failed to justify the rule based on its diversity concerns. Based on its assessment that there was little chance that the Commission would be able to justify retaining the cable/broadcast-cross-ownership rule, and that the disruption caused by vacatur would be insubstantial, the court vacated the rule.[47]

16. With respect to the standard of review generally under section 202(h), the court noted, in the context of discussing the cable/broadcast cross-ownership rule, that the Commission had applied too lax a standard and that "[t]he statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest."[48] The Commission petitioned for rehearing as to this issue, arguing that the court's interpretation of the statutory language would impose a higher standard in deciding whether to retain a rule than that which applied to the adoption of the rule in the first place. On rehearing, the court deleted the paragraph in its earlier opinion holding the Commission to a higher "necessary" standard in biennial review proceedings, finding that the cable/broadcast cross-ownership rule could not pass muster even under the more relaxed "consonance" standard and that determining the applicability of a stricter standard of review therefore was not necessary. The court decided to leave "unresolved precisely what section 202(h) means when it instructs the Commission first to determine whether a rule is 'necessary in the public interest' but then to 'repeal or modify' the rule if it is simply 'no longer in the public interest.'"[49]

17. In *Sinclair Broadcast Group, Inc. v. FCC*,[50] the court reviewed the Commission's decision relaxing the local TV ownership rule.[51] That rule allows the combination of two television stations in the same market if: (1) the Grade B contours of the stations do not overlap, or (2) (a) one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and non-commercial television stations, or "voices," would remain in that market after the combination.[52] Under the rule, voices are defined to include only broadcast television stations in the market.[53] In *Sinclair*, the court held that the Commission "adequately explained how the [local TV ownership rule] furthers diversity at the local level and is necessary in the 'public interest' under § 202(h) of the 1996 Act."[54] The court also upheld the local TV

[46] *Amendment of Part 76, Subpart J, Section 76.501 of the Commission's Rules and Regulations to Eliminate the Prohibition on Common Ownership of Cable Television Systems and National Television Networks,* 7 FCC Rcd 6156 (1992).

[47] *Fox Television*, 280 F.3d at 1053.

[48] *Id.* at 1050.

[49] *Fox Television Re-Hearing*, 293 F.3d at 540. The court also rejected the petitions for rehearing of intervenors National Affiliated Stations Alliance and National Association of Broadcasters, which argued that the court erred in failing to defer to the decision of Congress to set the national TV ownership rule at 35% and in vacating rather than remanding the cable/broadcast cross-ownership rule. *Id.* at 540-41.

[50] *See supra* note 8.

[51] In *Sinclair*, the court reviewed challenges to the local TV ownership rule as well as to grandfathering provisions related to local marketing agreements.

[52] 47 C.F.R. § 73.3555(b)(2)(i).

[53] *Id.* at § 73.3555(b)(2)(ii).

[54] *Sinclair*, 284 F.3d at 160.

ownership rule against a First Amendment challenge, applying the "rational-basis" standard of review.[55] The court held that there was a rational relationship between the *Local TV Ownership Report and Order* and our diversity and competition goals. The court noted that choosing the number eight and defining voices "are quintessentially matters of line drawing invoking the Commission's expertise in projecting market results," and did not decide the issue of whether eight is the appropriate numerical limit. The court invalidated, however, the Commission's definition of voices under the rule because it did not adequately explain its decision to include only broadcast television stations as voices. The court pointed out that the definition was inconsistent with the definition of voices for the radio/TV cross-ownership rule,[56] which also considers major newspapers and cable television to be voices. The court observed that "[o]n remand, the Commission conceivably may determine to adjust not only the definition of 'voices' but also the numerical limit."[57]

18. We seek comment on the statutory language of section 202(h) of the 1996 Act and the court's interpretations of that language in *Fox Television* and *Sinclair*. We specifically invite comment on the standard we should apply in determining whether to modify, repeal, or retain our rules under section 202(h) of the 1996 Act. For example, does the phrase, "necessary in the public interest," mean we must repeal a rule unless we find it to be indispensable? Or does the phrase mean that we can retain a rule if we would be justified under the current circumstances in adopting it in the first instance because the record shows that it serves the public interest? Or is the standard somewhere in between? The Commission argued in its rehearing petition in *Fox Television* that "necessary in the public interest," when viewed in the context of the rest of the 1934 and 1996 Acts, means "in the public interest," or useful or appropriate.[58] The very next sentence of the statute uses the term "no longer in the public interest," thus appearing to equate a rule's being "necessary in the public interest" with its being "in the public interest." The Commission argued that other provisions of the Communications Act contain similar language using the terms, "necessary," "required," and "necessity," but those provisions have been construed to require the Commission to demonstrate that the rules we adopt advance legitimate regulatory objectives, not that they are necessary in the sense of being indispensable. Others might argue, however, that "necessary in the public interest" connotes that a rule must be essential or indispensable in order for us to retain it.[59] What light do the statutory context and other case law cast on the meaning of the term? We invite comment on any other factors we should consider with respect to the meaning of the statutory term "necessary in the public interest" as it bears on our review of the ownership rules at issue in this proceeding.

19. In both *Fox Television* and *Sinclair*, the court, noting that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules,"[60] faulted the Commission's justification of its rules as lacking supporting factual evidence.[61] Accordingly, with respect to the rules under consideration, we strongly encourage commenters to provide empirical evidence to buttress their assertions. Our Media Ownership Working Group is engaged in a number of studies that are intended to

[55] *Id.* at 167-69 ("the only question is whether the *Local TV Ownership Report and Order* is rationally connected to its goals of ensuring a diversity of voices and adequate competition in television broadcasting").

[56] 47 C.F.R. § 73.3555(c)(iii, iv).

[57] *Sinclair*, 284 F.3d at 162.

[58] Commission Petition for Rehearing or Rehearing En Banc at 4-13, filed Apr. 19, 2002, in *Fox Television*, *supra* note 8.

[59] *Cf. Fox Television*, 280 F.3d at 1048.

[60] *Fox Television*, 280 F.3d at 1048; *Sinclair*, 284 F.3d at 159.

[61] *Fox Television*, 280 F.3d at 1041-44; *Sinclair*, 284 F.3d at 163 (pointing to an "evidentiary gap" in the Commission's reasoning).

inform the 2002 biennial review. These studies, which will be released separately for comment, concern the following subjects: (1) inter-media substitutability among local media outlets from the perspective of local advertisers; (2) the effect of broadcast media concentration on the level of non-advertising content produced and consumed; (3) the status of broadcast television in the multichannel marketplace; (4) a comparison of local news quantity and quality on network-owned stations and network affiliates; (5) past consumer substitution patterns across various media; (6) the effect of common ownership of same-market newspapers and television stations on news coverage; (7) a survey of American consumers regarding outlets used for news and current affairs; (8) an examination of program diversity on prime time network television between 1966 and 2002; (9) a survey of changes in the availability of media outlets over time in ten select cities; and (10) the effect of local radio market concentration on program diversity and advertising prices. Given the importance of this data to the proceeding, and in order to streamline the review process, comments will be due 60 days after Commission release of the studies; reply comments will be due 90 days after release of the studies. We intend to use the evidence collected in the studies, as well as the comments, to guide and support our decisions in this proceeding.

20. The First Amendment. Any media ownership rules we ultimately adopt in this proceeding must be consistent not only with the legal standard of section 202(h), but also with the First Amendment rights of the affected media companies and of consumers. The *Fox Television* and *Sinclair* cases recently applied the rational-basis standard to broadcast ownership rules.[62] The court held in *Fox Television* that the Commission's decision to retain the national TV ownership rule did not violate the First Amendment,[63] and it held in *Sinclair* that the local TV ownership rule complies with the First Amendment.[64] The court reaffirmed in both cases that the rational-basis standard of First Amendment scrutiny is applicable to broadcast television rather than the higher intermediate scrutiny applicable to cable operators or the strict scrutiny applicable to print media.[65] As the court noted in *Sinclair*, there is no unabridgeable First Amendment right to hold a broadcast license when a would-be broadcaster does not satisfy the public interest by meeting the Commission criteria for licensing, including ownership limitations.[66]

21. In general, ownership limits on cable operators have been subject to the *O'Brien*,[67] or intermediate scrutiny, test.[68] Under this standard, government regulation of speech will be upheld only if: (1) it furthers an important or substantial governmental interest; (2) the government interest is unrelated to the suppression of free expression; and (3) the incidental restriction on alleged First Amendment

[62] In the *1998 Biennial Report*, the Commission did apply the *O'Brien* or intermediate scrutiny test to the newspaper/broadcast cross-ownership rule, 15 FCC Rcd at 11121, ¶¶ 116-18 (applying *United States v. O'Brien*, 391 U.S. 367 (1968) ("*O'Brien*")). Also, in considering the application of the First Amendment to the newspaper/broadcast cross-ownership rule, in the *Newspaper/Broadcast NPRM*, supra note 10, which was released before the *Fox Television* and *Sinclair* cases, we asked about the significance of *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.), *cert. denied*, 122 S. Ct. 644 (2001) ("*Time Warner II*"), in which intermediate scrutiny was applied to cable regulations. *Newspaper/Radio Cross-Ownership NPRM*, 16 FCC Rcd at 17296-97, ¶¶ 31-33.

[63] *Fox Television*, 280 F.3d at 1045-47.

[64] *Sinclair*, 284 F.2d at 166-69.

[65] *Id.* at 167-68; *Fox Television*, 280 F.3d at 1045-46.

[66] *Sinclair*, 284 F.3d at 168 (citing *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 795-97 (1978)("*NCCB*")).

[67] *See* supra note 62.

[68] *Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1316-22 (D.C. Cir. 2000) ("*Time Warner I*"), *cert. denied*, 121 S. Ct. 1167 (2001); *Satellite Broadcasting & Commun. Ass'n v. FCC*, 275 F.3d 337, 346, 355 (4th Cir. 2001), *cert. denied*, 122 S. Ct. 2588 (2002).

freedoms is no greater than is essential to the furtherance of that interest.[69] The Supreme Court has determined that "promoting the widespread dissemination of information from a multiplicity of sources"[70] is a government interest that is not only important, but is of the "highest order"[71] and is unrelated to the suppression of free speech.[72]

22. Courts have consistently applied the rational-basis test when faced with First Amendment challenges to Commission ownership restrictions on broadcast media. This is true even when the ownership regulation effectively limits what a non-broadcast media firm, such as a newspaper or a cable company, can own.[73] In other words, when the rule prevents a newspaper from owning an in-market radio station, the courts do not apply the strict scrutiny test applicable to newspapers as newspapers, but rather the rational-basis test used for evaluating broadcast regulations. We will explore a variety of options for a new media ownership framework. We seek comment on the standard of review that would apply to these options.

III. THE MODERN MEDIA MARKETPLACE

23. Section 202(h) requires the Commission to consider whether any of its ownership rules are "necessary in the public interest *as a result of competition.*" As noted, the *Fox Television* court faulted the Commission for failing to provide any analysis of the state of competition in the television industry to justify its retention of the national TV ownership rule.[74] Therefore, our evaluation of the broadcast ownership rules must take into account the current status of competition in the media marketplace. Throughout this proceeding, we seek comment on how changes and developments in the media marketplace affect our analysis and decision making. For example, in Section IV we explore the definition of the product market and seek comment on whether the proliferation of programming outlets and services requires the Commission to redefine the product market to include media other than broadcasting. The data below provides a brief overview of the number of outlets and potential competitors in the video, audio, and newspaper industries. We seek comment on the significance of this data to our biennial review of the ownership rules as well as any other competitive data that would be useful to our analysis.

24. Video. There are currently over 106 million TV households in the U.S.[75] served by a variety of video outlets. Over-the-air outlets include: 1,331 commercial TV stations (752 UHF, 579 VHF); 381 non-commercial, educational TV stations (254 UHF, 127 VHF); 554 Class A TV stations (451 UHF, 103 VHF);[76] and, over 2,100 other low-power TV stations.[77] Over sixty percent of commercial TV

[69] *Turner Broadcasting System v. FCC*, 520 U.S. 180, 185-86 (1997) ("*Turner II*") (citing *O'Brien,* 391 U.S. at 377-78).

[70] *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 662 (1994) ("*Turner I*") (quotation marks omitted)).

[71] *Id.* at 663.

[72] *Id.* (citing *O'Brien*, 391 U.S., at 377); *Turner II*, 520 U.S. at 190. On the other hand, the Commission may not burden cable operators' speech with "illimitable restrictions in the name of diversity." *Time Warner II*, 240 F.3d at 1136. In *Time Warner II*, the D.C. Circuit held that the Commission could not rely on its diversity goal alone to support the horizontal and vertical restraints at issue in that case because of a specific limitation on the Commission's statutory authority for those restraints. *Time Warner II,* 240 F.3d at 1135-1136.

[73] *See, e.g., NCCB*, 436 U.S. at 798-802 (rational-basis test applied to broadcast-newspaper rule); *Fox Television*, 280 F.3d at 1045-46 (rational-basis test applied to television-cable cross-ownership ban).

[74] *Fox Television,* 480 F.3d at 1041-42.

[75] *U.S. Television Household Estimates*, Nielsen Media Research (Sept. 2002).

[76] A Class A television license is available to a low power television station licensee meeting the qualifications set forth in the Commission's rules in Part 73, Subpart J ("Class A Television Broadcast Stations"). A Class A station (continued....)

stations are affiliated with one of the top four networks (ABC, CBS, Fox and NBC). Another 19 percent are affiliated with the smaller national networks: United Paramount (UPN), Warner Brothers (WB), and Paxson Network.[78] The remaining commercial stations are affiliated with other smaller networks or are independents.

25. Cable TV is available to the vast majority of TV households in the U.S.[79] There are 69 million households that subscribe to cable.[80] There are over 230 national cable programming networks and more than 50 regional networks.[81] Many cable systems offer access channels for public affairs, educational and governmental ("PEG") programming and a few offer local cable news, educational and public affairs programming. Direct broadcast satellite ("DBS") is available nationwide and has over 18 million subscribers.[82] In addition to the national cable programming networks, DBS offers regional sports networks. DBS may also retransmit the signals of local and network affiliate television stations to subscribers in their local markets. DBS is also required to reserve not less than 4 percent of its channel capacity exclusively for noncommercial programming of an educational or informational nature. Other Multi-channel Video Program Distributors ("MVPDs") include: satellite master antenna systems (SMATV), with 1.5 million subscribers; home satellite dishes, which serve about 1 million homes; and multipoint distribution service (MDS), with about 700,000 subscribers.[83]

26. Audio. Over 13,260 radio stations are currently on the air (4,811 AM, 6,147 commercial FM and 2,303 educational FM).[84] The average radio market has 23 commercial stations. Of the 285 Arbitron radio markets, almost one-half of the markets are served by more than 20 stations and 90% of the markets are served by more than 10 stations.[85] In addition to broadcast radio, audio music, talk, and news channels are provided by many cable and DBS operators. Two Digital Audio Radio Service ("DARS") systems with over 140,000 subscribers offer almost 100 audio channels nationwide using satellite transmission.[86] Even more audio channels are available through Internet streaming.

27. Newspapers. In 2001, there were 1,468 daily newspapers in the U.S. The total circulation for those newspapers was about 56 million.[87] There were also about 7,700 weekly newspapers

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is subject to the same license terms and renewal standards as a full-power station, and is accorded primary status as long as it continues to meet the requirements for a qualifying low-power station.

[77] FCC Press Release, *Broadcast Station Totals as of June 30, 2002* (issued Aug. 26, 2002).

[78] BIA Financial Network Inc., MEDIA Access Pro data base (Mar. 2002).

[79] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, 1254-55 (2002) ¶ 17 ("*Eighth Annual MVPD Competition Report*") ("Based on data from Paul Kagan Associates, homes passed as a percentage of TV households was estimated to be 97.1 percent as of June 2001. ... [The National Rural Telecommunications Cooperative] suggests that the number of homes passed as a percentage of TV households could be as low as 81 percent."), 1330 App. B, Table B-1 (Kagan data showing that as of June 2001, cable television was subscribed to by 64% of homes that had at least one television).

[80] *Eighth Annual MVPD Competition Report,* 17 FCC Rcd at 1330, App. B, Table B-1.

[81] National Cable Telecommun. Ass'n, *Cable Developments 2002*, at 27-194.

[82] Sky Report, http://www.skyreport.com/dth_counts.htm (visited Sept. 10, 2002).

[83] *Eighth Annual MVPD Competition Report*, 17 FCC Rcd at 1338, App. C, Table C-1.

[84] FCC Press Release, *Broadcast Station Totals as of June 30, 2002* (Aug. 26, 2002).

[85] BIA Financial Network Inc., MEDIA Access Pro data base (May 2002).

[86] XM Satellite Radio, *Second Quarter Report* ending June 30, 2002, shows XM with 136,718 subscribers. Sirius Satellite Radio, *Second Quarter Report* ending June 30, 2002, shows Sirius with 3,347 subscribers.

[87] Newspaper Association of America, *Facts About Newspapers 2002*, at 14.

with a combined circulation of about 71 million.[88] Sunday newspaper circulation collectively reaches over 59 million per week.[89] Many of these newspapers are available over the Internet.

28. Internet and other media. Almost 60% of the U.S. population has Internet access at home.[90] Over 40 million residential Web users have accessed streaming video.[91] Also, about 90% of households have at least one VCR and more than one-half of those own at least two VCRs.[92] Over 14 million homes have DVD players.[93] Personal Video Recorders ("PVR") sales have reached 500,000 since they were introduced two years ago.[94]

IV. POLICY GOALS

29. Each of the rules under review in this proceeding seeks to further one or more of three important public interest goals -- diversity, competition and localism. The Commission long has embraced these values as the foundation of its ownership rules and policies. In this proceeding the Commission seeks to: (1) define more precisely the Commission's policy goals; (2) determine how to best promote these goals in today's media market consistent with our statutory mandate; (3) establish the best measure for diversity, competition, and localism; and (4) establish a balancing test to prioritize the goals if tension exists between them.

30. The courts have recognized the Commission's legitimate interest in promoting these policy goals through ownership limits.[95] Media ownership may be limited in order to promote the First Amendment interests of consumers of the electronic media and to promote diversity and competition.[96] The Court has upheld the Commission's predominant reliance on the diversity rationale to support its newspaper/broadcast cross-ownership policies.[97] In *Sinclair,* the Court of Appeals noted that ownership limits encourage diversity in the ownership of broadcast stations, which can in turn encourage a diversity of viewpoints in the material presented over the airwaves. The court added that diversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational basis review.[98] The interests that government may promote through content neutral rules also include competition – both the promotion of competition and the prevention of anti-competitive practices and results.

31. Section 202(h) requires the Commission to determine whether its ownership rules remain

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[88] *Id.* at 13.

[89] *Id.* at 14.

[90] *Id.* at 8.

[91] *Eighth Annual MVPD Competition Report*, 17 FCC Rcd at 1285-86, ¶ 89.

[92] *Id.* at 1288, ¶ 95.

[93] *Id.* 1288-89, ¶ 96.

[94] *Id.* 1290, ¶ 98.

[95] *NCCB*, 436 U.S. at 795-97; *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 571 at n.16 (1990), *overruled on other grounds, Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Sinclair*, 284 F.3d at 160; *Fox Television*, 280 F.3d at 1042, 1053.

[96] *Turner II,* 520 U.S. at 190 (quoting *Turner I,* 512 U.S. at 662-63 ("governmental purpose of the highest order in ensuring public access to a multiplicity of information sources); *Turner I,* 512 U.S. at 662 (this purpose is unrelated to the "suppression of free expression").

[97] *NCCB,* 436 U.S. at 797.

[98] *Sinclair,* 284 F.3d at 160.

necessary in the public interest as a result of competition. Therefore, we must first determine whether the marketplace provides a sufficient level of competition to protect and advance our policy goals. If not, we must determine whether the existing rules or revisions to those rules are required to protect and advance diversity, competition, and localism in the media marketplace.

32. The following paragraphs briefly discuss the Commission's policy goals and invite comment on each. We welcome the submission of any relevant empirical studies for quantifying benefits and harms, as well as comments based on well-established economic theory and empirical evidence. In that regard, we are especially interested in receiving comments that provide not only the theoretical justifications for adopting a particular regulatory framework, but also empirical data on the effect that competition and consolidation in the media industry have on our policy goals.

A. Diversity

33. Diversity is one of the guiding principles of the Commission's multiple ownership rules. It advances the values of the First Amendment, which, as the Supreme Court stated, "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[99] The Commission has elaborated on the Supreme Court's view, positing 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."[100]

34. The Commission has considered four aspects of diversity: viewpoint diversity, outlet diversity, source diversity, and program diversity.[101] Viewpoint diversity ensures that the public has access to "a wide range of diverse and antagonistic opinions and interpretations."[102] It attempts to increase the diversity of viewpoints ultimately received by the public by providing opportunities for varied groups, entities and individuals to participate in the different phases of the broadcast industry.[103] Outlet diversity is the control of media outlets by a variety of independent owners. Source diversity ensures that the public has access to information and programming from multiple content providers,[104] while program diversity refers to a variety of programming formats and content. Each of these components of diversity is described below.

35. Viewpoint Diversity. Viewpoint diversity has been the touchstone of the Commission's ownership rules and policies. We remain fully committed to preserving citizens' access to a diversity of viewpoints through the media.[105] The Supreme Court has stated that "it has long been a basic tenet of

[99] *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("*Associated Press*").

[100] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476, 1477 (1964) ¶ 3.

[101] *Local Radio Ownership NPRM*, 16 FCC Rcd at 19874, ¶ 30; *Report and Statement of Policy Re: Commission en banc Programming Inquiry* ("*1960 Programming Policy Statement*"), 44 F.C.C. 2303 (1960).

[102] *1998 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 13 FCC Rcd 11276, 11278 (1998) ("*1998 Biennial NOI*") ¶ 6.

[103] *Review of the Commission's Regulations Governing Television Broadcasting* ("*TV Ownership FNPRM*"), 10 FCC Rcd 3524, 3549 (1995) ¶ 60.

[104] *1998 Biennial NOI*, 13 FCC Rcd at 11278, ¶ 6. For example, if many stations create their broadcast news by gathering their news from the same information source, there is outlet diversity, but no source diversity.

[105] *See, e.g.*, *Turner I*, 512 U.S. at 663 ("[I]t has long been a basic tenet of national communications policy" that "the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public,"; (continued....)

national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[106] The diversity of viewpoints, by promoting an informed citizenry, is essential to a well-functioning democracy.[107] The principal means by which the Commission has fostered diversity of viewpoints is through the imposition of ownership restrictions.[108] In *Sinclair*, the Court of Appeals noted that ownership limits encourage diversity in the ownership of broadcast stations, which can in turn encourage a diversity of viewpoints in the material presented over the airwaves. The court added that diversity of ownership as a means to achieving viewpoint diversity has been found to serve a legitimate government interest, and has, in the past, been upheld under rational-basis review.[109]

36. Outlet Diversity. The control of media outlets by a variety of independent owners is referred to as "outlet diversity." Outlet diversity ensures that the public has access to multiple, independently-owned distribution channels (*e.g.*, radio, broadcast television, and newspapers) from which it can access information and programming. We have long assumed that diffusing ownership of outlets promotes a wide array of viewpoints. Thus outlet diversity was a key mechanism for promoting viewpoint diversity. In attempting to foster viewpoint diversity through structural regulation, our content-neutral method does not seek to evaluate the substance of any station's editorial decisions. Indeed, a major benefit of content-neutral structural regulation is that we avoid making inescapably subjective judgments about editorial decisions, viewpoints and content. Rather, we attempt only to preserve a sufficient number of independently owned outlets to increase the likelihood that independent viewpoints will be available in local markets. The Supreme Court has upheld the Commission's judgment that diversification of ownership enhances the possibility of achieving greater diversity of viewpoints.[110]

37. Source Diversity. A related concept is "source diversity," which refers to the availability of content to consumers from a variety of content producers. Source diversity ensures that the public has access to information and programming from multiple content providers and producers. A wide array of content producers can contribute both to viewpoint diversity (particularly where the content is news and public affairs programming) and program diversity. A number of government efforts, both past and present, have been aimed at promoting source diversity on mass media distribution platforms. Our efforts centered initially on broadcast television,[111] but have broadened in scope more recently to focus on

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47 U.S.C. § 257 (one of the "policies and purposes" of the Communications Act favors a "diversity of media voices"); *Fox Television*, 280 F.3d at 1042 (In the context of broadcasting, "the public interest" has historically embraced diversity").

[106] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663-64 (1994) (internal quotation marks omitted) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (plurality opinion) (quoting *Associated Press, supra note* 99)).

[107] *See* Richard D. Brown, *Early American Origins of the Information Age* in Alfred D. Chandler, Jr., and James W. Cortada, Eds., A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT (Oxford Univ. Press, New York NY, 2000) at 44-49 *passim* ("Because people widely believed that republican government required an informed citizenry, they scrambled to make sure that they, and often their neighbors, were properly informed.").

[108] *NCCB*, 436 U.S. at 795 (quoting *Associated Press*, *supra* note 99).

[109] *Sinclair*, 284 F.3d at 160 (Court upheld the Commission finding that "diversification of ownership would enhance the possibility of achieving greater diversity of viewpoint"); *see also Fox Television*, 280 F.3d at 1047 (not irrational to relate diversity of ownership to diversity of programming).

[110] *NCCB*, 436 U.S. at 796-97.

[111] *See, e.g., Review of the Prime Time Access Rules, Section 73.658(K) of the Commission's Rules*, 11 FCC Rcd 546 (1995) (repealing the Prime Time Access Rule, which generally prohibited network-affiliated television stations in the top 50 television markets from broadcasting more than three hours of network programs during prime time).

MVPDs such as cable operators and DBS service.[112]

38. Program Diversity. Program diversity refers to a variety of programming formats and content. Examples of program categories include formats such as dramas, situation comedies, reality television shows, and newsmagazines, as well as content, such as health, nature, foreign language/ethnic, and cooking. In 1960, when broadcast television was a more dominant mass communications medium in this country, we sought to promote program diversity through direct means.[113]

39. More than twenty years later, the Commission has indicated that markets may serve Americans' demand for diverse programming more effectively than government regulation.[114] In the *Dual Network Order*, the Commission allowed common ownership of a major broadcast network and an emerging broadcast network in part because "if two networks are owned by a single entity, the entity has an incentive to attract an array of viewers with differing interests to produce the largest combined audience for the overall enterprise. This allows for the major network to pursue programming suitable to mass tastes, with the smaller network programming to minority and niche tastes."[115]

40. Diversity Issues for Comment. We seek comment on several aspects of diversity, including how the specific terms should be defined. The airing of news and public affairs programming has traditionally been the focus of viewpoint diversity. We seek comment on whether we should consider non-traditional news programming as contributing to viewpoint diversity. For example, do "magazine shows" such as Sixty Minutes and "talk shows" such as Hardball contribute to viewpoint diversity as much as (or less or more than) straightforward news broadcasts?

41. Viewpoint diversity has been a central policy objective of the Commission's ownership rules. We seek comment on whether viewpoint diversity should continue to be a primary goal of the

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[112] 47 U.S.C. § 611 (carriage of public, educational and governmental programming), 47 U.S.C. § 612 (cable systems requires to lease channels to unaffiliated entities); 47 U.S.C. § 335 (DBS operators required to reserve four percent of their channel capacity exclusively for use by qualified programmers for noncommercial programming of an educational or informational nature); 47 U.S.C. § 533(f)(1)(B) (Commission required to "prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest").

[113] See, *e.g.*, *1960 Programming Policy Statement*, 44 F.C.C. at 2314:

> "[t]he major elements usually necessary to meet the public interest, needs, and desires of the community in which the station is located, . . . have included: (1) opportunity for local self-expression, (2) the development and use of local talent, (3) programs for children, (4) religious programs, (5) educational programs, (6) public affairs programs, (7) editorialization by licensees, (8) political broadcasts, (9) agricultural programs, (10) news programs, (11) weather and market reports, (12) sports programs, (13) service to minority groups, [and] (14) entertainment programs."

The 1960 Programming Policy Statement has not formally been superseded, but in recent decades the Commission has relied more on competition and marketplace mechanisms to determine the mix of programs available to viewers. See, *e.g.*, Erwin G. Krasnow & Jack N. Goodman, *The "Public Interest" Standard: The Search for the Holy Grail*, 50 FED. COMM. L.J. 605, 615-19 (describing the history of the *1960 Programming Policy Statement* and more recent decisions).

[114] *See, e.g.*, *FCC v. WNCN Listeners Guild*, 540 U.S. 582 (1981) (upholding, against challenges under the 1934 Act and the First Amendment, Commission policy that public interest is best served by promoting program diversity through market forces, and not by considering station formats in ruling on applications for license renewal or transfer); *Committee to Save WEAM v. FCC*, 808 F.2d 113, 117-18 (D.C. Cir. 1986) (finding that the Commission had reasonably articulated its policy).

[115] *Dual Network Order*, 16 FCC Rcd at 11131, ¶ 37 (footnote omitted).

Commission's decision-making. The Commission has not viewed source and outlet diversity as policy goals in and of themselves, but as proxies for viewpoint diversity.[116] Should the Commission continue to use source and outlet diversity as proxies to protect and advance viewpoint diversity? Or should each type of diversity be an explicit goal of the Commission's policymaking? Parties advocating that source and/or outlet diversity should be a goal of Commission ownership policies should address how priorities would be set among these types of diversity.

42. Once we define our diversity goal, we must then ask whether the marketplace will protect and advance diversity without regulatory requirements. As set forth in Section III, the current media marketplace appears robust in terms of the aggregate number of media outlets. Consumers generally have access to news, public affairs, and entertainment programming from a variety of media outlets – broadcast, cable, satellite, newspapers and the Internet. What has been the effect of this proliferation of new media outlets on the Commission's diversity goals? What effects, if any, do these outlets have on our objective of promoting diversity and the means by which we can best achieve those goals? How should these or other outlets be considered for the purposes of analyzing viewpoint diversity? Are there unique attributes of broadcasting that should lead us to define and measure diversity without reference to other media? Commenters should provide empirical data on consumer substitutability among the various media outlets or programs.

43. In considering these questions, we are particularly interested in the actual experience of the media industry. Has consolidation in local markets led to less or greater diversity? Commenters are encouraged to submit empirical data and analysis demonstrating both the change (either decrease or increase) in diversity levels and the causal link, as opposed to mere correlation, between those changes and greater consolidation in local markets. Evidence comparing the levels of diversity in local communities with different levels of media concentration would be especially useful.

44. If the market alone does not satisfy the Commission's goal of protecting and advancing viewpoint diversity, we must then consider the appropriate regulatory framework for achieving that goal. Traditionally, the Commission has focused on the number of independent owners on the theory that a larger number of owners would help provide greater viewpoint diversity. Commission policy presumes that multiple owners are more likely to provide "divergent viewpoints on controversial issues," which the Commission has stated is "essential to democracy."[117] We invite comment as to this policy. Although

[116] *TV Ownership FNPRM*, 10 FCC Rcd at 3549-50, ¶ 61 ("The indirect technique for encouraging viewpoint diversity (*i.e.*, structural rules) fosters two other kinds of diversity that the Commission has regarded as integral to the ultimate goal of providing the public with a variety of viewpoints. First, certain of the Commission's structural rules, such as the ownership limits, promote 'outlet' diversity, which refers to a variety of delivery services (*e.g.*, broadcast stations) that select and present programming directly to the public. Second, other Commission behavioral rules, such as the Prime Time Access Rule and the Financial Interest and Syndication Rule, were designed to foster 'source' diversity, which refers to ensuring a variety of program producers and owners. The Commission has felt that without a diversity of outlets, there would be no real viewpoint diversity -- if all programming passed through the same filter, the material and views presented to the public would not be diverse. Similarly, the Commission has felt that without diversity of sources, the variety of views would necessarily be circumscribed.") *followed in Amendment of Section 73.658(G) of the Commission's Rules – The Dual Network Rule* ("*Dual Network NPRM*"), 15 FCC Rcd 11253, 11265 n.37 (2000) ("Both outlet and source diversity provide the means for promoting viewpoint diversity. Outlet diversity refers to a variety of delivery services (*e.g.*, broadcast stations) that select and present programming directly to the public; source diversity refers to a variety of program producers and owners. Both outlet and source diversity are integral to the ultimate goal of providing the public with a variety of viewpoints . . .") (internal quotation marks and citations omitted) and *Local TV Ownership Report and Order*, 14 FCC Rcd at 12910-11 n.29 (1999) ¶ 17.

[117] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19877 (2001) ¶ 37, quoting *Amendment of Sections 73.34, 73.240 and 73.636 of the Commission's Rules* (continued....)

courts have affirmed the Commission's ability to limit ownership in pursuit of a diversity of viewpoints,[118] they recently have required that we demonstrate a close connection between the ownership rules and diversity.[119] Therefore, we must examine whether ownership limits are in fact necessary to promote diversity in the media. If we are to maintain ownership limits predicated on preserving diversity, we must inquire into whether our traditional theory of diffused ownership policy is in fact more likely to preserve diversity than a policy that relies on market forces or other measures to foster diversity.

45. If the Commission continues to rely on an independent voice test as a measure for ensuring the appropriate level of diversity, what media outlets or programming services should be included in the independent voice test? For example, should we include cable or DBS? Should commonly-owned media outlets be considered a single media "voice" in evaluating diversity? Should cable television count as one voice because the cable operator exercises editorial control over the content that is distributed over that platform? Or should the Commission look to the number of independent programming entities as separate and distinct voices?

46. What other measures of diversity, quantitative or qualitative, should we consider, and what tools do we have to measure diversity with a reasonable degree of accuracy? Are audience demographics an appropriate measure of diversity? Is competition an appropriate proxy for diversity, such that the presence of a competitive local market will assuage our concerns about diversity? Should we take ratings figures or other measures of consumer usage into account in measuring diversity, and if so, how? In considering the various potential ways to measure diversity, we seek comment on how their use comports with the values and principles embodied in the First Amendment.

47. We also must consider the appropriate geographic area over which to measure diversity. Although radio ownership restrictions are limited to the local market, television ownership is restricted both on the local level and nationally. Does the appropriate geographic area for measuring diversity differ based on whether the programming is local or national in nature? Should the appropriate geographic area for measuring diversity be the same as the relevant geographic market for competition purposes?

48. We also seek comment on whether the level of diversity that the public enjoys varies among different demographic or income groups. Although access to broadcasting services is available to all individuals in a community with the appropriate receiving equipment, access to other forms of media typically requires the user to incur a recurring charge, generally in the form of a subscription fee. Does this or any other differences between broadcasting and other media reduce the level of diversity that certain demographic or income groups enjoy? Does the fact that 86% of American households pay for television impact this analysis? What is the extent of any disparity in access to diversity, and how should we factor in that disparity in our diversity analysis?

49. Would one or more kinds of diversity be better promoted by alternatives to structural regulation, such as behavioral requirements? We invite comment on whether we should promulgate behavioral regulations. What, if any, behavioral requirements should be imposed and how should they be administered? How is diversity served, if at all, by existing behavioral rules such as those that require

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Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, 50 F.C.C. 2d 1046, 1074 (1975) at ¶ 99.

[118] *See, e.g., NCCB,* 436 U.S. at 796-97 (holding that the Commission, in limiting the common ownership of newspapers and broadcast stations in the same community, "acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints").

[119] *See Fox Television,* 280 F.3d at 1041-44; *Sinclair,* 284 F.3d at 163.

broadcasters to provide political candidates access to their facilities under certain conditions,[120] or those that require cable systems to set aside channel capacity for certain uses (*e.g.*, PEG, leased access)?[121] What kind of programs and content contribute to viewpoint diversity?

50. In addition to seeking to foster the policy goals discussed above, the Commission has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses.[122] In the context of this comprehensive review of our ownership rules, we invite comment on whether we should consider such diverse ownership as a goal in this proceeding. If so, how should we accommodate or seek to foster that goal? In addition, we invite comment as to our legal authority to adopt measures to foster that goal.[123]

B. Competition

51. Competition is the second principle underlying the Commission's local ownership rules and policies. In this proceeding, we seek to: (1) define the Commission's competition policy goal; (2) determine whether the market alone can achieve that goal; and if not, (3) establish the appropriate regulatory framework to protect and advance a competitive media market.

52. We must first consider the Commission's underlying policy objectives in examining competition. The Commission has relied on the principle that competitive markets best serve the public because such markets generally result in lower prices, higher output, more choices for buyers, and more technological progress than markets that are less competitive.[124] In general, the intensity of competition in a given market is directly related to the number of independent firms that compete for the patronage of consumers. We seek comment on how the Commission should define our competition policy goal. In

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[120] 47 U.S.C. § 312(a)(7) (authorizing the Commission to revoke a broadcaster's license for failure to provide legally qualified candidates for federal office access to its facilities); 47 U.S.C. § 315(a) (requiring a licensee to provide equal opportunities to all legally qualified candidates for a political office to use its facilities).

[121] *See, e.g.*, 47 U.S.C. § 531 (local franchise authority may require cable company to provide one or more channels for PEG use).

[122] When the Commission awarded broadcasting licenses by comparative hearing, it awarded applicants a "minority enhancement credit" for their minority origin. *See, e.g.*, *Rivertown Commun. Co.*, 8 FCC Rcd 7928, 7938 (ALJ 1993) ¶ 110. In 1984, when the Commission established a 12 TV station limit, it also established a minority "bubble," which increased the limit to 14 for minorities. Persons acquiring cognizable interests in minority owned and controlled broadcast stations were also entitled to this higher limit, and the aggregate reach of TV stations was raised to 30% of the national audience, provided that at least 5% of that reach was contributed by minority controlled stations. *Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 F.C.C.2d 74, 94-95, 97-98 (1985) ¶¶ 45, 53 ("*1985 Multiple Ownership Reconsideration Order*"). Also, the Commission has given tax certificates, which are a preferential tax treatment available upon the sale of broadcast stations and cable systems to minorities. *See, e.g.*, Office of the Chairman, *Studies Indicate Need to Promote Wireless & Broadcast License Ownership by Small, Women- and Minority-Owned Businesses,* Press Release, Dec. 12, 2000, available at 2000 WL 1808326 (F.C.C.). Finally, the Commission has applied a "distress sale policy," permitting a licensee whose license has been designated for revocation hearing, or whose renewal application has been designated for hearing on basic qualifications issues, to assign its license prior to commencement of the hearing to a minority controlled entity. *Martin W. Hoffman,* 15 FCC Rcd 22086, 22087 (2000) ¶3.

[123] *See Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995); *MD/DC/DE Broadcasters Ass'n v. FCC*, 236 F.3d 13, *rehearing denied*, 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002); *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, *rehearing denied*, 154 F.3d 487, *rehearing en banc denied*, 154 F.3d 494 (D.C. Cir. 1998).

[124] *See* F. M. Scherer and David Ross, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE*, (3d ed.) at 19-28 (Houghton Mifflin Co., Boston MA, 1990).

addition to the diversity component of our public interest analysis, should the Commission specifically analyze the competitive nature of the market? Or should we rely on the diversity component of our analysis such that a certain level of diversity would alleviate our competition concerns? Additionally, as discussed below, we seek comment on the various types of competition (*i.e.*, competition for viewers/listeners or advertisers) and the appropriate standards and measures to be used.

53. Once we define our competition policy goal, we must then determine whether the market will protect and advance competition without regulatory requirements. As set forth in Section III, the current media market appears robust in terms of the aggregate number of outlets. Today, broadcasters operate in an increasingly crowded and dynamic media market. During the past twenty years, the broadcast television industry has faced increasing competition both from additional television stations and from other video delivery systems. The number of full-power television stations has increased 68% since 1980, from 1,000 to almost 1,700,[125] and the number of broadcast networks has grown from three to seven. During that same period, there has been an enormous increase in the supply of non-broadcast video programming available to Americans. Cable television and DBS carry dozens, and often hundreds, of channels and have taken significant market share from broadcast TV stations.[126] Furthermore, Americans have demonstrated an increased willingness to pay for information and programming. Cable television and other MVPDs, including DBS, have reached an 86.4% penetration rate in American homes.

54. What has been the effect of this proliferation of new media outlets on the Commission's competition goals? What effects, if any, do these outlets have on our objective to promote competition and the means by which we can best achieve this goal? How should these and other outlets be considered for the purposes of analyzing competition? Are there unique attributes of broadcasting that should lead us to define and measure competition without reference to other media?

55. If the market alone does not satisfy the Commission's goal of protecting and advancing competition, we must then consider the appropriate regulatory framework for achieving that goal. The Commission has traditionally relied on structural ownership rules, which focus on the number of independent owners, on the theory that a larger number of owners would enhance competition. While our local ownership rules were based largely on preserving viewpoint diversity, the Commission also found that these rules would serve the public interest by preventing broadcasters from "dominat[ing] television and radio markets and wielding power to the detriment of small owners, advertisers, and the public interest."[127] Are structural ownership limits the best means to promote competition in the media? If we are to maintain ownership limits predicated on preserving competition, is our traditional theory of diffused ownership policy more likely to preserve competition than a policy that relies on market forces or other measures to foster competition?

56. If we determine that a competition analysis is necessary, we must define the relevant product and geographic markets in which broadcast TV and radio stations compete, as well as the market share of the participants within the relevant market, and then weigh the benefits of consolidation against the harms to consumers. For example, although ownership consolidation can produce efficiencies that result in stronger stations and improved services to the public, excessive concentration may reduce

[125] *Compare Revision of Radio Rules and Policies,* MM Docket No. 91-140, Report and Order, 7 FCC Rcd 2755, 2758 (1992) ¶ 5 *with* Commission Press Release, http://www.fcc.gov/Bureaus/MassMedia/News_Releases/2001/nrmm0112.txt, visited July 31, 2002.

[126] Nielsen Media Research reports that the broadcast television networks' share of the national audience slid to 50.1% in May 2002 from 85% in 1981, while cable networks' share has increased to 46.0%. Nielsen's numbers for May 2002 are reported in Allison Romano, *Nibbling Away at Broadcast*, BROADCASTING & CABLE (June 3, 2002) at 11. The figure for 1981 is from Nielsen Media Research, *Primetime Network Rating and Shares* (Apr. 17, 2001).

[127] *1984 Multiple Ownership Order,* 100 F.C.C. at 38, ¶ 64.

competition for viewers/listeners and lessen incentives to innovate and improve services to the public.

57. We must first determine the relevant product markets. Generally, broadcast stations compete to attract viewers/listeners and advertising dollars, and they compete as buyers of programming. In past examinations of our ownership rules, we have focused on the program delivery market, the advertising market, and the program production market. These individual product markets vary in significance depending upon the particular rule under examination. In addition, these product markets are interrelated, since advertising revenue is often used to finance program acquisition, which in turn helps to attract viewers/listeners, which then enables media owners to charge advertisers. We have not, however, resolved the issue of the relative weights we should accord each of these product markets for purposes of our competition analysis.[128] We seek comment on whether our competition analysis should focus on competition for advertising revenue, competition for viewers/listeners, a combination of the two, competition for programming, or some other factor.

58. We first address the delivered programming market. Viewers/listeners seeking delivered programming may choose among various providers, including broadcasters, cable systems, DBS, and DARS. Viewers/listeners, however, may also obtain programming from videos, DVDs, CDs, and the Internet. Viewers/listeners may also attend movie theaters, stage theaters, and music concerts. While the Commission previously concluded that delivered video programming could be a relevant market, we seek comment on whether the relevant market should be broader. The answer depends on the degree of substitutability between delivered programming and these other options. Do viewers/listeners consider these other options to be good substitutes for delivered programming? Commenters are encouraged to produce studies and empirical data to support their views regarding the relevant product market. If delivered programming is the relevant product market, should we measure market concentration by using the number of separately owned outlets, or some other metric? If the relevant product market is broader than delivered programming, how should we measure market concentration?

59. Next, we address the advertising market. As the steward of the Communications Act, the Commission is charged with evaluating the potential benefits and harms to the viewing and listening public, not to advertisers.[129] We first seek comment on whether our authority under the Communications Act justifies our basing broadcast ownership regulation on the level of competition in the advertising market. We also seek comment on whether, as a policy matter, the Commission should be concerned with advertising rates, or whether competition concerns in advertising markets are more appropriately governed by the antitrust agencies. What precisely are the harms viewers and listeners would suffer if advertising prices were to rise as a result of more concentrated media markets, and what empirical evidence of these harms is available?

60. The vast majority of American households now pay for information and programming by subscribing to cable television or satellite services. Does this change in consumer viewing habits suggest that the advertising market may not be the best product market to analyze because we do not capture this factor as part of the competitive analysis? For instance, people who subscribe to DBS often watch non-broadcast channels. By reducing viewership of local broadcast channels, non-broadcast channels may reduce advertising revenues flowing to local television stations. How can we capture the impact of a rule change on viewers if we are using a product definition (*e.g.*. advertising) that does not account for these viewers/listeners. A recent study indicated that Internet users spend approximately 25% less time

[128] *Local Radio Ownership NPRM,* 16 FCC Rcd at 19878, ¶ 40.

[129] *Hillco Commun., Inc.,* MB Docket No. 02-236, Hearing Designation Order FCC 02-236 at ¶ 13 (rel. Sept. 5, 2002), available at 2002 WL 2030952; *Local Radio Ownership NPRM,* 16 FCC Rcd at 19865-66, ¶ 9.

watching television stations than non-Internet users.[130] This phenomenon suggests that the Internet may compete with television for viewers, which could reduce advertising revenues for both broadcast and non-broadcast channels. Competitive developments such as these are not reflected in past Commission evaluations of the advertising market, yet they may have a meaningful effect on broadcasters' ability to compete in today's media market. We seek comment on how trends such as these should impact our analysis. In light of market developments, would a direct analysis of competition for viewers/listeners be a more appropriate means for advancing our competition goal? If so, how should we measure entities' market power? Commenters are encouraged to produce studies and empirical data to support or refute claims.

61. If the Commission determines that competition in advertising markets is an important component of our competitive analysis, we must then determine the relevant advertising product market. Historically, the Commission has focused only on broadcast advertising.[131] We seek comment on whether, in today's marketplace, we should broaden the relevant advertising product market to include other media advertising.

62. To what extent do non-broadcast media compete with broadcasters for advertising dollars? For example, the cable television industry has undergone consolidation at both the national and local level. In addition to competing for audience share,[132] cable television now appears to be a more formidable competitor to broadcasters for national and local advertising. In 1980, broadcast TV captured virtually all of the national and local TV ad market (over 99%), whereas cable had less than one percent. In 2000, broadcast TV share declined to 70% of national TV ad revenue and about 80% of local TV ad revenue, and cable increased to 30% and 20%, respectively.[133] How do these and other developments in the media advertising market affect our decision-making? Parties are asked to provide empirical data on the substitutability for advertisers among all media outlets and to comment on how this data should impact how we would define the relevant advertising product markets. How should the differences between local, regional, and national advertising markets factor into our analysis?

63. We also seek comment on the extent, if any, to which our competition analysis should consider the programming purchasing market. Broadcasters, broadcast networks, cable networks, cable operators, DBS networks, and DBS operators create, purchase, or barter for programming. Would relaxation or elimination of the broadcast ownership rules enable broadcasters to exercise monopsony power in the purchase of programming, or is there sufficient competition from other program buyers (*e.g.*,

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[130] UCLA Center for Communication Policy, *Surveying the Digital Future*, THE UCLA INTERNET REPORT 2001 at 32, available at http://www.ccp.ucla.edu/pages/internet-paper.asp (visited on Sept. 11, 2002).

[131] *Amendment of Section 73.3555 of the Commission's Rules, the Broadcast Multiple Ownership Rules*, 4 FCC Rcd 1723, 1727, 1732 & n.42 (1989) ("commercial radio stations have begun to face significant competition from local cable television systems which sell advertising on an 'interconnected' basis under which the same ad would appear on numerous local cable systems"; "[t]he 'products' involved in competition analysis of broadcast media are the listening or viewing audiences, which are in effect sold by radio and television stations to advertisers. . . . The relevant product market is thus measured by the substitutability of different media (*i.e.*, radio, . . .) for the purposes of purchasing advertising."); *1984 Multiple Ownership Order*, 100 F.C.C.2d at 39-40 ¶¶ 66-69 ("While we question whether the product market should exclude all other advertising media . . . , for purposes of analyzing the effects of eliminating the Seven Station Rule we will . . . treat the TV and radio advertising markets as separate product markets.").

[132] Nielsen Media Research reports that the broadcast television networks' share of the national audience slid to 50.1% in May 2002 from 85% in 1981, while cable networks' share has increased to 46.0% Nielsen's numbers for May 2002 are reported in Allison Romano, Nibbling Away at Broadcast, Broadcasting & Cable (June 3, 2002) at 11. The figure for 1981 is from Nielsen Media Research, *Primetime Network Rating and Shares* (Apr. 17, 2001).

[133] Universal McCann, *Estimated U.S. Annual Advertising Volume 1980-2001*.

cable and DBS) or from other distribution streams (*e.g.*, Internet or international) to prevent the exercise of such power?

64. Our competition analysis must also define the geographic market for delivered programming and advertising. The geographic extent of the market, the area where buyers can purchase a particular product or service from sellers, is sometimes difficult to determine, since different media outlets serve different geographic areas. What are the implications of these different geographic market definitions for our competition analysis? Would the appropriate geographic market be different if we focused on viewership/listenership rather than advertising?

65. Innovation. Change permeates virtually every aspect of the organization of media markets and the operation of media companies. In both broadcast and cable industries, analog transmission technologies are giving way to digital transmission technologies that will greatly increase operators' ability to offer new, more and better services. In addition to broadcast and cable, consumers also have access to multi-channel video and audio programming from DBS and the Internet and multi-channel audio programming from DARS. Each of these distribution technologies are expanding the number of program choices and developing program content for increasingly specialized audiences. All of these changes reflect innovation, *i.e.*, the development of new products or services or new, less costly ways of producing or delivering existing services.

66. Innovation reflects developments in technology that affect the modern media marketplace. Innovation brings significant benefits to consumers through the creation of new media products and services, but it can destabilize established business practices and customer relationships. Markets in which innovation is a prominent attribute differ from traditional markets, largely because the focal point of competitive rivalry is shifted more toward innovation, which may fundamentally alter the behavior of firms competing in the market. In traditional markets (where product differentiation is not extensive), firms compete for customers primarily based on price and terms of sale of an existing (substitutable) product or service. By contrast, competitors in markets where innovation is an important force face a more dynamic and uncertain market. Innovation competition involves intense "competition for the market" such that a successful innovation may result in the sudden economic obsolescence of an existing product or technology (and sometimes the demise of the firms that produce it). Innovation competition tends to produce market leaders that dominate a market for a period of time until supplanted by another innovation introduced by the market leader or a competitor.[134]

67. We seek comment on this analysis. To what extent does innovation competition characterize rivalry in contemporary delivered programming, broadcast advertising, and program production markets? In which media markets does price competition seem to predominate over innovation competition? If innovation competition is pervasive in media markets today, how should our ownership rules be modified to encourage rivalry focused on innovation?

68. Congress has directed the Commission to make the introduction of new technologies and services a priority.[135] We seek comment on whether innovation is a valid policy goal in the consideration of the competitive effects of our ownership rules. In this regard, we invite comment on how our media ownership policies and rules affect the incentives to innovate among broadcasters and other media market

[134] David S. Evans and Richard Schmalensee, *Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries*, National Bureau of Economic Research (May 2001), available at http://papers.nber/org/papers/w8268.pdf (visited July 10, 2002).

[135] "It shall be the policy of the United States to encourage the provision of new technologies and services to the public." 47 U.S.C. § 157. The preamble to the Telecommunications Act of 1996 states "AN ACT To promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."

competitors. For example, how do our broadcast ownership rules affect innovation in the form of digital television, digital cable, Internet access, and other new technologies? Do our ownership rules hinder continued innovation? Should the Commission actively seek to promote innovation through its ownership rules, or merely avoid interfering with firms' ability to innovate? If the former, what changes to the ownership rules, if any, would promote innovation?

C. Localism

69. The Commission has historically pursued policies aimed at encouraging localism. One statutory basis of the Commission's promotion of localism in broadcasting is Section 307 of the 1934 Act, which dates from the Radio Act of 1927 and, in its present form, states: "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."[136] Another is the Congressional Findings and Policy in connection with the Cable Television Consumer Protection and Competition Act of 1992, which include the finding that "[a] primary objective and benefit of our nation's system of regulation of broadcast television is the local origination of programming."[137] We invite comment on the goal of localism as we have defined it and whether we should define it more narrowly or more broadly.

70. From the earliest days of broadcasting, federal regulation has sought to foster the provision of programming that meets local communities' needs and interests.[138] Thus, the Commission has licensed stations to serve local communities, pursuant to section 307(b) of the 1934 Act, and it has obligated them to serve the needs and interests of their communities.[139] Stations may fulfill this obligation by presenting local news and public affairs programming and by selecting programming based on the particular needs and interests of the station's community. Further, as the *Fox Television* court recognized, one of the Commission's purposes in retaining the national TV ownership rule was "to preserve the power of affiliates in bargaining with their networks and thereby allow the affiliates to serve their local communities better."[140]

71. Localism remains an important attribute of the broadcast media industry. We request

[136] 47 U.S.C. § 307(b).

[137] Pub. L. 102-385, §§ 2(a) (10), Oct. 5, 1992, 106 Stat. 1460.

[138] *See, e.g.*, ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30, 1927, at 8-9 ("the commission found it possible to reassign the stations to frequencies which would . . . serve as a basis for the development of good broadcasting to all sections of the country . . . ."; "New York City and Chicago stations were not allowed to dominate the situation"; SECOND ANNUAL REPORT OF THE FEDERAL RADIO COMMISSION TO THE CONGRESS OF THE UNITED STATES FOR THE YEAR ENDED JUNE 30, 1928, at 9-14 *passim* (describing preliminary enforcement of the Davis Amendment, ch. 263, § 5, 45 Stat. 373 (1928), repealed, Act of June 5, 1936, ch. 511, § 1, 49 Stat. 1475, which, as amended, survives today in the form of 47 U.S.C. § 307(b)).

[139] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C.2d 1075, 1091-92 (1984) ¶ 32, *reconsideration denied*, 104 F.C.C.2d 357, *affirmed in part and reversed in part on other grounds, Action for Children's Television v. FCC*, 821 F.2d 741 (D.C. Cir. 1987); *Deregulation of Radio*, 84 F.C.C.2d 968, 982 (1981) ¶ 34 , *reconsideration denied in part*, 87 F.C.C.2d 797 (1981), *affirmed in part and remanded in part on other grounds, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); *Amendment of Section 3.606 of the Commission's Rules and Regulations, Amendment of the Commission's Rules, Regulations and Engineering Standards Concerning the Television Broadcast Service, Utilization of Frequencies in the Band 470 to 890 Mcs. For Television Broadcasting*, 41 F.C.C. 148, 172 (1952) ¶ 79.

[140] *Fox Television*, 280 F.3d at 1036.

comment whether, and to what extent, it is related to ownership limits. For example, do ownership limits tend to ensure an adequate supply of local information intended to meet local needs and interests? Is such news, public affairs, and other programming likely to be available in the current marketplace without ownership limits? To what extent do consumers' access to local news and information on non-broadcast media (*e.g.*, newspapers, cable television, DBS, and the Internet) impact this analysis? How much local news and information is available on a typical cable system and on the Internet, other than news that originates on broadcast stations?[141] Would some combination of market mechanisms and ownership limits, rather than one or the other, best promote localism? Are consolidation and efficiency innovations likely to reduce the level of local programming or reduce the amount of programming that is locally produced?

V. LOCAL OWNERSHIP RULES

72. In this section, we discuss and invite comment on possible changes to our multiple ownership rules concerning local broadcasting (the local TV multiple ownership rule and the radio/TV cross-ownership rule). We also invite suggestions of how we could achieve our goals of diversity, competition, and localism by means other than broadcast ownership rules. The options include case-by-case determinations of multiple ownership and a single ownership rule that would apply to all media outlets. We invite comment on how best to define a "voice" or other measurement of viewpoint diversity in our local rules. In this latter regard we focus especially on relatively new media such as DBS and the Internet, which have become powerful forces in recent years but are not reflected in our current rules.

A. Local TV Multiple Ownership Rule

73. The local TV ownership rule allows an entity to own two television stations in the same DMA, provided: (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not ranked among the four highest-ranked stations in the DMA, and (b) at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the proposed combination ("top four ranked/eight voices test").[142] In counting the number of independently owned and operating full-power stations that count as voices under the rule, only those stations whose Grade B signal contours overlap with the Grade B contour of at least one of the stations in the proposed combination are counted.[143]

74. The Commission adopted a rule prohibiting common ownership of two TV stations with intersecting Grade B contours in 1964.[144] The rule was based in part on the Commission's earlier "diversification of service" rationale, which suggests that the Commission believed its diversity concerns were better promoted by a greater number rather than a lesser number of separately owned outlets.[145] In

[141] Cable operators must carry local channels; some cable operators have developed regional news and public affairs programming. For example, Comcast has stated that it runs "Comcast Local Edition," a five-minute program delivered every half-hour on its Washington, D.C., area cable system that includes interviews with local government officials and discussions of local and regional issues, among other things; and local franchise authorities often require that cable operators carry locally originated programming on PEG channels. *Applications for Consent to the Transfer of Control of Licenses, Comcast Corp. and AT&T Corp., Transferor, to AT&T Comcast Corp., Transferee*, MB Docket No. 02-70, Applications and Public Interest Statement ("*AT&T Comcast Public Interest Statement*") at 43-44 (filed Feb. 28, 2002).

[142] 47 C.F.R. § 73.3555(b); *Local TV Ownership Report and Order*, 14 FCC Rcd at 12907-08, ¶ 8.

[143] *Local TV Ownership Reconsideration Order*, 16 FCC Rcd at 1072-73, ¶¶ 16-18.

[144] *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations*, 45 F.C.C. 1476 (1964).

[145] *Genessee Radio Corp.*, 5 F.C.C. 183 (1939).

1996, Congress directed the Commission to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market."[146] The Commission revised the rule to its current form in 1999, citing as reasons growth in the number and variety of local media outlets and the efficiencies and public service benefits that can be obtained from joint ownership.[147] Additionally, the Commission sought to "facilitate further development of competition in the video marketplace and to strengthen the potential of broadcasters to serve the public interest."[148] The Commission made relatively minor changes to the rule on reconsideration.[149] In its remand of the Commission's 1999 Order, the court found the Commission's explanation of its decision to include only broadcast television stations as voices insufficient, although it concluded that the Commission had adequately explained how the local TV ownership rule "furthers diversity at the local level and is necessary in the 'public interest' under § 202(h) of the 1996 Act."[150]

75. Below we ask for comment whether the local TV ownership rule is necessary in the public interest as the result of competition. Does it continue to serve its original purposes of furthering diversity and facilitating competition in the marketplace? Does the rule promote the other goals we set forth above, including all the various forms of diversity, competition, and localism? If the rule serves some of our purposes and disserves others, does the balance of its effects argue for keeping, revising, or abolishing the rule? In the following paragraphs, we explore these questions in more detail.

1. The *Sinclair* Decision

76. The voice test that applies to the current local TV ownership rule includes only TV stations. As discussed above, in *Sinclair*, the court invalidated the definition of voices because the Commission had not adequately explained its decision to exclude other media. The court noted that the Commission's decision was inconsistent with the definition of voices for the radio/TV cross-ownership rule, which also considers daily newspapers, radio stations, and incumbent cable operators to be voices. The court noted that, having found for purposes of TV/radio cross-ownership that counting other media voices more accurately reflects the actual level of diversity and competition in the market, the Commission had not explained why such diversity and competition should not also be reflected in its definition of voices for the local TV ownership rule. The court noted that on remand, the Commission may adjust not only the definition of voices, but also the numerical limit, given that there is a relationship between the definition of voices and the choice of a numerical limit.[151]

77. We invite comment on how to apply a voice test for a local TV ownership rule, if we decide to apply one. Should we continue to count only independently owned and operating full power commercial and non-commercial television stations, or should we expand the media included in the definition of a voice? For example, should we include radio stations, daily newspapers, cable systems, DBS and DARS, the Internet, and perhaps other media? To what extent do consumers view these other media as sources of local news and information? In addition, we invite comment as to what numerical or other limit we should set for the number of voices. In current marketplace conditions, what number of voices would preserve our competition and diversity goals? Finally, we invite comment as to whether any definition of "voices" we adopt for the local TV ownership rule should be used in other rules, or

[146] 1996 Act, § 202(c)(2).

[147] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12930-31, ¶¶ 57-58.

[148] *Id.* at 12903, ¶ 1.

[149] *See Local TV Ownership Reconsideration Order, supra* note 32.

[150] *Sinclair,* 284 F.3d at 160. *See* Section V for a more detailed discussion of *Sinclair*.

[151] *Id.* at 162.

whether there is adequate justification for distinguishing between voices relevant to one rule and those relevant to another.

2. Diversity

78. The rule barring ownership of two TV stations in the same market was intended to preserve viewpoint diversity and promote competition in local markets.[152] With respect to viewpoint diversity, the prohibition against common ownership of two top-four-ranked stations in the same market was intended to avoid combinations of two stations offering separate local newscasts.[153] The Commission's analysis indicated that the top-four-ranked stations in each market generally had a local newscast, while lower-ranked stations frequently did not. The Commission reasoned that permitting combinations between these two categories of stations, but not among the top four-ranked stations, would better preserve the possibility for different viewpoints in local news presentation, "which is at the heart of our diversity goal."[154]

a. Nature of viewpoints on local television

79. We seek evidence on the extent to which local television stations express viewpoints in local newscasts and, if so, whether, and to what extent, those newscasts provide diverse points of view. What are a station's incentives regarding the expression of a viewpoint, both explicitly through editorializing and implicitly through decisions on whether and how to cover particular events? It is our understanding that TV stations have largely abandoned editorials because they fear that viewers who disagree with the viewpoint expressed will temporarily or permanently elect to watch another channel. Is this accurate? If so, what is the effect of this change? News organizations argue that they have a strong economic incentive to keep their news coverage and reporting as balanced and unbiased as possible.[155] On the other hand, it appears that news periodicals and other print media may have defined and distinct viewpoints. If so, are different viewpoints explained or represented in their news reporting? What effects have national, regional, and local cable news had on the expression of viewpoints in local markets? We seek comment on these issues, including whether local TV ownership regulations are necessary to foster viewpoint diversity.

80. We have already suggested that market incentives may preserve program diversity as effectively as more diffused ownership structures.[156] We seek comment on whether owners of broadcast stations have similar incentives with respect to diverse viewpoints. Our understanding is that, when both television stations in a duopoly carry local news, the newscast typically is produced by a single set of personnel using one set of facilities. Are there different economic incentives among stand-alone stations,

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[152] *Local TV Ownership Report and Order*, 14 FCC Rcd at 12910-11, ¶ 15.

[153] *Id.* at 12933, ¶ 66.

[154] *Id.*

[155] *See* Comments of News Corporation Limited and Fox Television Holdings, Inc., at 18 (citing *1998 Biennial Report,* 15 FCC Rcd at 11149 (Separate Statement of Comm'r Powell) ("Local news programs rarely editorialize, or pick political candidates, or take stands on major issues . . . .")); Doug Halonen, *TV Editorials Merit Endangered Status,* ELECTRONIC MEDIA, June 8, 1998, at 3 (noting that "[general] managers feared they (editorials) could offend viewers, and that in this clicker world, they'll be gone"). *See also* Comments of Media General, Inc., at 31-34 (asserting that commonly-owned broadcast stations, even in the same market, may take different editorial stances to maximize the stations' overall audience share), MM Docket Nos. 01-235 and 96-197, filed Dec. 3, 2001.

[156] *See, e.g., FCC v. WNCN Listeners Guild,* 540 U.S. 582 (1981) (upholding, against challenges under the 1934 Act and the First Amendment, Commission policy that public interest is best served by promoting program diversity through market forces, and not by considering station formats in ruling on applications for license renewal or transfer); *Dual Network Order,* 16 FCC Rcd at 11131, ¶ 37.

duopolies, or "triopolies" to produce, in a single newscast, a diversity of viewpoints? What other evidence or economic theories would shed light on the "viewpoint" incentives of commonly-owned local broadcast outlets? Are different viewpoints produced by one editor the equivalent for diversity purposes of different viewpoints produced by multiple editors?

b. Connection between ownership and viewpoint

81. In the *1984 Multiple Ownership Order*, the Commission cited evidence that at least some TV station owners allowed local management to make news reporting decisions.[157] In addition, according to testimony before Congress by the President and Chief Operating Officer of Viacom, Inc., CBS' TV stations determine locally how much news to air, what stories are run, and when they are aired.[158] To what extent are station owners or the local news departments responsible for those viewpoints expressed through local newscasts? What evidence is available on this point? Do station owners have formal or informal policies that determine the involvement of station owners in news coverage and reporting decisions? Commenters are requested to provide information bearing on the connection between editorial judgment or news selection and station ownership. If the record indicates a lack of connection between ownership and viewpoint expressed via local news programming, we seek comment on the weight that finding should be accorded in our determination of whether the local TV ownership rule continues to be supportable in its present form.

c. Program diversity

82. The Commission previously has noted that a single owner of multiple outlets may have stronger incentives to provide diverse entertainment formats, programs, and content on its multiple outlets than would separate station owners.[159] An entity that owns multiple stations in a market may have the incentive to target its programming to appeal to a variety of interests in an effort to maximize audiences, rather than program its multiple outlets with the same format or programming, thereby competing with itself. While acknowledging this viewpoint in the *TV Ownership FNPRM,* the Commission questioned whether this model would promote a variety of viewpoints with regard to news and public affairs programming, but sought comment on whether it may indeed promote diversity of entertainment formats and programs.[160] We invite comment on whether, and if so how, common ownership leads to provision of more diverse programming with respect to both entertainment and news and public affairs programming in order to maximize audience share. If common ownership of multiple stations promotes program diversity, how does this affect the need for the current local TV ownership rule? Absent a rule,

[157] *1984 Multiple Ownership* Order, 100 F.C.C.2d at 34, ¶ 52.

[158] Testimony of Mel Karmazin, president and chief operating officer, Viacom Inc., Before the Senate Committee on Commerce, Science and Transportation (July 17, 2001), 2001 WL 808306 at 7 (F.D.C.H.) (*"Karmazin Testimony"*) ("Our stations' news directors have complete freedom locally. This is a fundamental CBS policy. And it is good business.").

[159] *TV Ownership FNPRM*, 10 FCC Rcd at 3550-51, ¶¶ 62-63 ("While this model may, indeed, promote diversity of entertainment formats and programs, we question whether it would act similarly with regard to news and public affairs programming.") The argument that a monopoly broadcaster might deliver more diversity than broadcasters in a competitive market originates with Peter Steiner, *Program Patterns and Preferences and the Workability of Competition in Radio Broadcasting*, 66(2) Q.J. ECON. 194 (1952). Steiner's result does not hold under other specifications. He assumes that viewers prefer only one type of programming. Allowing viewers to have lesser preferred substitutes leads to a different result. Competition maximizes diversity and welfare as long as channel space is unlimited. *See* Jack Beebe, *Institutional Structure and Program Choices in Television Markets*, 91(1) Q.J. ECON. 15 (1977). More recent work suggests that incorporating advertising may also change Steiner's outcome. *See* Simon Anderson & Steve Coate, *Market Provision of Public Goods: The Case of Broadcasting*, 2001 Working Paper, Univ. of Virginia and Cornell Univ.

[160] *TV Ownership FNPRM*, 10 FCC Rcd at 3550-51, ¶ 63.

would market forces alone lead to increased program diversity on commonly-owned stations?

83. A second, more fundamental, issue regarding program diversity is raised by the dramatic advances in video delivery technology in the past quarter century. Cable television systems and DBS providers offer dozens, and often hundreds, of channels to subscribers. Entire channels are devoted to particular formats or specialized subjects. The increase in the variety of programming available to many American consumers today suggests that limits on TV station ownership may no longer be needed to promote program diversity in the video market. We seek comment on this analysis in connection with the local TV multiple ownership rule.

3. Competition

84. In the *TV Ownership FNPRM,* issued in 1995, the Commission identified three product markets in which television broadcasters operate: the market for delivered programming; the advertising market; and the program production market.[161] Further, the Commission segmented the advertising market into national, national spot, and local markets, based on the nature of the geographic area advertisers wish to reach.[162] The Commission tentatively concluded that cable television directly competes with broadcast television stations in each of these markets, and that broadcast radio and newspapers compete with television in the local advertising market.[163] The Commission sought comment on whether other suppliers of video programming (*e.g.,* multichannel multipoint distribution service[164] and DBS compete with broadcast television stations. The Commission stated that it may not be appropriate to include them because their market penetration was so low that they were not relevant substitutes to a majority of Americans.[165] The record compiled in the *1998 Biennial Report* suggested

[161] Product markets are identified through examining the extent of substitutability among various products. A standard method for defining the boundaries of the product market a particular firm operates in is to ask: if a hypothetical monopolist raised the price of its product, to what degree would consumers continue to purchase that product or turn to products of other firms? If consumers readily turn to other firms' products, then those products are substitutes for the first firm's products, and all are in the same product market. *See U.S. Dep't of Justice and FTC, 1992 Horizontal Merger Guidelines,* § 1.11, 57 Fed. Reg. 41552 (dated Apr. 2, 1992, as revised, Apr. 8, 1997). In applying antitrust law, DOJ and FTC define a product market by postulating demand-side responses to a "small but significant and nontransitory" increase in price by a "hypothetical monopolist."

[162] See *TV Ownership FNPRM,* 10 FCC Rcd at 3541, ¶ 35. *See also* B. M. Owen and S. S. Wildman, VIDEO ECONOMICS at 11-13 (Harv. Univ. Press, Cambridge MA, 1992).

[163] In the *Local TV Ownership Report and Order,* the Commission concluded that the evidentiary record supported the general conclusion that there may be some intermedia substitutability in the markets served by broadcasters. The evidence, however, was insufficient to characterize generally the degree of the substitutability of different media. *See Local TV Ownership Report and Order,* 14 FCC Rcd at 12919-20, ¶ 33. In our competitive analysis of recent radio transactions, we have presumed that the relevant product market is radio advertising. However, we have asked whether we should continue focusing on the radio advertising market as a separate media market. *Local Radio Ownership NPRM,* 16 FCC Rcd at 19895, ¶ 86.

[164] The predominant use of the 2500-2690 MHZ band is by the Fixed Service for Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS"), and Instructional Television Fixed Service. Traditionally, MMDS spectrum has been used to deliver multichannel video programming (known as wireless cable service) to residential customers. In 1998, however, the Commission released the Two-Way Order permitting MMDS licensees to construct digital two-way systems that could provide high-speed, high-capacity broadband service, including two-way Internet service via cellularized communication systems. *In Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions,* 13 FCC Rcd 19112 (1998), *recon.,* 14 FCC Rcd 12764 (1999), *further recon.,* 15 FCC Rcd 14566 (2000).

[165] *TV Ownership FNPRM,* 10 FCC Rcd at 3538, ¶ 29.

that this situation may have changed.[166] We encourage comment on which types of firms compete in these markets today. Are there media outlets other than those discussed here, *e.g.*, the Internet, that should be considered to be competitors in these product markets? We seek information on the local market share of DBS and multichannel multipoint distribution service, as we generally only have aggregate national subscription data for these services. If broadcast TV competes with cable and other media, do our local broadcast ownership rules affect broadcasters' ability to effectively compete?

85. The Commission tentatively concluded in the *TV Ownership FNPRM* that the geographic market for delivered programming was local; the geographic markets for advertising were both national and local; and the geographic market for program production was national/international in scope. Local geographic markets are particularly difficult to define because the local footprint of a broadcast outlet is likely to be different than the geographic area covered by other media outlets, such as cable systems. We seek comment on how we should define the local geographic media market. Commenters are encouraged to submit data that we could use to identify relevant competitors within geographic markets.

a. Advertising Market

86. For our competitive analysis of the local TV ownership rule, we seek comment on advertising markets.[167] Advertising markets are both national and local in scope because of the differing geographic areas advertisers wish to reach. Certain advertisers wish to reach the entire nation at once with their advertisements and therefore seek out media outlets with a national footprint. The sources of media with a national footprint include broadcast television networks, program syndicators, cable television networks, DBS and possibly cable multiple system operators ("MSOs").[168] Other advertisers are only interested in paying for advertisements that reach viewers in a specific, local area. These advertisers seek out media with a local footprint. These local media include individual broadcast television stations, individual cable system operators, individual broadcast radio stations, and local newspapers. The "national spot market" is a subset of the local advertising market. In this market, national advertisers buy advertising time on certain specific local media outlets in order to bring a specialized advertising message to only some regions of the country. Generally, the national advertisers work with national advertising representative firms to place these advertisements. With newer technology, however, the television networks are able to place national spot advertisements into their own feeds. We ask for comment on this analysis of advertising markets, and on the policy implications of this or other analyses for our ownership rules. Our goal is to ascertain whether the local TV ownership rule, as currently formulated, continues to be needed to promote competition in these advertising markets.

87. Broadcast television stations compete most directly in the local advertising market. We seek to identify the relevant competitors in this market. Has the consolidation of cable systems into local and regional clusters improved the ability of cable operators to compete with television broadcasters in the local advertising market? At a minimum, we expect that local cable operators that can offer an advertising product comparable to that of local television stations should be included in our analysis. If we conclude that cable operators do compete in the local television advertising market, that would suggest that the rule as currently structured may not be necessary to promote competition in local television advertising markets and that a more relaxed ownership limit may be appropriate. If we conclude that

[166] *1998 Biennial Report*, 15 FCC Rcd at 11112-13, ¶ 100.

[167] We ask whether examination of advertising competition is, or should be, relevant to our analysis of the ownership rules in Section IV of this *Notice*.

[168] AT&T and Comcast state in their license transfer applications that their combination will enable them to reach viewers in 8 of the top 10 DMAs and thereby become the first cable multiple system operator that can viably compete with broadcast and cable networks for national advertising dollars. *AT&T Comcast Public Interest Statement, supra* note 141, at 45-46.

cable operators and television stations constitute the relevant market participants, we propose counting each outlet equally for purposes of assessing local advertising competition. We seek comment on this analysis, including whether a metric other than outlet counting is more appropriate in this area, and on the maximum level of concentration among these outlets that would ensure competition in local television advertising markets. We encourage commenters to submit empirical analyses of whether advertisers view different advertising media as substitutes for local television. Such data might include advertiser spending patterns or information from firms that purchase advertising for clients.

88. It is also possible that radio stations, daily newspapers, and/or direct mail may, for some advertisers, exert competitive pressure on local television advertising rates. If one or more of such media are substitutes for some advertisers but not for others, we seek comment on whether to include such other competing outlets in our advertising competition analysis. For instance, if daily local newspapers are substitutes with local television advertising for only some advertisers, including local newspapers as a fully competing outlet in our analysis might overstate the true competitive impact of newspapers on television advertising rates. Conversely, the exclusion of daily local newspapers from our analysis could result in a local television ownership rule that is unduly restrictive from a competitive perspective. We strongly encourage commenters to address this issue of how our local media ownership rules should account for this issue of partial substitutability.

b. Delivered Video Market

89. For our competitive analysis of the local TV ownership rule, we also seek comment on the market for delivered video programming. In the *TV Ownership FNPRM*, the Commission observed that the time Americans spent viewing television remained steady between 1970 and 1988. The Commission concluded from this stability of television viewing over time that "delivered video programming" could be a relevant market.[169] We wish to revisit the evidence on this issue, including updated data on Americans' television viewing. If such data shows comparable levels of television viewing from 1988 to the present, should we continue to define delivered video market programming as a relevant market? If delivered video programming is a relevant market, we must determine how to measure market concentration. The Commission has traditionally used the number of separately owned stations or outlets serving a market. We seek comment, however, on other potential measures of concentration, such as audience share.

90. Consumers have entertainment alternatives to watching television (*i.e.*, delivered video programming from broadcast TV, cable TV, and DBS). These options include video programming from VCRs/DVDs, movie theaters and the Internet, as well as non-video entertainment such as listening to audio programming, reading, and virtually any other activity that a large number of people find entertaining. To what extent do consumers find these entertainment alternatives to be good substitutes for television viewing? If there is substantial substitution between these alternatives and television viewing, this may suggest that the relevant market is broader than delivered video programming. How should this affect our analysis of the need for a local TV ownership rule or how such a rule should be drawn?

91. Assuming that the delivered video market is a relevant product market for our competition analysis, the Commission has tentatively included commercial broadcast television operators, public broadcast television station operators, and cable system operators to be economically relevant alternative suppliers of delivered video programming.[170] The rapid growth of DBS since 1995 requires us to include DBS as a strong participant in the delivered video market. We seek comment on other media that should be included in the delivered video market. For example, in our *Eighth Annual MVPD*

[169] *TV Ownership FNPRM*, 10 FCC Rcd at 3536, ¶ 24.

[170] *Id.* at 3538, ¶ 29.

Competition Report, we detailed the status of additional potential competitors, including: wireless cable systems, SMATV systems, local exchange carriers, open video systems, Internet video, home video sales and rentals, electric utilities, and broadband service providers.[171] Some of these media are not available in many markets and, thus, may not be relevant substitutes to a majority of Americans.[172] Should a level of market penetration be deemed at which a non-broadcast video delivery media directly competes with broadcast television stations? How does the fact that there are no consumer fees for broadcast TV affect our analysis?

92. While some video delivery media may be considered good substitutes for entertainment programming, are the same media good substitutes for local news and public affairs programming? What measures should we use to determine whether consumers view different media as substitutes for entertainment programming or news programming? Although cable systems carry local broadcast stations and therefore may be considered good substitutes for both entertainment programming and local news and public affairs programming, DBS systems and other media may carry less local news and public affairs programming. To what extent, if any, should our analysis of competition in the market for delivered programming differ from our analysis of viewpoint and program diversity?

c. Video Program Production Market

93. Television stations, along with TV networks, cable networks, cable operators, DBS networks and DBS operators purchase or barter for video programming. The program production market could be affected if relaxation of the local TV ownership rule permits a broadcaster to exercise significant market power in the purchase of video programming. The result might be that suppliers of video programming would be forced to sell their product at below competitive market prices in order to gain access to the local market controlled by one or a few local group owners. The potential for the exercise of such market power, however, depends critically on the absence of a sufficient number of competitors. The ever-increasing number of alternative providers of delivered video programming in virtually every major market may mitigate the potential for distorting the prices of video programming by providing program producers with additional outlets for their product. We solicit comment on this point and evidence on the potential market power in the purchase of video programming if we were to relax the local ownership rule.

d. Innovation

94. We seek comment on the impact that the local TV ownership limits may have on innovation in the media marketplace. Does our current rule promote innovation? Would relaxation of the local TV ownership rule increase incentives or resources to provide innovative broadcast programming or new broadcast-based technologies or services? What effect, if any, would a relaxed local ownership rule have on the transition to digital television, or the provision of other services by a local TV station? Examples of innovations that have been withheld from the media marketplace as a direct result of local

[171] *Eighth Annual MVPD Competition Report*, 17 FCC Rcd at 1271-97, ¶¶ 55-115. Local telephone companies may provide video programming services in their telephone service areas through radio communications, as a cable system, or by means of an open video system. In addition, telephone companies may provide transmission of video programming on a common carrier basis. Electric utilities possess characteristics, such as ownership of fiber optic networks and access to public rights-of-way, that could make them distributors of multichannel video programming.

[172] While competitive satellite alternatives to the incumbent wireline MVPDs are developing and attracting an increasing proportion of MVPD subscribers, most consumers have limited choices among video distributors. A relatively small percentage of consumers have a second wireline alternative, such as an OVS or overbuild cable system. Among the several wireless technologies used to provide video programming service, DBS is the only wireless technology currently available to a majority of subscribers nationwide. *Eighth Annual MVPD Competition Report,* 17 FCC Rcd at 1298, ¶ 119.

TV ownership limits would be particularly useful to our competitive analysis.

4. Localism

95. We seek comment on whether and if so, how the local TV ownership rule affects localism. Does the local TV ownership rule affect either the quantity or quality of local news and other programming of local interest produced and aired by local stations? Does it affect the local selection of news content that is aired? We request that commenters provide data on the impact that TV duopolies and Local Marketing Agreements ("LMAs")[173] have had on the production of local programming by stations involved in such combinations or arrangements. According to testimony before Congress by the President and Chief Operating Officer of Viacom, Inc., after CBS' combination with Viacom, which resulted in six duopoly markets, CBS had, or planned to have, half-hour news spots or hourly updates on stations, in five different markets, that had not run such programming before.[174] We invite comment on whether these assertions reflect industry-wide trends. We ask commenters to provide empirical data that demonstrates increased or decreased levels of local programming as a result of consolidation.

96. In the *1984 Multiple Ownership Order*, the Commission cited awards received by TV stations "from leading professional organizations and community organizations" as one relevant indicator of local news quality.[175] If such awards are a reasonable barometer of news "quality," we request empirical analyses of whether these awards tend to be earned systematically more or less often by TV duopolies and/or LMAs.

97. Local TV newscasts and local public affairs shows are an important service provided by local television stations. The cost of producing those programs may represent a significant portion of a station's budget, particularly in small markets where the fixed costs of production are spread over a relatively small customer base. We seek comment on whether the current local TV ownership rule affects the viability of existing local newscasts and/or potential newscasts, particularly for small stations. Commenters asserting that a relaxation of the local TV ownership rule will result in more local news are requested to specifically address whether such greater output outweighs the potential loss of diverse voices among stations that previously had separate newscasts. Are there other factors or policy goals we should consider in determining whether to retain, modify or eliminate the local TV ownership rule?

B. Radio/TV Cross-Ownership Rule

98. The radio/TV cross-ownership rule limits the number of commercial radio and television stations one entity may own in a market. The rule allows common ownership of at least one television station and one radio station in a market. In larger markets, a single entity may own additional radio stations depending on the number of other voices in the market.[176]

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[173] An LMA or a time brokerage agreement is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming. *Local TV Ownership Report and Order*, 14 FCC Rcd at 12958, ¶ 126.

[174] *Karmazin Testimony, supra,* note 158, at 9.

[175] *1984 Multiple Ownership Order,* 100 F.C.C.2d at 32-33, ¶¶ 48-50.

[176] 47 C.F.R. § 73.3555(c). The radio/TV cross-ownership rule generally allows common ownership of one or two TV stations and up to six radio stations in any market where at least twenty independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market where at least ten independent "voices" would remain post-combination; and one TV and one radio station notwithstanding the number of independent "voices" in the market. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven

(continued....)

99. The original rule, which prohibited radio/TV cross-ownership, was adopted in 1970. In adopting the rule, the Commission stated explicitly that "the principal purpose of the proposed rules is to promote diversity of viewpoints in the same area ... [W]e think it clear that promoting diversity of ownership also promotes competition."[177] The Commission adopted a presumptive waiver policy to permit certain radio/TV combinations in 1989, and relaxed the rule to its current form in 1999.[178] The Commission relaxed the radio/TV cross-ownership rule to balance its traditional diversity and competition concerns with its desire to permit broadcasters and the public to realize the benefits of radio-television common ownership. The modifications were intended to ease administrative burdens and provide predictability to broadcasters in structuring their business transactions.[179] In the *1998 Biennial Report,* the Commission concluded that no further changes were warranted because the radio/TV cross-ownership rule had been so recently relaxed, but it committed to monitor the market effects of our deregulatory actions to determine whether further changes are warranted.[180]

100. We ask parties to comment on whether the radio/TV cross-ownership rule is necessary in the public interest as the result of competition. Does it continue to serve its original purposes of promoting economic competition and diversity, particularly viewpoint diversity? Does the rule promote the other goals we set forth above, including the various forms of diversity and localism? If the rule serves some of our purposes and disserves others, does the balance of its effects argue for keeping, revising, or abolishing the rule? In the following paragraphs, we explore these questions in more detail.

101. Some of the issues and requests for data contained in the preceding section on the local TV ownership rule overlap with our analysis of the radio/TV cross-ownership rule. For example, our request for comment on consumers' sources for news and information is directly relevant to both the local TV ownership rule and radio/TV cross-ownership rule. Issues of viewpoint diversity and localism, and issues of competition in the advertising market and innovation, are also relevant to both the local TV ownership rule and the radio/TV cross-ownership rule. Where appropriate, we will apply data and analysis from that section to our analysis of the radio/TV cross-ownership rule.

1. Viewpoint Diversity

102. The current radio/TV cross-ownership rule counts as a media voice each independently owned and operating same-market full-power commercial and noncommercial broadcast television and radio station. It also counts certain types of daily newspapers and cable systems because "such media are an important source of news and information on issues of local concern and compete with radio and television, at least to some extent, as advertising outlets."[181] Thus, the current rule implies that only these

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(...continued from previous page)
commercial radio stations. For this rule, a "voice" includes independently owned and operating same-market, commercial and noncommercial broadcast TV, radio stations, independently owned daily newspapers of a certain circulation, and cable systems providing generally available service to television households in a DMA, provided that all cable systems within the DMA are counted as a single voice. *Local TV Ownership Report and Order,* 14 FCC Rcd at 12950-52, ¶ 111.

[177] *Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations,* 22 F.C.C.2d 306, 313 (1970) ¶ 25, *recon. granted in part,* 28 F.C.C.2d 662 (1971).

[178] The presumptive waiver policy originally applied in the top 25 television markets.

[179] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12948, ¶¶ 102-03.

[180] *1998 Biennial Report,* 15 FCC Rcd at 11073, ¶ 26.

[181] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12953, ¶113.

particular types of media contribute to viewpoint diversity.[182] The rule does not account for news available on Internet web sites, DBS, cable overbuilds, magazines or weekly newspapers. In our 1984 review of the national TV ownership rule, however, we concluded that, with respect to viewpoint diversity, the market includes a wide variety of media types engaged in the dissemination of ideas, including not only television and radio outlets, but also "cable, other video media, and numerous print media as well."[183] Should those media be counted in a new voice test for radio/TV cross-ownership, and if so, to what extent? Should we count each independently owned cable network carried by a cable system in a market as one voice? Does competition among these media render the current restriction unnecessary? Finally, we seek comment on any alternatives to a voice test.

2. Localism

103. In 1989, the Commission concluded that the cost savings and aggregated resources of combined radio-television operations appeared to contribute to more news, public affairs and other non-entertainment programming. Based in part on that finding, the Commission adopted a new presumptive waiver policy allowing increased radio-television ownership in the top-25 television markets and in certain situations involving the acquisition of "failed" stations. It anticipated that this policy would lead to a limited number of additional radio-television combinations that would enable the Commission to obtain additional evidence regarding the advantages and disadvantages of maintaining the cross-ownership rule.[184] We seek comment on the quantities of local news and public affairs programming provided by TV-radio combinations and stand-alone TV and radio stations in those same markets. Are combinations and stand-alone stations providing comparable quantities of such programming? If TV-radio combinations produce a greater quantity of news programming than non-combined stations, does that suggest that greater cross-ownership among TV and radio stations would produce more news and/or public affairs programming? If the quantity of news and public affairs is the same or less on cross-owned stations, does it suggest the opposite?

3. Competition

104. In analyzing the relationship of the radio/TV cross-ownership rule and our goal of competition, the key issue under our traditional competition framework is the extent to which radio and television stations compete with each other to attract advertising revenue. The stronger the competition between these two outlets, the more relevant a cross-ownership limit may be. Relaxation or elimination of the rule may not harm competition if the record shows that there is weak substitution between radio and television advertising. We welcome comment, as well as any empirical studies, on the substitution between radio and television advertising. We also wish to consider what bearing advertising substitution between radio, television, and other outlets, such as newspapers, magazines, and Internet websites, may have on this rule. Any empirical work demonstrating such advertising substitution is strongly encouraged.

105. We are also concerned with the impact that radio/TV cross-ownership limits may have on innovation in the media marketplace. Does our current rule promote innovation? Would relaxation of the radio/TV cross-ownership rule increase incentives to provide innovative broadcast programming or new broadcast-based technologies or services? Examples of innovations that have been withheld from the

[182] The rule also excludes non-English language daily newspapers – for example, *El Diario La Prensa* in New York City and *La Opinion* in Los Angeles – notwithstanding that the rule counts Spanish-language or other non-English-language radio and television stations.

[183] *1984 Multiple Ownership Order,* 100 F.C.C.2d at 25, ¶ 25.

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

media marketplace as a direct result of radio/TV cross-ownership limits would be particularly useful to our competitive analysis. Are there other factors or policy goals we should consider in determining whether to retain, modify, or eliminate the radio/TV cross-ownership rule?

C. Alternative Means to Achieve Goals

106. If the record demonstrates that the current ownership rules are no longer necessary to actually serve the stated goals and the public interest, we seek comment on the most appropriate means to achieve the stated goals. We see, at a minimum, three alternatives: (1) case-by-case approach; (2) outlet specific rules; and (3) a single local media ownership rule covering all outlets. Often, bright line structural regulations have the effect of being both over-inclusive and under-inclusive. That is, a prophylactic structural rule may prohibit a combination that poses little competitive or consumer harm, or entails substantial consumer benefits. Or, such a limit may allow anti-competitive combinations that nevertheless satisfy the rule. We ask whether our structural regulations should be replaced with a case-by-case review of transactions so that a fact-specific analysis of the impact on our policy goals can be conducted. In the alternative, or in conjunction with a case-by-case review, should the Commission rely solely on the unfettered marketplace to achieve its stated policy goals? If we decide to retain structural rules, should the Commission retain a set of outlet specific rules similar in form to our current rules?

107. We recognize that a pure case-by-case approach could create an unnecessary level of uncertainty among media firms. Such uncertainty could be mitigated by one or more "soft" ownership caps. A soft cap would identify a certain level of ownership concentration below which a transaction would be presumed lawful, and above which the transaction would be unlikely to be permitted, but would be reviewed by the Commission on a case-by-case basis. If we adopted one or more soft caps, we anticipate identifying the factors we would consider in evaluating proposed above-cap transactions. We seek comment on these matters.

108. If we decide to retain structural rules, should the Commission retain a set of outlet specific rules similar in form to our current rules? This type of ownership rule structure may permit the Commission to limit specific harms and promote specific benefits in a more targeted fashion than would case-by-case review. For example, if we found that two outlet types were both the undisputed leaders in contributing to viewpoint diversity and were the only two competitors in a particular advertising market, we would explore whether a cross-ownership limitation was necessary to preserve viewpoint diversity and economic competition.

109. As suggested by this hypothetical, however, such an outlet specific method could require persuasive evidence that particular outlets are sufficiently unique that they merit treatment separate from other outlets. The *Sinclair* court held that we failed to justify applying disparate voice tests to broadcast television stations in the local TV multiple ownership and the radio/TV cross-ownership rules. For this reason, should the Commission adopt a local single media ownership rule that is applicable to all or some media outlets and dependent on the number of independent "voices" in any particular market? This single rule option is intended to address only those instances in which the ownership of multiple media outlets included a broadcast station. A single rule applicable to all media might help avoid the type of inconsistency criticized by the *Sinclair* court. The goal of a single rule would be to replace outlet specific rules that no longer may be justified by themselves but which, viewed collectively, may continue to be necessary in some form to promote competition, diversity and localism. We seek comment on these proposals.

110. A key factor in whether we pursue a single framework or more outlet specific policies, or other options, is the feasibility of synthesizing the results of our various inquiries. We have identified the promotion of diversity, competition, and localism as potential guiding principles in setting ownership policies. It is conceivable that certain media outlets are substitutes for diversity purposes, but are not substitutes from the perspective of advertisers or program producers. In that situation, one option might

be to: (1) maintain same-outlet restrictions (*e.g.*, a limit on the number of commonly-owned radio stations per market), perhaps based on market size, in order to preserve economic competition among those outlets that directly compete with each other; and (2) eliminate the cross-ownership rules based on clear evidence that Americans today rely on a far wider array of media outlets than they did decades ago, when the cross-ownership rules were first adopted. Or, if the evidence supported a finding that certain different types of outlets were particularly important news sources, we might replace the cross-ownership limits with an overall per-market cap on media outlets. We seek comment on whether this type of ownership framework would be an appropriate response to a record that showed that the markets for advertising and viewpoint diversity are not coterminous. If we adopt such a framework, should we adopt grandfathering provisions, and if so, what limits should we set?

111. Another approach to setting a single ownership rule would be to focus on promoting viewpoint diversity. Such a rule might be appropriate if evidence in the record were to show that certain media constitute an "essential class" of news outlets for Americans today. If the evidence before us were to show, for example, that local television stations, local cable operators, and daily newspapers were a distinct group of influential news outlets, we might consider a local media ownership rule that permitted one entity to own up to a certain percentage of such outlets in a local market. Such a rule could limit the common ownership of cable systems and broadcast stations in a market. We seek comment on the implications of such a result. In setting the appropriate percentage cap, we would rely partly on the extent to which the evidence indicated that all other media -- such as radio, the Internet, weekly newspapers, magazines, cable and DBS -- were significant (though not "essential") outlets for Americans to obtain news and information. We seek comment on this option and, in particular, on whether such a rule aimed at promoting viewpoint diversity would effectively promote competition in local media markets as well. By limiting application of this rule to only those instances in which the ownership of multiple media outlets includes a broadcast station, would we impair broadcasters' ability to compete in today's media marketplace?

D. "Voice" or Other Test

112. We next address three subjects related to a so-called "voice test" to assure competition and diversity in a given market: (1) how to reformulate our mechanism for measuring diversity and competition in a market; (2) how to accord different weights to different media types to the extent that they are relied on by consumers differently; and (3) how to account for diversity and competition via MVPDs and the Internet in a revised voice test.

1. Creating a New Metric

113. In this section, we explore how to reformulate our mechanism for measuring diversity and competition in a given market. All four of our existing local broadcast ownership rules are aimed at preserving diversity and competition. The radio/TV cross-ownership rule employs a voice test that allows varying levels of broadcast ownership based on the number of broadcast stations, major newspapers and cable systems in the market. Such market-specific mechanisms, properly implemented, represent an effective mechanism for addressing media ownership limits in widely divergent market conditions.

114. Thus, we initially explore whether to continue to use a voice test to guarantee a minimum level of diversity and competition in a given market. The two current voice tests collectively include television stations, cable systems, radio stations, and daily newspapers as "voices."[185] Other media that we could consider include Internet web sites (including video services and online radio stations), DARS, magazines, DBS operators, weekly newspapers, and national newspapers. We request comment, including empirical evidence, on whether each of these additional outlets should be counted in a revised

[185] For a description of the two current voice tests, *see supra* Section V.

voice test.

2. Weighting the Voices

115. If data show that consumers rely to varying degrees on different types of outlets for news and public affairs, we seek comment on how we might design a test that accords different weights to different outlet types. For example, it may be appropriate to consider using weights based on such factors as audience reach, ownership structure, the percent of programming or print content devoted to local news, and/or consumer use patterns. Such an approach could be a more accurate measure of diversity and competition than the binary "voice" model (*i.e.*, an outlet either is or is not a voice), but may be difficult to design and administer over time as industry conditions change. This raises the question of how to account for such changes in a manner that does not undermine certainty and predictability.

116. If we pursue a weighted approach to measuring diversity and competition in a given market, we would need a way to quantify the relative contributions of each type of outlet. We are uncertain whether traditional all-news programming should continue to be the only measure of an outlet's role in the market, or whether other types of information that people obtain from the media should count as well. Such quasi-news sources might include cable and DBS channels covering business or sports, and websites devoted to those subjects. In addition, some non-news programming on broadcast television, such as "60 Minutes," may be similar to news programming in certain respects. We seek comment on the relevance of these sources of news and information to a weighting system for various media outlets.

117. We also seek comment on the relevance of current MVPD and Internet penetration levels in considering the contributions of MVPDs and the Internet to diversity and competition. Broadcast television and radio are available to virtually all Americans who purchase a television or radio, but the Internet, DBS, and cable require monthly subscriptions. Does this fact support a difference in the treatment of these media, such as a rule that counts only broadcast television and radio? Or is the fact that some media are "free" and others require subscriptions immaterial to their impact on the American people? In the past decade, non-broadcast media have become widely available and have been subscribed to by the majority of American homes.[186] Are they now ubiquitous? Do the Americans who still consume only broadcast television and radio have any distinguishing features, such as location or level of income or education?

118. Traditional voice tests do not consider the entire range of news sources available to the public. A vast majority of people may choose to receive news and information from a single source (*e.g.*, a local television broadcast). However, this fact does not necessarily imply that the public has limited access to many other sources of news and information (including the Internet, for example). In other words, a lack of diversity in the outlets that consumers typically view or listen to does not necessarily imply that consumers have limited access to diverse viewpoints or to multiple sources of news and information. We seek recommendations on how to accurately capture the vibrancy and variety of today's

[186] *Eighth Annual MVPD Competition Report,* 17 FCC Rcd at 1254-55, ¶ 17 (between 80% and 97% of homes are passed by cable systems), 1330 App. B, Table B-1 (subscription to cable service is 64%), 1338 App. C, Table C-1 (DBS subscription is 16% and rising). Narrowband Internet access is now almost universally available, *see Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398, 2432 (1999) ¶ 64. About 60% of American homes subscribe to Internet access. *Eighth Annual MVPD Competition Report,* 17 FCC Rcd at 1285-86, ¶ 89. Broadband Internet access is widely available and more than 10% of homes subscribe. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, 4803 (2002) ¶ 9 & n.24, *appeal pending sub nom. Brand X Internet Services v. FCC*, 9th Cir. No. 02-70518 (and consolidated cases) (filed Mar. 22, 2002).

media market in a framework that is predictable, adaptable to future marketplace changes, and judicially sustainable.

3. Accounting for Diversity and Competition Via MVPDs and the Internet

119. MVPDs and the Internet have posed unique challenges under past formulations of the voice test. Unlike TV and radio stations, MVPDs and the Internet are single outlets furnishing access to multiple news sources. In analyzing whether and how MVPDs, such as cable systems, should be counted as voices, we must examine not only how much content is available, but also who controls viewers' access to it. We decided in 1999, in the context of the radio/TV cross-ownership rule, to count a cable system as one voice because "most programming is either originated or selected by the cable system operator, who thereby ultimately controls the content of such programming."[187] However, cable systems also give viewers access to much information on matters of public concern. For example, it appears that a typical household that subscribed to cable (or DBS) service could find – on CNN, CNBC, MSNBC, Fox News, and C-SPAN – at least as many sources of information about national issues as it would find on multiple broadcast TV and radio stations. It also appears, however, that most MVPDs carry largely the same all-news channels and other channels with specialized news and information such as business, sports, and weather. Thus, under one possible approach, we could choose to count CNN as one voice even if it were carried in a community by the largest cable operator, an overbuilder, and two or more DBS providers.

120. Another approach would be to count each independent owner as a voice, so that if one entity owned a broadcast station, a cable system and several channels on it, an Internet access service, and a web page in the same area, it would count as one voice instead of many. Although we have listed many sources of media programming and distribution, industry consolidation and the reduction in the number of owners could diminish diversity and competition across these outlets.

121. We invite comment on DBS's contribution to diversity and competition, and whether DBS should be considered a voice in any rule we adopt. At a minimum, DBS contributes to viewpoint diversity through its editorial control over channel selection. In addition, DBS systems are, like cable systems, platforms and outlets for far more channels and programs than can be presented by broadcasters. In the past we have not counted DBS as a voice because it did not then provide local programming.[188] We invite comment as to whether that rationale is still valid today. Should we consider DBS a voice because of the range of programs and channels it provides? Do these systems contribute to diversity and competition regardless of the extent to which DBS provides local programming?

122. In addition, DBS operators' transmission of local broadcast channels has greatly increased since the enactment of the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), which permitted DBS operators to retransmit local broadcast signals into local markets.[189] We ask whether, in light of SHVIA, DBS can fairly be classified as an outlet for the purpose of any new voice test. Does the local programming available on DBS merely reproduce the information obtainable via over-the-air television and cable? Does DBS provide a source of diversity and competition to consumers in rural areas that are not served by local TV stations or cable?

123. We request comment on whether the foregoing analysis of cable and DBS is correct.

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[187] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12953, ¶ 113.

[188] *Id.* at 12954, ¶ 114.

[189] Pub. L. No. 106-113, 113 Stat. 1501, app. I at 1501A-523 and 544; 17 U.S.C. § 122; 47 U.S.C. § 338. At present, EchoStar and DirecTV each provide local-into-local service to approximately 40 of 210 DMAs. *See, e.g.,* Dish Network DirecTv Satellite TV, http://satellite-dish.virtualave.net/local-networks.htm (visited July 10, 2002).

Based on that analysis, should we count these media as voices, and if so, how? For example, where there are two cable systems serving the same area, should we count each as a voice? Or, should we count, as independent voices, each independently owned source of news and public affairs programming that is made available to cable and DBS subscribers? When the same programming is made available in a community by more than one MVPD, *e.g.*, if each one provides CNN, should that count as one voice or more? How, if at all, should the same question be answered for broadcast stations in the same area that carry programs from the same source, such as a single news broadcast? On an AOL Time Warner cable system, for example, should CNN count as a voice independent of AOL Time Warner? Should we count each independently owned network carried by a cable system or DBS provider in a market as one voice? On cable television, do PEG channels carry enough information and viewpoints to count as one or more voices? How common are locally or regionally oriented cable offerings such as New England Cable News,[190] the borough-specific cable channels in New York City,[191] and NorthWest Cable News that serves Seattle and the Pacific Northwest?[192] Finally, we seek comment on the ability of cable operators and DBS providers to act as content gatekeepers by choosing which programming is selected to fill the available channel capacity. Should their status as gatekeepers affect whether or how we count them as voices?

124. Like cable and DBS, the Internet also presents unique challenges in the context of diversity and competition. In 1999, we decided not to count the Internet as a voice, in part because "many still do not have access to this new medium."[193] Is the Internet now so widely accessible that it should count as a voice? Are there characteristics of the acquisition of information on the Internet, such as the need to click a hyperlink or key in a website's Internet address, that make it different from broadcasting such that we should not count it?[194] Or, should these characteristics of the Internet affect the significance we give the Internet? If so, should it count as one voice or many? On the Internet, how much news and how many viewpoints are original; that is, not merely re-purposed content that also is available from local and national media outlets, such as TV stations, networks, and newspapers? We assume that the Internet permits the user to access any news source having a presence on the World Wide Web. Is there any instance of an Internet service provider ("ISP") or other entity acting as an "Internet gatekeeper" by denying a subscriber access to a news source on the World Wide Web? Is the role of a gatekeeper different between the Internet and cable or DBS? We also assume that, unlike cable or DBS, the Internet has unlimited capacity such that there is no limit on the number of news sources that a user can reach. On the other hand, some ISPs feature particular news sources on their home pages.[195] We seek comment on these assumptions and their relevance to our analysis of diversity and competition.

VI. NATIONAL OWNERSHIP RULES

125. In this section we consider whether the national TV ownership rule[196] and the dual

[190] *See* New England Cable News, http://www.necn.com (visited July 10, 2002).

[191] *See* NY1 News, http://www.ny1.com/Boroughs/bronx.html (visited July 10, 2002).

[192] *See* NWCN, http://www.nwcn.com, (visited July 10, 2002). *See generally* Non-Stop News, http://www.rtnda.org/resources/nonstopnews/index.html (visited July 10, 2002).

[193] *Local TV Ownership Report and Order,* 14 FCC Rcd at 12953, ¶ 114.

[194] *See* Bruce M. Owen, THE INTERNET CHALLENGE TO TELEVISION at 8 ("Internet television requires that one pay close attention. There is nothing passive about it. Like a video game, highly interactive programs on Internet TV require as much focused attention as work or active sports.") (Harvard Univ. Press, Cambridge MA, 1999).

[195] For example, Comcast's broadband Internet access first page includes Associated Press news stories. *See* Comcast High-Speed Internet, http://www.comcast.net/comcast.html (visited Aug. 6, 2002).

[196] 47 C.F.R. § 73.3555(e).

network rule[197] continue to meet the statutory standard.[198] Unlike the local TV ownership rule and the radio/TV cross-ownership rule, these two rules do not directly limit local media ownership, although they may indirectly affect viewpoint diversity in a given local market by limiting network ownership across markets. As such, they appear to play a less direct role in our core policy concern of viewpoint diversity, although we invite comment on this issue.

A. National TV Ownership Rule

126. The national TV ownership rule prohibits an entity from owning television stations that collectively would reach more than 35% of U.S. television households. Reach is defined as the number of television households in the TV DMA to which each owned station is assigned.[199] VHF stations are attributed with all TV households in the DMA; UHF stations are attributable with 50% of the DMA households (the "UHF discount").[200]

127. The Commission first adopted national ownership restrictions for television broadcast stations in 1941 by imposing numerical caps on the number of stations that could be commonly-owned.[201] The rule was amended a number of times thereafter to increase the cap on the number of television stations.[202] In 1985, the station cap was raised from 7 to 12 and an audience reach limit of 25% was added.[203] The stated purposes of these early national TV ownership limits were, in general, to balance several goals. On the one hand, the Commission wanted to promote competition and "diversification of program and service viewpoints."[204] On the other hand, common ownership of stations in different areas allows efficiencies to be realized,[205] and the Commission raised numerical limits as the number of

[197] 47 C.F.R. § 73.658(g).

[198] 1996 Act, § 202(h).

[199] 47 C.F.R. § 73.3555(e)(1). In the *1999 National Television Ownership Report and Order,* the Commission clarified that no market will be counted more than once when calculating the 35% cap. DMAs, rather than Arbitron's Areas of Dominant Influence, are used to define a station's market for the purpose of calculating national audience reach. *Broadcast Television National Ownership Rules, Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules,* 15 FCC Rcd 20743 (1999).

[200] 47 C.F.R. § 73.3555(e)(2). Section 73.3555(e)(2) explains that "national audience reach" is based on the number of television households in DMAs, and that UHF television stations are credited with reaching only 50% of the television households in the DMA.

[201] *Broadcast Services Other Than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941).

[202] *Rules Governing Broadcast Services Other Than Standard Broadcast*, 9 Fed. Reg. 5442 (May 23, 1944) (raising the ownership limit from three to five stations); *Amendment of Multiple Ownership Rules,* 43 F.C.C. 2797, 2801-02 (1954) ¶ 14 (raising the ownership limit from five to seven stations); *1984 Multiple Ownership Order,* 100 F.C.C.2d at 18, ¶ 5 (establishing a six-year transitional period during which common ownership of up to twelve stations would be permitted).

[203] *See 1985 Multiple Ownership Reconsideration Order*, 100 F.C.C.2d at 88-92, ¶¶ 34-41 ("The audience reach cap was defined as 25% of the national audience, calculated as a percentage of all Arbitron ADI television households.").

[204] *See 1985 Multiple Ownership Reconsideration Order,* 100 F.C.C.2d at 97 ¶¶ 50-52; *1984 Multiple Ownership Order,* 100 F.C.C.2d at 21-23 & nn.8-10, 17, ¶¶ 13-17; *Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations,* 95 F.C.C.2d 360, 361-62 & nn.7-9, 366 & nn.24-25 (1983) ¶¶ 3, 11.

[205] *Amendment of Multiple Ownership Rules,* 43 F.C.C. at 2801-02, ¶ 14.

television stations increased.[206]

128. In the 1996 Act, Congress directed the Commission to eliminate the station cap and raise the national reach limit from 25% to 35%.[207] In the *1998 Biennial Report*, the Commission addressed the issue of whether or not to modify or eliminate the 35% national audience reach limit. The Commission determined that the changes made in 1999 to the local television ownership rule should be observed and assessed before making any further changes to the national limit. It also found that many group owners had acquired large numbers of stations nationwide, and that this trend needed further observation.[208] The Commission stated that consolidation of ownership of television stations in the hands of a few national networks would not serve the pubic interest. The Commission reasoned that national networks have a strong economic interest in having their affiliates clear (that is, decide to broadcast) all network programming, and independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed. It also said that independent ownership of stations increases the diversity of programming by providing an outlet for non-network programming.[209] Additionally, the Commission referred to possible competitive problems in the national markets for advertising and program production.[210] As discussed below, the court in *Fox Television* has remanded the Commission's decision in the *1998 Biennial Review* not to consider further changes in the national TV ownership rule. In this section, we invite comment on whether to retain, eliminate, or modify the national TV ownership rule.

129. We ask for comment about whether the current national TV ownership rule is necessary in the public interest as the result of competition. Does it continue to serve its original purposes of promoting competition and viewpoint and programming diversity? Does the rule promote the other goals in described Section IV above, including localism and the various other forms of diversity and competition? If the rule serves some of our purposes and disserves others, does the balance of its effects argue for keeping, revising, or abolishing the rule? In the following paragraphs, we explore these questions in more detail.

130. In addition, we invite comment on the relevance and continued efficacy of the UHF discount. The UHF discount is intended to recognize the deficiencies in over-the-air UHF reception in comparison to VHF reception. The Commission retained the 50% UHF discount in the *1998 Biennial Report*, concluding that the signal disparity between UHF and VHF had not yet been eliminated. Noting that the signal disparity should be rectified to some extent by digital television, however, the Commission stated in the *1998 Biennial Report* that when the transition to digital television is near completion, we would issue a notice of proposed rulemaking proposing a phased-in elimination of the discount.[211]

131. We ask the parties to comment on the extent of the UHF "handicap" in today's marketplace. In particular, over 86% of consumers receive video programming from MVPDs where UHF signal quality is largely equalized with that of VHF channels. In addition, cable has must carry obligations with respect to UHF stations and DBS operators carry UHF stations in any local market where they elect to carry at least one local broadcast signal. We seek comment on whether the UHF discount continues to be necessary in light of the effect of MVPDs on UHF signal issues.

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[206] *1984 Multiple Ownership Order,* 100 F.C.C.2d at 19, ¶7.

[207] 1996 Act, § 202(c)(1).

[208] *1998 Biennial Report,* 15 FCC Rcd at 11072-75, ¶¶ 25-30.

[209] *Id.* at 11075, ¶ 30.

[210] *Id.* at 11073, ¶ 26 n.78.

[211] *Id.* at 11079-80, ¶ 38.

1. Diversity

132. In 1984, the Commission concluded that the relevant geographic market for considering viewpoint diversity is local, not national. Thus, in the *1984 Multiple Ownership Report and Order*, the Commission relaxed the national ownership restrictions. It raised the station cap from seven stations to twelve stations and said that the entire rule would be eliminated (or sunset) in six years. In explanation, the Commission stated that:

> A primary goal of the Commission in adopting the [ownership restrictions] was to encourage a diversity of independent viewpoints. . . . In brief, we conclude that a national rule is irrelevant to the number of diverse viewpoints in any particular community and that even if we believed that radio and television were the only media relevant to diversity of viewpoint, the phenomenal growth in both television and radio since the rule was adopted in 1953 provides sufficient basis for raising the [ownership restrictions].[212]

The Commission reasoned that the area from which consumers can select the relevant mass media alternatives is generally the local community in which they work and live, where radio and TV signals are available in discrete local markets, and other local media outlets are abundantly available. It determined that the lack of relevance of the rule to local viewpoint diversity "persuades us that elimination of the national ownership rule is unlikely to have an adverse impact on the number of independent viewpoints available to consumers."[213] It also determined that elimination of the national TV ownership rule posed no threat to the diversity of independent viewpoints in the information and entertainment markets, because a wide range of media outlets existed and because the rule did not affect the number of viewpoints in the relevant local markets.[214]

133. On reconsideration, the Commission added a 25% audience reach limit to the 12 station cap and eliminated the sunset provision adopted in the *1984 Multiple Ownership Order*, concluding that "the complete and abrupt elimination of our national multiple ownership rules might engender a precipitous and potentially disruptive restructuring of the broadcast industry."[215] The Commission reiterated that diversity of viewpoint was determined at the local level. The Commission also affirmed that the 1984 decision:

> balanced the need for a presumptive rule equating ownership diversity at the national level with viewpoint diversity against the demonstrable benefits of group ownership. In the context of this balancing process, we found that national ownership diversity is not of primary relevance in promoting viewpoint diversity. In this regard we noted that the most important idea markets are local . . . [N]ational broadcast ownership limits, as opposed to local ownership limits, ordinarily are not pertinent to assuring a diversity of views to the constituent elements of the American public.[216]

134. In the *1998 Biennial Report*, the Commission reconsidered its views regarding the relationship between the national TV ownership rule and viewpoint diversity. It asserted that independently-owned affiliates play a valuable role by "counterbalancing" the networks' strong economic incentive in clearing all network programming "because they have the right . . . to air instead"

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[212] *1984 Multiple Ownership Order*, 100 F.C.C.2d at 24-25, ¶ 24.

[213] *Id.* at 27, ¶¶ 31-32.

[214] *Id.* at 30-31, ¶ 43.

[215] *1985 Multiple Ownership Reconsideration Order*, 100 F.C.C.2d at 76, ¶ 3.

[216] *Id.* at 81-82, ¶ 18 (footnote omitted) (citing *1984 Multiple Ownership Order*, 100 F.C.C.2d at 38, ¶ 62).

programming more responsive to local concerns.[217] Thus, in determining not to modify or eliminate the rule, it noted that the "competitive concerns" of opponents of relaxing or eliminating the [national TV ownership rule], including the concern that the number of viewpoints expressed nationally would be reduced, were more convincing than the comments in support of relaxation or elimination.[218]

135. In *Fox Television*, the D.C. Circuit remanded the decision in the *1998 Biennial Report* to retain the national TV ownership rule, holding that the decision to retain it was arbitrary and capricious. The court took note of the Commission's *1984 Multiple Ownership Order,* which concluded that the rule should be repealed because it focuses on national, rather than local, markets and thus has an insignificant effect on viewpoint diversity. It also took note of the Commission's 1984 assertion that it had no evidence suggesting that stations which are not group-owned better respond to community needs, or spend more of their revenues on local programming.[219] When the Commission changed course by retaining the limit in the *1998 Biennial Report*, it failed to explain why it no longer considered the reasoning in its *1984 Multiple Ownership Order* to be persuasive. According to the court, the Commission's failure to explain this significant deviation from its earlier conclusions rendered its 1998 decision arbitrary and capricious.[220]

136. It appears that the national TV ownership rule is not directly relevant, and perhaps not relevant at all, to the goal of promoting viewpoint diversity. Consumers generally do not travel to other cities to obtain viewpoints. Instead, they rely on outlets for news sources, such as TV, radio, newspapers, Internet, cable, DBS, and magazines that are available in their own cities. As a result, the expression of viewpoints by television stations in one city does not appear to affect in any meaningful way the viewpoints available to people located in other cities. We seek comment on this analysis as well as on the general question whether our national TV ownership rule is relevant to our goal of promoting viewpoint diversity on a local level. Is there a relationship between the national ownership rule and the dual network rule with regard to viewpoint diversity? For example, could we safely repeal the national ownership rule as long as we maintain the dual network rule because the latter renders more likely the preservation of at least four different newscasts in each market? Does, as the Commission concluded in the *1998 Biennial Report,* independent ownership of stations increase diversity of programming by providing outlets for non-network programming?[221] Do commenters believe that the broadcast of non-network programming promotes our goal of source diversity?

137. We also seek comment on the role of independently owned and operated stations. In deciding not to relax the national ownership rule in the *1998 Biennial Report*, the Commission said:

> We do not believe that consolidation of ownership of all or most of the television stations in the country in the hands of a few national networks would serve the public interest. The national networks have a strong economic interest in clearing all network programs, and we believe that independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and

[217] *1998 Biennial Report,* 15 FCC Rcd at 11075, ¶ 30.

[218] *Id.* at 11073, ¶ 26 n.78. The arguments raised by the parties in support of retaining the rule were that the bargaining power of networks over their affiliates would increase, the number of viewpoints expressed nationally would be reduced, concentration in the national advertising market would increase, and the potential for monopsony power in the program production market would be enlarged.

[219] *Fox Television*, 280 F.3d at 1043.

[220] *Id.* at 1043-44.

[221] *See 1998 Biennial Report,* 15 FCC Rcd at 11,074-75, ¶ 30.

> interest of the local communities to which they are licensed. Independent ownership of stations also increases the diversity of programming by providing an outlet for non-network programming.[222]

In *Fox Television*, the court found our explanation to be a plausible justification for the national ownership rule and consistent with the requirements in section 202(h). The court stated, however, that the Commission's conclusion was not adequately supported by the record:

> Although we do not agree with the networks that this reason is unresponsive to § 202(h) ... we must agree that the Commission's failure to address itself to the contrary views it expressed in the *1984 Report* effectively undermines its rationale. ... The [*1998 Biennial Report*] does not indicate the Commission has since received such evidence or otherwise found reason to repudiate its prior decision.[223]

We seek comment on whether independently owned, network-affiliated stations offer more diverse programming and/or programming from more diverse sources than affiliated stations that are owned and operated by their network. We ask parties to provide evidence supporting their comments on this issue. Are there other factors or policy goals we should consider in determining whether to retain, modify, or eliminate the national TV ownership rule?

2. Competition

138. We seek comment on how the national TV ownership rule affects the ability of TV station group owners to compete against other video providers. We are interested in the impact this rule may have on the program production market and the advertising market. We also ask whether examination of advertising competition is, or should be, relevant to this analysis. Commenters are asked to analyze the impact of the transaction costs and uncertainties associated with network-affiliate relationships as well as any pro-competitive benefits of the current national television ownership rule. We also seek comment on whether the national television ownership rule artificially constrains the largest group owners from employing their skills in additional markets, and whether and how this operates to the detriment of consumers in those markets.

a. Program Production Market

139. Broadcast television stations organize a schedule of video programming which they either produce themselves or purchase from others in a national market. The *TV Ownership FNPRM* expressed a competitive concern about the ability of large purchasers of video programming to exercise monopsony power and artificially restrict the price paid for programming.[224] The market for program production appears to consist of firms that produce niche and general entertainment programming for sale to program packagers. Program packagers include cable networks, broadcast television networks, program syndicators, and individual owners of television stations (regardless of whether the station also carries network programming).

140. We seek comment on whether the national TV ownership rule promotes or hinders competition in the program production market. We ask commenters to address whether raising the national ownership cap would facilitate monopsony power. Our answer to this question depends significantly on the identification of market participants. For example, if program producers are

[222] *Id.*

[223] *Fox Television*, 280 F.3d at 1043.

[224] *TV Ownership FNPRM*, 10 FCC Rcd at 3544, ¶ 46.

constrained by the cost structure of their products to selling programming exclusively to broadcast television stations, that might suggest that raising the 35% cap would harm program production – and possibly program diversity – by increasing the negotiating power of the remaining television group owners vis-à-vis program producers. But if the market for purchasing programming included not just local television stations, but also cable networks, we would be less concerned that raising the 35% cap would create or exacerbate monopsony power in the program acquisition market. Therefore, we encourage parties addressing the 35% cap issue to submit evidence of the relevant market participants and the likely impact of raising the national cap on program producers.

141. In addition, regulatory changes have occurred in the past six years that may have affected the program production market. Prior to the 1996 increase in the national TV ownership cap, the Commission eliminated the financial interest and syndication rules ("fin-syn") and the prime time access rule ("PTAR").[225] Can the effects of the 1996 change in the national ownership cap be separated from the effects of the repeal of the fin-syn and PTAR rules? If so, we ask commenters to identify those effects and to address whether the 35% cap continues to be necessary to promote a robust and diverse program production market.

b. Advertising Markets

142. We have considered national television advertising as a relevant market based on the different nature of advertisers seeking a national audience rather than ones purchasing time for local markets.[226] More recently, we identified a strategic group among the programming networks that consisted of ABC, NBC, CBS, and Fox.[227] This assessment was based on findings that: (1) the relatively few local stations available with which to affiliate constituted a meaningful entry barrier into the strategic group; and (2) prime time viewership ratings were significantly higher for the strategic group networks than for other broadcast television networks. If our prior identification of this strategic group continues to be accurate today, the existence of this group likely restrains competition for national advertising among

[225] *See Review of the Prime Time Access Rule, Section 73.658 (k) of the Commission's Rules,* 11 FCC Rcd 546 (1995) (repealing the Prime Time Access Rule, which, in order to stimulate the production of programs by producers independent of networks, had generally prohibited network-affiliated television stations in the top 50 television markets from broadcasting more than three hours of network programs during prime time); *Review of the Syndication and Financial Interest Rules, Sections 73.659 – 73.663 of the Commission's Rules,* 10 FCC Rcd 12165 (1995).

[226] *See, e.g., Amendment of Sections 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of AM, FM, and Television Broadcast Stations,* 95 F.C.C.2d 360, 386 (1983) ¶ 43 ("In this regard, as to economic concentration the traditional Commission approach to national ownership requires that the relevant market be a national broadcast market for viewers and listeners (who are the products in an advertiser-supported system).").

[227] *See Dual Network Order,* 16 FCC Rcd at 11122-23, ¶ 20. A strategic group refers to a cluster of independent firms within an industry that pursue similar business strategies. For example, the major networks supply programming to their affiliated local stations that is intended to attract mass audiences and advertisers that want to reach such large, nationwide audiences. By contrast, the emerging networks target more specialized, niche audiences similar to cable television networks. The conceptual basis for a strategic group is developed in R. E. Caves and M. E. Porter, *From Entry Barriers to Mobility Barriers: Conjectural Decisions and Contrived Deterrence to New Competition,* 91 Q.J. ECON. 241 (May 1977). *See also* Michael E. Porter, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITION at ch. 7 (The Free Press, New York NY, 1980). For additional references on the application of the strategic group concept, see F. M. Scherer and David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (3rd ed.) at 284-85 (Houghton Mifflin, Boston MA, 1990). When properly applied, the concept of a strategic group ordinarily implies that only a relatively few firms will be included within its boundaries so that competitive rivalry will be oligopolistic in nature, although the number of firms actually populating the industry aggregated over all strategic groups may be quite numerous.

the broadcasters.[228]

143. We seek comment on whether this analysis continues to be an accurate characterization of the national advertising market and the participants in the market. First, we request comment on whether the key participants in the national television advertising market should be defined more broadly to include broadcast TV networks outside the strategic group. If so, what are the factors that should be considered in identifying the members of the strategic group? Should the participants in the national television advertising market also include other outlets such as non-broadcast television networks (ESPN, CNN, *etc.*)? Cable networks and the other broadcast networks such as The WB and UPN have national coverage and carry national advertising, which may suggest they serve as substitutes from the perspective of at least some advertisers.

144. Second, regardless of whether we also include non-broadcast networks in the national television advertising market, we seek information on the extent to which national spot advertisements and/or syndicated programming are fungible with network television advertising from the perspective of advertisers. If group owners compete in the national advertising market, it would appear that increasing the 35% ownership cap could diminish competition by allowing broadcast networks to acquire additional stations, thereby reducing the effectiveness of non-network group owners in the national advertising market. We request market share data and analysis on this important point. Technology changes in advertising delivery may also allow the broadcast television networks to effectively provide national spot advertising. That is, a national network may deliver different advertisements targeted to different regions of the country simultaneously. We seek comment on this development and its relevance, if any, to competition in the national advertising market. Third, a recent study suggests that the national advertisers do not readily substitute between alternative media.[229] We seek comment on this analysis.

145. The national TV ownership rule does not appear to have a direct effect on the number of competitors in the local advertising market. The rule affects primarily the total number of national households one group owner can reach, not the number within a single market. Of course, we recognize that the 35% limit could inhibit the participation of a group owner in a particular local TV market and thereby affect competition in that market. In particular, we seek comment on whether additional scale economies could be realized by group owners and whether the current rule prevents especially skilled management from entering additional local markets. We seek comment on this general issue, and whether limiting the size of group owners nationally can have an impact on competition in the local advertising market.

c. Innovation

146. We are also concerned with the impact that the national TV ownership rule may have on innovation in the media marketplace. Does our current rule promote or hinder innovation? Does a traditional competition analysis adequately capture the beneficial effects of innovation? What effect, if any, would a relaxed national TV ownership rule have on the ability of a broadcast network to develop innovative programming or services, or to effectuate the transition to digital television? Does the answer depend on whether the group owner plans to provide purely high definition television or standard definition television plus ancillary services? Would relaxation of the national TV ownership rule increase the ability and incentives of market participants (the large group owners in particular) to develop innovative technologies and/or new types of video programming? Examples of innovations that have been withheld from the media marketplace as a direct result of national TV ownership limits would be

[228] *Dual Network NPRM,* 15 FCC Rcd at 11261-62, ¶¶ 22-24.

[229] Alvin Silk, Lisa Klein, & Ernst Berndt, *Intermedia Substitutability and Market Demand By National Advertisers*, REVIEW OF INDUSTRIAL ORGANIZATION (2002). The national advertising categories studied are: magazine, network TV, outdoor, spot radio, network radio, spot TV, newspapers and direct mail.

particularly useful to our competitive analysis.

3. Localism

147. The Commission has said in the past that a national TV ownership rule strengthens localism by creating a class of non-network station owners that can decide whether to preempt network programming in favor of programming that would better serve the needs and interests of that station's community.[230] In *Fox Television*, the court affirmed that localism is a potentially relevant consideration in deciding whether to retain, modify, or eliminate the national TV ownership rule.[231] Given this statement by the court and fact that the national ownership rule may have the most direct impact of our rules on the attainment of localism, our evaluation of the continued need for this rule will rely heavily on our findings regarding its effectiveness in promoting localism.

148. The production of local news and public affairs programming may represent one form of localism. We seek to understand whether the national TV ownership rule, by preserving a class of affiliates, may have the effect of increasing or decreasing the quantity and/or quality of local news and public affairs programming. We would be particularly interested in any clear correlation between the status of stations as affiliates or network-owned and the quantity of local news and public affairs produced by those stations. We request that commenters submit evidence addressing the relative output of affiliates and networks in this regard and address the appropriate weight of such data in our evaluation of localism and the national ownership rule.

149. The national TV ownership rule may also promote localism by creating economic incentives for non-network station owners regarding the preemption of network-delivered programs with station-selected programming. Networks incur costs in producing or purchasing programming for distribution on their networks. Since the networks initially bear these costs, network-owned and operated stations may have a stronger economic incentive than affiliates, all else being equal, to distribute network programming rather than replacing it on a station-by-station basis in response to community interests. It is also possible, however, that the local programming preference in a particular instance may be sufficiently strong that even a network-owned station would find it profitable to replace its own programming with alternative programming. Parties commenting on this issue are asked to address specifically the allocation of advertising revenues between networks and affiliates on preempted programming. We seek comment on these observations and on any other economic incentives affecting the preemption of network programming by local stations.

150. In addition, television stations are obligated to serve the needs and interests of their local communities.[232] We ask commenters to address the extent to which affiliates and/or network-owned stations could be expected to preempt network programming when it is not in their economic interest to do so. According to testimony before Congress by the President and Chief Operating Officer of Viacom, Inc., CBS' owned-and-operated stations "have complete freedom locally," even preempting primetime network programming to air, for example, an emergency weather newscast, a local telethon, and other events of local interest.[233] If the principal category of such "unprofitable" preemption is breaking news or

[230] *See, e.g., 1998 Biennial Report,* 15 FCC Rcd at 11074-75, ¶ 30.

[231] *Fox Television*, 280 F.3d at 1043.

[232] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 F.C.C. 2d, 1075, 1091-1092 (1984).

[233] *Karmazin Testimony, supra* note 158, at 8-9 (stating that WVCC-TV in Minneapolis preempted three hours of primetime network programming in May 2001 to run an emergency weather newscast; WBZ in Boston has preempted primetime network shows annually for the past 20 years to air the Boston Children's Hospital Telethon, and preempted daytime programming to air "complete" coverage of Congressman Joe Moakley's funeral.).

other emergency information, should we expect networks and affiliates to respond similarly with respect to such situations?

151. A key aspect of the argument that the national TV ownership rule promotes localism is that affiliates serve local needs more effectively than network station owners because affiliates are more likely to replace network programming with programming more suited to local needs. There are, however, significant portions of the American public that already receive broadcast programming through stations owned and operated by broadcast networks. Is there evidence that consumers served by network-owned stations have either benefited or been harmed by the lack of a non-network owner as a check on network-provided programming?

152. It is also possible that localism may be furthered by the national TV ownership rule by preserving a sufficiently large class of network affiliates that collectively can influence network programming decisions. This may be the case where networks plan to air a particular program that a large percentage of its affiliates disfavor. Negotiations between a sufficiently large group of affiliates may cause the network to revise its programming decision. By contrast, if the national television ownership cap were raised or eliminated, a smaller group of affiliates raising the same concern might be less able to persuade the network to alter is programming plans. We ask commenters to address the frequency and efficacy of such discussions, to the extent they occur in practice, and the value of this form of localism compared with station-by-station preemption issues discussed above.

153. We also seek comment on whether the national TV ownership rule continues to be necessary to preserve affiliate bargaining power regarding preemption. Would increasing the cap shift bargaining power to the networks such that "local" rights would be lost as a practical matter?

154. Separate from the selection of programming, our goal of promoting localism may be addressed through rules that promote the production of local news and public affairs programming The *1984 Multiple Ownership Order* relied on news ratings as an indicator of the quality of local news produced by group-owned stations versus that produced by stand-alone stations.[234] The Commission reasoned that higher ratings indicated a greater responsiveness to local needs.[235] Should we compare the quality of local news produced by network owned and operated stations and that of affiliates using ratings as a measure of quality? Are there alternative measures for this comparison?

4. Audience Measurement

155. The national TV ownership rule is calculated based on the number of television households a station can reach. The number of households reached nationwide is the sum of the number of households in each DMA in which a group owner owns a television station. The number of households in a DMA is halved for UHF stations. The national TV ownership rule is thus based on homes "passed," not homes actually viewing the stations of a group owner. This "potential audience" measure is at odds with the way we calculate a national ownership audience reach limit for cable television. A home is attributed to a multi-system cable operator only if that MSO actually serves the home, not simply because it is available to that home. We seek comment on which measurement method is appropriate given the policy objectives of the national TV ownership rule, and the differences between

[234] *1984 Multiple Ownership Order,* 100 F.C.C.2d at 31, ¶ 44. Also relevant is whether repeal of the rule would remove barriers to the flow of information. This might be true if group-owned stations provide a different mix of programming that better matches consumer preferences. A study by Professor Parkman shows that local news programming of group-owned stations have higher ratings, suggesting that group-owned stations are more responsive to viewer demand for news. Parkman, *The Effects of Television Station Ownership on Local News Ratings*, 64 REV. ECON. & STATS. 289 (1982).

[235] *1984 Multiple Ownership Order,* 100 F.C.C.2d at 31, ¶ 44.

cable and broadcast television in the ease with which the potential service can be accessed (switching off and on channels versus subscription and installation). Is the current method of measuring the broadcast audience appropriate because broadcast is a non-subscription service? Is there an alternative measurement method that would be preferable to either of these existing approaches?

B. Dual Network Rule

156. The dual network rule currently provides: "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in § 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)."[236] Thus, the rule in its current form permits broadcast networks to provide multiple program streams (program networks) simultaneously within local markets, and prohibits only a merger between or among these four networks.

157. The dual network rule was originally adopted over sixty years ago and flatly prohibited any entity from maintaining more than a single radio network.[237] A few years later, the rule was extended to television networks.[238] The Commission believed that an entity that operated more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be tied up by the more powerful network entity. In addition, the Commission expressed concern that dual networking could give a network too much market power. The rule was therefore also intended to remove barriers that would inhibit the development of new networks, as well to serve the Commission's more general diversity and competition goals.[239]

158. After Congress, in the 1996 Act, directed the Commission to amend the rule, the Commission amended the rule for the first time since it was adopted to permit a broadcast station to affiliate with a network organization that maintains more than one broadcast network unless the multiple network combination was created by a combination among ABC, CBS, Fox, or NBC, or a combination between one of these four networks and UPN or WB.[240] In the *Dual Network Order* last year, the Commission further relaxed the rule to permit a "top four" network to merge with or acquire UPN or WB. The Commission found that: (1) competition in the national advertising market would not be harmed by this rule change;[241] (2) greater vertical integration of the sort contemplated by this rule change was potentially an efficient, pro-competitive response to increasing competition in the video market;[242] and (3) program diversity would not be harmed because the two combined networks would have strong economic incentives to diversify their program offerings.[243] We ask for comment whether the relaxation of the dual network rule has had the effects that we foresaw in the *Dual Network Order*.

159. We ask for comment about whether the present dual network rule is necessary in the public interest as the result of competition. Does it promote the goals we set forth above – diversity, competition, and localism? If the rule serves some of our purposes and disserves others, does the balance

[236] 47 C.F.R. § 73.658(g).

[237] *Dual Network Order*, 16 FCC Rcd at 11114, ¶ 2.

[238] *Id.*

[239] *1998 Biennial Report*, 15 FCC Rcd at 11095-96, ¶ 70.

[240] *Dual Network Order*, 16 FCC Rcd at 11115, ¶ 4.

[241] *Id.* at 11125, ¶ 25.

[242] *Id.* at 11124-25, ¶ 24.

[243] *Id.* at 11131, ¶ 37.

of its effects argue for keeping, revising, or abolishing the rule? In the following paragraphs, we explore these questions in more detail.

1. Diversity

a. Program Diversity

160. In the *Dual Network Order*, the Commission found that program diversity at the national level would not likely be harmed by the combination of an emerging network (*i.e.*, UPN or WB) with one of the four major networks. The Commission found it likely that their common owner would have strong incentives to produce a diverse schedule of programming for each set of local TV outlets in the same market.[244] After the *Dual Network Order*, Viacom, parent of CBS, acquired UPN.[245] Has the Commission's expectation proved correct? We also seek comment on the effect that consolidation between and among top four networks likely would have on program diversity. Additionally, we seek comment on whether, and if so how, the increased competition that television stations face from cable networks and other media affects the diversity of programming on all national program networks.

b. Viewpoint Diversity

161. With respect to the combination of two or more top four networks, we see several potential viewpoint diversity issues. The first is the loss of an independently owned and produced local newscast in cities where the two networks each own local television stations.[246] We seek comment on the impact of such a development on viewpoint diversity. Even if we were to eliminate the dual network rule entirely, that does not necessarily mean that the merged company could actually own all the stations previously owned by the two networks. The local TV ownership rule could limit the degree to which one entity, including a network, could own multiple TV stations in one market, assuming we retain that rule.[247] We seek comment on whether we should address the loss of an independent local newscast as a result of a combination of two or more of the four major networks in the dual network rule, in the local TV ownership rule, or in some alternative new rule.

162. The second possible viewpoint diversity concern relating to the elimination of the dual network rule is the potential loss of one or more independent national television news operations. The primary focus of networks' national news operations appears to be on the nightly newscasts by ABC, CBS, and NBC. We ask for comment, in light of other sources of news and current public affairs, whether the loss of one or more of those nightly newscasts as an independent source of news would significantly reduce sources of news and current affairs and thus injure the public interest. Should the fact that the national broadcast networks alone reach virtually all households in the country affect our analysis? Would a reduction in the number of independently-owned national television networks give the

[244] *Id.* at 11131, ¶ 37.

[245] *Shareholders of CBS Corp. and Viacom, Inc., for Transfer of Control of CBS Corporation and Certain Subsidiaries, Licensees of KCBS-TV, Los Angeles, CA, et al.*, 15 FCC Rcd 8230 (2000).

[246] In the *Dual Network* Order, we found that eliminating the emerging network portion of the rule would not adversely affect the provision of news and public affairs programming because emerging networks typically do not carry local news and public affairs programming. We noted statements of Viacom that emerging networks have not yet been in a position to absorb the full costs of developing news departments offering regularly scheduled news programming. Thus, we concluded, a combination of a top four network and an emerging network would not cause a reduction of diversity in news or public affairs programming. *Dual Network Order*, 16 FCC Rcd at 11131-32, ¶ 38.

[247] For example, if a network owned the maximum number of stations in any market, our local TV ownership rule would prohibit it from purchasing a station owned by another network in the market.

remaining networks undue power and influence, such as during national elections?

163. Third, in the *Dual Network Order*, we noted evidence in the record from Network Affiliated Stations Alliance ("NASA") that eliminating the dual network prohibition against combinations of two of the top four major networks would increase the networks' economic leverage over their affiliates.[248] NASA stated that the big four broadcast networks still had by far the largest concentration of viewers and economic power, undiminished by new media and audience fragmentations. We seek comment on how the combination of two top four networks would affect the balance of negotiating power between networks and affected affiliates. Commenters should identify with precision how any such leverage affects viewpoint diversity in terms of program selection. We also seek comment on whether combinations of major networks would affect the quantity or quality of diverse viewpoints on the merged company's owned and operated stations. Are there other factors or policy goals we should consider in determining whether to retain, modify or eliminate the dual network rule?

2. Competition

164. The *Dual Network Order* did not resolve whether the dual network rule should be eliminated.[249] We did note, however, that commenters were divided on whether a merger of two major networks would create or enhance market power.[250] Some commenters pointed to new broadcast and non-broadcast competitors and argued that a merger of two major networks would not unduly affect the level of diversity and competition. Other commenters argued that major networks continue to have market power and relaxation of the rule would have an adverse impact on competition. We invite updates of these arguments. We also seek comment on whether the dual network rule promotes or retards innovation.

165. In the *Dual Network Order*, we found that the merger of an emerging network and a major network may benefit viewers and advertisers by lowering the risk associated with the creation of new network programming by giving one company a larger potential audience for the programming produced by the network.[251] This spreads the fixed costs of program creation over a larger number of viewers, thereby lowering the per-viewer cost of producing the programming. If there are potential efficiencies of eliminating the rule for emerging networks, as we concluded last year, will comparable efficiencies accrue if two or more top four networks were permitted to merge?

166. In the *Dual Network Order*, we found that the combination of an emerging network and one of the four major networks would not harm the national television advertising market because the two networks would compete in different strategic groups.[252] We now seek comment on the effect of mergers among the four major networks on the program production market. If the four major networks constitute a strategic group within the national advertising market, do they also operate as a strategic group within the program production market? We seek comment on how competition in the program production market and program diversity would be affected, if at all, by a merger among two or more of the four major networks.

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[248] *Dual Network Order*, 16 FCC Rcd at 11126, ¶ 28. The Commission did not address the arguments because the issue of eliminating the dual network rule in its entirety was not before the Commission at that point.

[249] *Id.* at 11126-27, ¶ 29 ("The questions presented in the *Notice* related solely to the emerging networks portion of the dual network rule; the question of eliminating the rule in its entirety was not squarely presented to this Commission for review. Therefore, we will not address that issue in this proceeding.") (footnote omitted).

[250] *Id.* at 11125-27, ¶¶ 26-29.

[251] *Id.* at 11124-25, ¶ 24.

[252] We ask whether examination of advertising competition is, or should be, relevant to our analysis of the ownership rules in Section IV of this *Notice*.

167. We are also concerned with the impact that the dual network rule may have on innovation in the media marketplace. Does our current rule promote innovation? Would relaxation of the dual network rule increase incentives to provide innovative broadcast programming or new broadcast-based technologies or services? Examples of innovations that have been withheld from the media marketplace as a direct result of the dual network rule would be particularly useful to our competitive analysis.

3. Localism

168. The *Dual Network Order* did not address localism as a policy goal *per se*. It did address localism in the context of a discussion of diversity. Thus, it noted that retention of the then-existing dual network rule might affect the financial viability of the UPN network. If UPN were no longer viable, then some stations that had been affiliated with it might not be able to survive without the benefits of affiliation. That is, without network-obtained programming and a recognized brand, the affiliates might not be able to sustain the increases in the cost of programming that they would have to bear to attract viewers, which could result in the cessation of operations. This could have cascading adverse consequences on diversity at the local level.[253] We seek to expand our understanding of the relationship between localism and the dual network rule. We invite comment as to whether the current rule promotes localism and, if so, whether, modification or elimination of the rule would have any effect. We also seek comment on whether combinations among major networks would affect the quantity or quality of local news provided by the merged company's owned and operated stations. Are there any other factors we should consider in determining whether to retain, modify, or eliminate the dual network rule?

VII. ADMINISTRATIVE MATTERS

A. Procedural Provisions

1. Notice and Comment Provisions

169. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules,[254] interested parties may file comments on this item on or before 60 days after Commission release of the Media Ownership Working Group studies, and reply comments on or before 90 days after Commission release of the Media Ownership Working Group studies.

170. Parties may submit their comments using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.[255] Comments may be filed as an electronic file via the Internet at http://www.fcc.gov/e-file/ecfs.html. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To obtain filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply. Additional information on ECFS is available at http://www.fcc.gov/e-file/ecfs.html.

171. Filings may also be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays

[253] *Dual Network Order,* 16 FCC Rcd.at 11128-29, ¶¶ 33-35.

[254] 47 C.F.R. §§ 1.415, 1.419.

[255] *See Electronic filing of Documents in Rulemaking Proceedings,* 63 Fed. Reg. 24121 (1998).

in receiving U.S. Postal Service mail). Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

172. We also request that parties send two paper copies of each pleading to Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone (202)863-2893, facsimile (202)863-2898, or email at qualexint@aol.com. Parties must also send one electronic copy via email, plus eight paper copies of their filing, to Linda Senecal, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 2-C438, Washington, D.C. 20554, email lsenecal@fcc.gov .

2. Ex Parte Provisions

173. Because this proceeding involves broad public policy issues, the proceeding will be treated as "permit but disclose" for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. *Ex parte* presentations will be governed by the procedures set forth in Section 1.1206 of the Commission's rules applicable to non-restricted proceedings.[256] Should circumstances warrant, this proceeding or any related proceeding may be designated as restricted.

174. Parties making oral *ex parte* presentations are directed to the Commission's statement re-emphasizing the public's responsibility in permit-but-disclose proceedings and are reminded that memoranda summarizing the presentation must contain the presentation's substance and not merely list the subjects discussed.[257] More than a one or two sentence description of the views and arguments presented is generally required. *See* 47 C.F.R. § 1.1206(b)(2), as revised. Other rules pertaining to oral and written presentations are set forth in Section 1.1206 (b) as well.

175. We urge persons submitting written *ex parte* presentations or summaries of oral *ex parte* presentations in this proceeding to use ECFS in accordance with the Commission rules. Parties using paper *ex parte* submissions must file an original and one copy with the Commission's Secretary, Marlene H. Dortch. As applicable, please follow the procedures set forth in the paragraphs above for sending your submission by mail, or for hand delivery of your submission to the Commission's filing location in downtown Washington, D.C.

176. In addition, we request that parties provide two paper copies of each *ex parte* submission to Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, telephone (202)863-2893, facsimile (202)863-2898, or email at qualexint@aol.com. We ask parties to

[256] An *ex parte* presentation is any communication (spoken or written) directed to the merits or outcome of a proceeding made to a Commissioner, a Commissioner's assistant, or other decision-making staff member, that, if written, is not served on other parties to the proceeding or, if oral, is made without an opportunity for all parties to be present. 47 C.F.R. § 1.1201.

[257] *See Commission Emphasizes the Public's Responsibilities in Permit-But-Disclose Proceedings*, 15 FCC Rcd 19945 (2000).

serve one electronic copy via email, plus one paper copy of each *ex parte* submission, to (1) Linda Senecal, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 2-C438, Washington, D.C. 20554, email lsenecal@fcc.gov ; and (2) Mania Baghdadi, Industry Analysis Division, Media Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 2-C267, Washington, D.C. 20554, email mbaghdad@fcc.gov.

177. This document is available in alternative formats (computer diskette, large print, audio record, and Braille). Persons with disabilities who need documents in these formats may contact Brian Millin at (202)418-7426 (voice), (202)418-7365 (TTY), or via email at bmillin@fcc.gov.

178. The Media Bureau contacts for this proceeding are Paul Gallant, (202)418-2380, and Debra Sabourin, (202)418-2330. Press inquiries should be directed to Michelle Russo at (202)418-2358 (voice), (202)418-7365 (TTY) or (888)835-5322 (TTY).

B. Initial Regulatory Flexibility Analysis

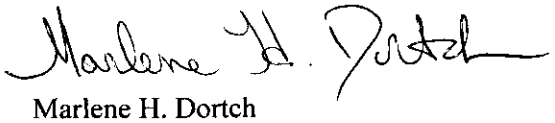
179. As required by the Regulatory Flexibility Act,[258] the Commission has prepared an Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities of the proposals addressed in this *Notice*. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines for comments on this *Notice*, and they should have a separate and distinct heading designating them as responses to the IRFA.

VIII. ORDERING CLAUSES

180. IT IS ORDERED that, pursuant to sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and section 202(h) of the Telecommunications Act of 1996, this Notice of Proposed Rulemaking is ADOPTED.

181. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

[258] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et. seq.*, has been amended by the *Small Business Regulatory Enforcement Fairness Act of 1996*, Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

APPENDIX A

Initial Regulatory Flexibility Act

As required by the Regulatory Flexibility Act ("RFA"),[259] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking ("*Notice*"), provided in sections IV, V and VI of the item. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the *Notice*. The Commission will send a copy of the *Notice*, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[260] In addition, the *Notice* and the IRFA (or summaries thereof) will be published in the Federal Register.[261]

A. Need for, and Objectives of, the Proposed Rules

Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") requires the Commission to review all of its broadcast ownership rules every two years commencing in 1998, and to determine whether any of these rules are necessary in the public interest as the result of competition. The 1996 Act also requires the Commission to repeal or modify any regulation it determines to be no longer in the public interest. At the time these ownership rules were adopted, there were fewer local media outlets and fewer types of media than there are today. The ownership rules in their current form therefore may need revision to ensure that they accurately reflect current media marketplace conditions. The goal of this proceeding is to solicit comment on the modification of the subject policies and rules.

In this *Notice*, we seek comment on both "local" and "national" ownership rules. The local rules are the local TV multiple ownership rule and the radio/TV cross-ownership rule. The national ownership rules are the national TV multiple ownership rule and the dual network rule. These four rules are described in Sections V and VI of this *Notice*. Additionally, open proceedings concerning the newspaper/broadcast cross-ownership rule and the local radio ownership rule are incorporated into this proceeding.

Section 202(h) of the 1996 Telecommunications act directs the Commission to re-examine its broadcast ownership rules every two years and either repeal, retain or modify them. Additionally, two recent court decisions by the U.S. Court of Appeals for the District of Columbia Circuit state that section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules. In the *Fox Television* case, discussed in Section II of the item, the court vacated the cable/broadcast cross-ownership rule and remanded for further consideration the Commission's decision in its 1998 biennial review to retain then national TV multiple ownership rule. In the *Sinclair* case, discussed in Section II of the item, the same court invalidated the Commission's definition of "voices" under the local TV ownership rule, stating the Commission had failed to justify its decision to include only TV broadcast stations as voices.

In light of the mandate in section 202(h) and these recent court decisions, the Commission seeks comment from parties concerning ownership rules discussed in the *Notice*. The Commission believes that a broad range of comments must be received to ensure we fulfill our mandate to further the public interest, convenience and necessity.

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[259] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, 110 Stat. 847 (1996).

[260] *See* 5 U.S.C. § 603(a).

[261] *See id.*

We are required under the Regulatory Flexibility Act to demonstrate a flexible and responsive awareness of the interests of small business entities that are subject to the rules under review in this *Notice*. Accordingly, we solicit comment from all small businesses entities, including minority-owned and women-owned small businesses. We especially solicit comment on whether, and if so, how, the particular interests of these small businesses may be affected by the rules.

B. Legal Basis

This *Notice* is adopted pursuant to Sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and Section 202(h) of the Telecommunications Act of 1996.

C. *Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply*

The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by any proposed rules, if adopted.[262] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity" under Section 3 of the Small Business Act.[263] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[264] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[265]

In this context, the application of the statutory definition to television stations is of concern. An element of the definition of "small business" is that the entity not be dominant in its field of operation. We are unable at this time to define or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimates that follow of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. An additional element of the definition of "small business" is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over inclusive to this extent.

Television Broadcasting. The Small Business Administration defines a television broadcasting station that has no more than $12 million in annual receipts as a small business.[266] Television broadcasting consists of establishments primarily engaged in broadcasting images together with sound, including the production or transmission of visual programming which is broadcast to the public on a predetermined schedule.[267] Included in this industry are commercial, religious, educational, and other

[262] 5 U.S.C. § 603(b)(3).

[263] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to the RFA, the statutory definition of a small business applies, "unless an agency, after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of the term where appropriate to the activities of the agency and publishes the definition(s) in the Federal Register."

[264] *Id.*

[265] 15 U.S.C. § 632.

[266] 13 C.F.R. § 121.201 (North American Industry Classification System ("NAICS") Code 513120).

[267] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Source of Receipts, Information Section 51, App. B at B-7-8 (2000).

television stations.[268] Also included are establishments primarily engaged in television broadcasting and which produce programming in their own studios.[269] Separate establishments primarily engaged in producing programming are classified under other NAICS numbers.[270]

According to Commission staff review of the BIA Publications, Inc., Master Access Television Analyzer Database on August 22, 2002, about 870 (70%) of 1,250 commercial television broadcast stations have revenues of $12 million or less. We note, however, that under SBA's definition, revenues of affiliates that are not television stations should be aggregated with the television station revenues in determining whether a concern is small. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules, because the revenue figure on which it is based does not include or aggregate revenues from non-television affiliated companies.

Radio Broadcasting. The SBA defines a radio station that has $6 million or less in annual receipts as a small business.[271] According to Commission staff review of BIA Publications Inc. Master Access Radio Analyzer Database on August 22, 2002, about 10,800 (96%) of 11,320 commercial radio stations have revenue of $6 million or less. We note, however, that many radio stations are affiliated with much larger corporations with much higher revenue. Our estimate, therefore, likely overstates the number of small entities that might be affected by any changes to the ownership rules.[272]

Cable and Other Program Distribution. The SBA has developed a small business size standard for cable and other program distribution services, which includes all such companies generating $12.5 million or less in revenue annually.[273] This category includes, among others, cable operators, direct broadcast satellite ("DBS") services, home satellite dish ("HSD") services, multipoint distribution services ("MDS"), multichannel multipoint distribution service ("MMDS"), Instructional Television Fixed Service ("ITFS"), local multipoint distribution service ("LMDS"), satellite master antenna television ("SMATV") systems, and open video systems ("OVS"). According to the Census Bureau data, there are 1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than $10 million in revenue.[274] We address below each service individually to provide a more precise estimate of small entities.

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[268] *Id. See* Executive Office of the President, Office of Management and Budget, Standard Industrial Classification Manual (1987), at 283, which describes "Television Broadcasting Stations (SIC Code 4833)" as:

> Establishments primarily engaged in broadcasting visual programs by television to the public, except cable and other pay television services. Included in this industry are commercial, religious, educational and other television stations. Also included here are establishments primarily engaged in television broadcasting and which produce taped television program materials.

NAICS Code 513120, by its terms, supercedes the former SIC Code 4833, but incorporates the foregoing inclusive definitions of different types of television stations. *See* Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Source of Receipts, Information Section 51, App. B at B-7-8 (2000).

[269] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Source of Receipts, Information Sector 51, App. B at B-7 (2000).

[270] NAICS Code 512110 (Motion Picture and Video Production); NAICS Code 512120 (Motion Picture and Video Distribution); NAICS Code 512191 (Teleproduction and Other Post-Production Services); NAICS Code 512199 (Other Motion Picture and Video Industries).

[271] NAICS Code 513112.

[272] *Id.*

[273] 13 C.F.R. § 121.201 (NAICS Code 513220). This NAICS Code applies to all services listed in this paragraph.

[274] Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series – Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of $10 million was used to estimate the number of small business firms because the relevant Census categories stopped (continued....)

Cable Operators. The Commission has developed, with SBA's approval, our own definition of a small cable system operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[275] We last estimated that there were 1,439 cable operators that qualified as small cable companies.[276] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small entity cable system operators that may be affected by the decisions adopted in this *Notice*.

The Communications Act, as amended, also contains a size standard for a small cable system operator, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1% of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[277] The Commission has determined that there are 68,500,000 subscribers in the United States. Therefore, an operator serving fewer than 685,000 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[278] Based on available data, we find that the number of cable operators serving 685,000 subscribers or less totals approximately 1,450.[279] Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed $250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

DBS Service. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of cable and other program distribution services.[280] This definition provides that a small entity is one with $12.5 million or less in annual receipts.[281] The Commission, however, does not collect annual revenue data for DBS and, therefore, is unable to ascertain the number of small DBS licensees that could be impacted by these proposed rules. DBS service requires a great investment of capital for operation, and we acknowledge, despite the absence of specific data on this point, that there are entrants in this field that may not yet have generated $12.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

Home Satellite Dish ("HSD") Service. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of cable and other program distribution services.[282] This

(...continued from previous page)
at $9,999,999 and began at $10,000,000. No category for $12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

[275] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable system operator is one with annual revenues of $100 million or less. *Sixth Report and Order and Eleventh Order on Reconsideration,* 10 FCC Rcd. 7393 (1995).

[276] Paul Kagan Associates, Inc., CABLE TV INVESTOR, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[277] 47 U.S.C. § 543(m)(2).

[278] 47 C.F.R. § 76.1403(b).

[279] Paul Kagan Associates, Inc., CABLE TV INVESTOR, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[280] 13 C.F.R. § 121.201 (NAICS Code 513220).

[281] *Id.*

[282] *Id.*

definition provides that a small entity is one with $12.5 million or less in annual receipts.[283] The market for HSD service is difficult to quantify. Indeed, the service itself bears little resemblance to other MVPDs. HSD owners have access to more than 265 channels of programming placed on C-band satellites by programmers for receipt and distribution by MVPDs, of which 115 channels are scrambled and approximately 150 are unscrambled.[284] HSD owners can watch unscrambled channels without paying a subscription fee. To receive scrambled channels, however, an HSD owner must purchase an integrated receiver-decoder from an equipment dealer and pay a subscription fee to an HSD programming package. Thus, HSD users include: (1) viewers who subscribe to a packaged programming service, which affords them access to most of the same programming provided to subscribers of other MVPDs; (2) viewers who receive only non-subscription programming; and (3) viewers who receive satellite programming services illegally without subscribing. Because scrambled packages of programming are most specifically intended for retail consumers, these are the services most relevant to this discussion.[285]

Multipoint Distribution Service ("MDS"), Multichannel Multipoint Distribution Service ("MMDS"), Instructional Television Fixed Service ("ITFS") and Local Multipoint Distribution Service ("LMDS"). MMDS systems, often referred to as "wireless cable," transmit video programming to subscribers using the microwave frequencies of the MDS and ITFS.[286] LMDS is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.[287]

In connection with the 1996 MDS auction, the Commission defined small businesses as entities that had an annual average gross revenues of less than $40 million in the previous three calendar years.[288] This definition of a small entity in the context of MDS auctions has been approved by the SBA.[289] The MDS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. MDS also includes licensees of stations authorized prior to the auction. As noted, the SBA has developed a definition of small entities for pay television services, which includes all such companies generating $12.5 million or less in annual receipts.[290] This definition includes multipoint distribution services, and thus applies to MDS licensees and wireless cable operators that did not participate in the MDS auction. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of $12.5 million annually. Therefore, for purposes of the IRFA, we find that there are approximately 850 small MDS providers as defined by the SBA and the Commission's auction rules.

The SBA definition of small entities for cable and other program distribution services, which includes such companies generating $12.5 million in annual receipts, seems reasonably applicable to ITFS.[291]

[283] *Id.*

[284] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 12 FCC Rcd 4358, 4385 (1996).

[285] *Id.* at 4385.

[286] *Amendment of Parts 21 and 74 of the Commission's Rules with Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service and Implementation of Section 309(j) of the Communications Act – Competitive Bidding*, 10 FCC Rcd 9589, 9593 (1995)(*"ITFS Order"*).

[287] *See Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997)(*"LMDS Order"*).

[288] 47 C.F.R. § 21.961 (b)(1).

[289] *See ITFS Order*, 10 FCC Rcd at 9589.

[290] 13 C.F.R. § 121.201 (NAICS Code 513220).

[291] *Id.*

There are presently 2,032 ITFS licenses. All but 100 of these licenses are held by educational institutions. Educational institutions are included in the definition of a small business.[292] However, we do not collect annual revenue data for ITFS licensees, and are not able to ascertain how many of the 100 non-educational licensees would be categorized as small under the SBA definition. Thus, we tentatively conclude that at least 1,932 licensees are small businesses.

Additionally, the auction of the 1,030 LMDS licenses began on February 18, 1998, and closed on March 25, 1998. The Commission defined "small entity" for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years.[293] An additional classification for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding calendar years.[294] These regulations defining "small entity" in the context of LMDS auctions have been approved by the SBA.[295] There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. On March 27, 1999, the Commission re-auctioned 161 licenses; there were 40 winning bidders. Based on this information, we conclude that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS provides as defined by the SBA and the Commission's auction rules.

In sum, there are approximately a total of 2,000 MDS/MMDS/LMDS stations currently licensed. Of the approximate total of 2,000 stations, we estimate that there are 1,595 MDS/MMDS/LMDS providers that are small businesses as deemed by the SBA and the Commission's auction rules.

Satellite Master Antenna Television ("SMATV") Systems. The SBA definition of small entities for cable and other program distribution services includes SMATV services and, thus, small entities are defined as all such companies generating $12.5 million or less in annual receipts.[296] Industry sources estimate that approximately 5,200 SMATV operators were providing service as of December 1995.[297] Other estimates indicate that SMATV operators serve approximately 1.5 million residential subscribers as of July 2001.[298] The best available estimates indicate that the largest SMATV operators serve between 15,000 and 55,000 subscribers each. Most SMATV operators serve approximately 3,000-4,000 customers. Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten SMATVs, we believe that a substantial number of SMATV operators qualify as small entities.

[292] SBREFA also applies to nonprofit organizations and governmental organizations such as cities, counties, towns, townships, villages, school districts, or special districts, with populations of less than 50,000. 5 U.S.C. § 601 (5).

[293] *See LMDS Order,* 12 FCC Rcd at 4403-4.

[294] *Id.*

[295] *See* Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

[296] 13 C.F.R. § 121.201 (NAICS Code 513220).

[297] *See Third Annual Report,* 12 FCC Rcd at 4403-4.

[298] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming,* 17 FCC Rcd 1244, 1281 (2001).

Open Video Systems ("OVS"). Because OVS operators provide subscription services,[299] OVS falls within the SBA-recognized definition of cable and other program distribution services.[300] This definition provides that a small entity is one with $12.5 million or less in annual receipts.[301] The Commission has certified 25 OVS operators with some now providing service. Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

Daily newspapers. The SBA defines a newspaper publisher with less than 500 employees as a small business.[302] According to the 1997 Economic Census, 8,620 of 8758 newspaper publishers had less than 500 employees.[303] The data does not distinguish between newspaper publishers that publish daily and those that publish less frequently, and the latter are more likely to be small businesses than the former because of the greater expense to publish daily. The newspaper/broadcast cross-ownership rule applies only to daily newspapers. It is likely that not all of the 8,620 small newspaper publishers are affected by the current rule.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

We anticipate that none of the proposals presented in the *Notice* will result in an increase to the reporting and recordkeeping requirements of broadcast stations, newspapers, or cable television stations. However, one alternative available to the Commission in this *Notice* is retention of the current rules.

E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered

The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[304]

We are directed under law to consider alternatives, including alternatives not explicitly listed above.[305] This *Notice* invites comment on a number of alternatives to retain, modify, or eliminate the individual ownership rules. The Commission will also consider additional significant alternatives developed in the record.

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[299] *See* 47 U.S.C. § 573.

[300] 13 C.F.R. § 121.201 (NAICS Code 513220).

[301] *Id.*

[302] NAIC Code 511110.

[303] http://www.census.gov/prod/ec97/97m5111a.pdf, visited 9/12/02.

[304] 5 U.S.C. § 603(c)(1)-(c)(4).

[305] 5 U.S.C. § 603(b).

In this context, we highlight below certain aspects of this *Notice* in which we have asked commenters to discuss alternative means of achieving our goals. Parties' discussions of alternatives that are in their submitted comments will be fully considered in our evaluation of whether to retain, modify or eliminate our media ownership rules.

Our local ownership rules include the newspaper/broadcast cross-ownership rule, the radio/TV cross-ownership rule, the local radio ownership rule, and the local TV multiple ownership rule. These rules are interrelated. Each is intended to foster competition and diversity in the local media marketplace. One approach under consideration is to consider these rules collectively and thus adopt a single rule that would foster diversity, competition, and localism. An alternative option is to retain the current regulatory scheme, in which we apply individual, media-specific local ownership rules. We ask for comment on how best to choose among these or other alternatives.

We also ask about alternative approaches to identifying and weighting "voices" if the Commission adopts a new "voice" test. Should the Commission develop a new "voice" test, according weights to different outlet types, or considering factors such as audience reach, ownership structure, percentage of programming or print content devoted to local news, and/or consumer use patterns? Should the Commission consider an alternative that would count, or not count, certain types of media outlets as a "voice"?

In this *Notice*, the Commission explores the underpinnings of three principles underlying the regulation of the broadcast industry, namely diversity, competition and localism. These principles are of particular import to small entities. Thus, we seek comment to promote on the general advantages and disadvantages of relying on our current ownership rules to promote the public interest versus developing a single local ownership rule or conducting a case-by-case analysis.

In addition to seeking to foster the policy goals discussed above, the Commission has historically used the ownership rules to foster ownership by diverse groups, such as minorities, women and small businesses. In the context of this comprehensive review of our ownership rules, we invite comment on whether we should consider such diverse ownership as a goal in this proceeding. If so, how should we accommodate or seek to foster that goal? In addition, we invite comment as to our legal authority to adopt measures to foster that goal.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

None.

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

In the matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277
Cross-Ownership of Broadcast Stations and Newspapers, MB Docket No. 01-235
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MB Docket No. 01-317
Definition of Radio Markets, MB Docket No. 00-244

Let me begin by saying that I don't know of any issue before the Commission that is more fraught with serious consequences for the American people than the media ownership rules. There is the potential in the ultimate disposition of this issue to remake our entire media landscape, for better or for worse. At stake is how radio and television are going to look in the next generation and beyond. At stake are old and honored values of localism, diversity, competition, and the multiplicity of voices and choices that undergirds our American democracy. At stake is equal opportunity writ large – the opportunity to hear and be heard; the opportunity to nourish the diversity that makes this country great and which will determine its future; the opportunity for jobs and careers in our media industries; and the opportunity to make this country as open and diverse and creative as it can possibly be.

The Nineties brought new rules permitting increased consolidation in the broadcasting industry, on the premise that broadcasters needed more flexibility in order to compete effectively. These rules paved the way for tremendous consolidation in the industry – going far beyond, I think, what anyone expected at the time. These changes created efficiencies that allowed some media companies to operate more profitably and on a scale unimaginable just a few years ago. They may even have kept some companies in business, allowing stations to remain on the air when they otherwise might have gone dark. But they also raise profound questions of public policy. How far should such combinations be allowed to go? What is their impact on localism, diversity and the availability of choices to consumers? Does consolidation always, generally or only occasionally serve the interests of the citizenry? How do we judge these things?

Answering these and many other questions requires more than just personal impressions or philosophical ideas about government regulation or deregulation. Among other things, it demands detailed information on current realities in specific media markets, and far-ranging economic and market structure surveys. It also compels a look at consumer consumption habits. I commend Chairman Powell for putting together a Media Ownership Task Force to study the many ramifications of this issue. But I would emphasize that it's a lot to study, and doing it right requires significant resources of labor and money and time. I hope the Task Force will have the resources it needs to conduct studies that must be both very broad and very deep. Then I hope we might even consider, as a Commission, holding hearings here and around the country, to speak with Americans and better gauge what the reality of particular media markets is. I don't want to vote on final rules – and I would be reluctant to vote on final rules – unless and until I feel comfortable that we have the information and the analysis needed to inform our votes. We need as many stakeholders as we can find to take part in this proceeding. I want to hear more from industry, from labor, from consumers, from academe, from artists and entertainers, from anybody who has a stake in how this is resolved. And I think just about everyone, if he or she stops to think about it, has an interest and a stake.

I also want to emphasize that commenters should not feel they have to limit themselves to the questions posed in this item. The Commission labors under no illusion that we have asked every possible question; indeed, we may have overlooked some that cry out for response, so I urge those who respond to look at every aspect of these issues that you deem relevant to our decision-making process.

I will concur with this *Notice* both because it fulfills our statutory mandate to review the ownership rules, and because it asks some important questions that should help us to determine whether the public interest continues to be served by these rules. However, though I would have preferred to have this *Notice* be a truly clean slate for our analysis, I have some concerns that the timing and tone of the *Notice* may be seen as prejudging these very important issues. Indeed, some analysts have already concluded that the ownership caps and limits are history. Just yesterday, the Precursor Group issued a release predicting that the result of our review in this proceeding will "likely permit the convergence, vertical integration and consolidation of the media sector," and that "[o]wnership caps and bars on cross ownership are highly likely to be repealed . . ." At this stage of the process – in the absence of the hard information we need to make informed decisions and in the absence of any finding that our rules no longer serve the public interest – I think such conclusions are, at the very least, premature. They are also dangerous.

Our Media Ownership Working Group is engaged in a number of studies on a variety of media issues related to or affected by the ownership rules. These have not yet been completed. My preference was to move forward with this review of our ownership rules only after those studies are completed. That would have simplified life for our stakeholders and probably saved folks the cost of filing more than one set of comments. However, I believe the decision to link the comment periods for this *Notice* and the studies mitigates the problem somewhat, and that it will allow commenters to make use of the data that the studies produce before they give us their final input.

Congress' mandated review of our media ownership rules insists that we only eliminate such rules if doing so is in the "public interest." Some still argue that "public interest" shouldn't count for much in our ownership reviews, and that this is just about picking a number and letting business build up to the limit. I think this Commission has moved beyond any such narrow approach to the public interest and that none of us embraces the concept that the public interest means anything other than the traditional Commission public interest standard. Thus, under the statute, even after *Fox Television*, we should change our media ownership rules only if real evidence demonstrates that the public interest continues to be served by doing so. And I believe that the courts are still amenable to keeping most of our rules, ***if*** we provide appropriate justification and evidence to support them. Some observers act as though the court has decided to be rid of all our rules. They have said nothing of the sort.

Because the stakes here are so incredibly high, it is far more important that we get this done right than that we get it done quickly. I keep coming back to the high stakes involved in what we are doing. Suppose for a moment that the Commission decides to remove or significantly change current limits on media ownership -- and suppose our decision turns out to be a mistake. How do we put the genie back in the bottle then? No way.

Nevertheless, we are launched now on this fateful journey. Much hangs in the balance. But if we approach these proceedings with an open mind, with receptivity on all sides to hard facts and compelling evidence, and if we reach out, really reach out, to stakeholders all across this land, I believe the Commission can arrive at decisions that will serve the public interest and build our own credibility in the process.

SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN APPROVING IN PART, CONCURRING IN PART

Re: 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277

Today we begin the 2002 Biennial Review of our broadcast ownership regulations. I support this Notice, and commend the Chairman for his strong leadership in this area. With this action today, we begin the most comprehensive review of our broadcast ownership regulations that I believe the Commission has ever conducted. We will examine the goals our rules are intended to achieve, the current marketplace in which they operate, and – pursuant to our statutory mandate – the extent to which each rule continues to be "necessary in the public interest as the result of competition." We also consider whether a different regulatory framework might better serve the Commission's policy goals in today's marketplace. While this task will be challenging, I am hopeful that we will end this process with a clear, reasoned and justified approach to ownership restrictions that will withstand judicial scrutiny.

I think it is important to note that the media landscape has changed dramatically since our ownership rules were adopted. These rules are, frankly speaking, old. Our long-standing goals of competition, diversity, and localism, however, do not lose their importance with age. These goals remain critical. But the import of these goals does not relieve us of our statutory obligation to review our rules. We therefore embark on this biennial review to ensure that whatever ownership rules we retain or adopt, they fulfill these goals in a manner that reflects the current marketplace.

I write separately to express a few concerns. First, I am troubled by the Notice's articulation of the legal standard inherent in section 202(h) of the Telecommunications Act of 1996 (the basis for this biennial review). That provision instructs the Commission to review its broadcast ownership rules every two years to determine whether they are "necessary in the public interest as the result of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest."[1] This Notice "invite[s] comment" on the standard the Commission should apply in determining whether to modify, repeal, or retain our rules pursuant to this provision. Yet, the Notice also notes that the "Commission" already articulated an interpretation of this standard before the D.C. Circuit, arguing in its rehearing petition in *Fox Television* that "necessary in the public interest" in §202(h) means merely "useful" or "appropriate." As I have said previously, I disagree with this interpretation. I believe interpreting "necessary in the public interest" as meaning merely "in the public interest" inappropriately reads the critical word "necessary" out of the statute. Congress included the term, and I believe we must give it more significance. "Necessary in the public interest" must mean more than "useful" or "appropriate." I believe the term "necessary" should be read in accordance with its plain meaning to mean something closer to "essential." Accordingly, I concur in the Notice's discussion of the legal standard of section 202(h).

I also would have preferred that this Notice provide more guidance to industries and consumers regarding our direction. For instance, I believe we could have provided more guidance on newspaper/broadcast cross-ownership. Unlike every other one of our major broadcast ownership regulations, the newspaper/broadcast cross-ownership rule has not been modified since its adoption in 1970s. Today, newspapers are treated differently from all other forms of business that disperse information (including broadcast television stations, which generally are permitted to combine in large markets). In short, only newspapers remain caught in a 1970s atmosphere.

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (196), §202(h).

Almost seven years ago, the Commission expressed its belief that the newspaper/broadcast cross-ownership rule needed to be reviewed, and possibly revised, to reflect marketplace changes since the 1970s. The Commission committed to "commence an appropriate proceeding to obtain a fully informed record in this area and to complete that proceeding expeditiously."[2] The then-Chairman emphasized that:

> there is no reason to wait – especially when there is reason to believe that . . . the newspaper/broadcast cross-ownership rule is right now impairing the future prospects of an important source of education and information: the newspaper industry.[3]

Unfortunately, despite this rhetoric, the Commission followed that decision not with a rulemaking, but merely with a Notice of Inquiry into the waiver policy for newspaper/radio combinations. And the Commission has never completed this proceeding.

In its 1998 biennial report, the Commission again concluded that the newspaper/broadcast cross-ownership rule should be modified: "We recognize that there may be situations in which the rule may not be necessary to protect the public interest in diversity and competition."[4] Again the Commission promised to initiate a rulemaking proceeding to begin this process.

For a third time in the 2000 biennial report, the Commission again committed, this time:

> in the near future, [to] issue a notice of proposed rulemaking seeking comment on whether we need to modify the daily newspaper/broadcast cross-ownership rule in order to address contemporary market conditions.[5]

Thanks to Chairman Powell's leadership, the current Commission finally complied last September, issuing another Notice. We now have a full record on the extent to which the newspaper/broadcast rule should be retained, modified or eliminated, and we have had almost a year to review the record. Regardless of what the Commission concludes is the appropriate action to take, the affected parties deserve to be spared further delay in knowing that answer. I believe we could have concluded this proceeding by the end of the year.[6]

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[2] Capital Cities/ABC, Inc., *Memorandum Opinion & Order*, 11 FCC Rcd 5841, ¶87 (1996).

[3] *Id.* at Separate Statement of Chairman Reed E. Hundt.

[4] 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MM Docket No. 98-35, *Report*, 15 FCC Rcd 11058, ¶95 (2000).

[5] 2000 Biennial Regulatory Review, CC Docket No. 00-175, *Report*, 16 FCC Rcd 1207, ¶32 (2001).

[6] Contrary to claims that acting on this one rule would be unfair to other relevant industries, the Commission long ago gave an advantage to other licensees by relaxing their local ownership restrictions. Since 1996, the TV/radio cross-ownership rule was relaxed, the TV duopoly rule was relaxed, the dual network ban was relaxed, the national radio cap was eliminated, the cable/network cross-ownership ban was eliminated, and the local radio caps were increased. As a result, the number of radio and television licenses one entity could own in a local market was significantly increased ... as long as the entity did not also own a newspaper. Indeed, it is the newspaper industry that has been prejudiced by the Commission's failure to act on the 1998 and 2000 Biennial Review Reports' conclusions that this rule should be reviewed and likely modified. Moreover, I do not believe that addressing the newspaper-broadcast rule separately would prejudice the outcome of this proceeding. Broadcasters and newspapers would still be considered "voices" in a local media marketplace, and the Commission could still regulate ownership of these entities as deemed appropriate in this rulemaking.

In light of this history, I would have preferred we go further in explaining our direction with regard to the newspaper/broadcast rule. For instance, while there may be disagreement on what steps the Commission should take in smaller markets, I believe there is less disagreement regarding whether some change might be appropriate in the largest markets. I would have preferred to tentatively conclude that some change was warranted. We also could have provided some form of interim relief, at least until this rulemaking is complete. For example, we could have provided broadcast stations and newspapers the same opportunity to combine that two television stations have in the largest markets, as long as a significant number of independent voices remain in the marketplace.

Accordingly, for the reasons discussed above, I approve in part and concur in part on this Notice.