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

**REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS**

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Executive Summary

The National Association of Broadcasters ("NAB") submits these reply comments in the FCC's proceeding reviewing its broadcast ownership rules pursuant to Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"). Given the much less dominant position of local broadcasters in today's media marketplace, as clearly shown by the record in this proceeding, the retention of the current thicket of broadcast-only local ownership restrictions – which were originally adopted in an era of broadcaster preeminence – is increasingly outmoded and unjustified.

In this reply, NAB reemphasizes that the Commission bears the burden of affirmatively justifying retention of the local ownership rules in their current form by empirically demonstrating their benefits in today's competitive marketplace. However, the record in this proceeding does not provide the clear empirical evidence that the Commission must have to meet its burden of establishing under Section 202(h) that the existing broadcast ownership restrictions continue to serve the public interest "as the result of competition." Certainly the commenters in this proceeding who called for retention of the current regulatory regime provided little information relevant to the Commission's express obligation under Section 202(h) to determine whether its ownership rules still serve the public interest in light of competitive changes in the marketplace.

Instead, the commenters opposing any change in the existing local ownership rules engaged in a lengthy jeremiad against the perceived failings of commercial media markets, all consolidation in those markets, and the alleged evils of profit-maximizing media conglomerates. These commenters conspicuously failed, however, to connect their generalized criticisms of the commercial mass media with actual harms that will be directly ameliorated by retention of each of the local ownership restrictions. Certainly these commenters have failed to establish that the alleged harms prevented by the local ownership rules outweigh the significant costs imposed by these rules, especially in smaller markets.

But even more critically, commenters urging retention of the current regime of broadcast-only local ownership restrictions have virtually ignored the well-documented changes that have occurred in the mass media marketplace, and refused to acknowledge the significant deleterious effects that these changes have had on the competitive position of local broadcasters in recent years. By essentially disregarding the growth of cable, Direct Broadcast Satellite, satellite radio and the Internet, commenters supporting ownership restrictions have greatly exaggerated the ability of traditional media, especially television broadcasters, to continue to dominate both the commercial marketplace and the marketplace of ideas. Commenters opposing any change in the current broadcast regulatory regime have therefore failed to provide evidence warranting retention of the existing broadcast-only local ownership restrictions in today's digital media marketplace dominated by highly consolidated multichannel video programming distributors. And certainly the commenters have failed to provide empirical evidence that would permit the Commission under Section 202(h) to retain the local ownership rules in light of "competition."

In contrast, commenters calling for reform of the existing broadcast ownership regime have presented a convincing case for change. Numerous commenters described in detail how the elimination or loosening of the local ownership restrictions (particularly the television duopoly rule and the newspaper/broadcast cross-ownership ban) is needed to allow local broadcasters to remain competitively viable in a digital, multichannel environment. These commenters, including NAB, stressed that local television broadcasters are facing unprecedented financial challenges, due to growing competition, the decline of network compensation and the high cost of the digital transition. Indeed, evidence provided by NAB shows that many television broadcasters in medium and small markets – especially those who are not the ratings leader in their markets – are now losing money, and their financial situation can only be expected to worsen. Commenters also provided detailed and specific examples of the concrete public interest benefits that flow from existing local ownership combinations, particularly television duopolies and newspaper/broadcast combinations.

In sum, if the Commission wishes to ensure that free, over-the-air local broadcasters remain economically viable and capable of serving the public interest by providing costly services such as local news, then the ownership restrictions that apply to broadcasters, but not to their highly consolidated multichannel competitors, must be reformed or eliminated. The evidence in this proceeding clearly shows that the existing broadcast-only ownership restrictions – which were initially adopted when the media marketplace was dominated by three networks offering one channel of analog programming each – no longer serve the Commission's goals of competition, diversity and localism in today's digital, multichannel environment, but instead prevent local broadcasters, especially television stations, from competing on an equitable playing field with newer programming distributors.

To maintain the broadcast industry's competitive viability and its ability to function in the public interest, NAB again requests the Commission to eliminate the newspaper/broadcast cross-ownership ban and the radio/television cross-ownership rule, and to adopt a presumptive "10/10" rule for allowing television duopolies in all Designated Market Areas ("DMAs"). Other commenters have endorsed this standard, under which two stations each with a year-long average 7:00 a.m.-1:00 a.m. viewing share of less than 10 could be commonly owned, and a station with a viewing share of 10 or more could be co-owned with another station with a share of less than

10. This reformed rule would provide needed financial relief for struggling lower-rated stations, especially those in medium and small markets, while still promoting diversity and competition by preventing the combination of two higher-rated stations in the same market, unless circumstances warranting a waiver were shown. NAB has further shown that the choice of a 10 viewing share as the presumptive "cut-off" point for allowing duopolies – which was selected after reviewing audience share data from all television markets in the country – is appropriate because it separates market-leading stations from non-leading stations on a reasonably consistent basis across DMAs of varying size.

NAB again also urges the Commission to give full effect to the local radio ownership standards established in Section 202(b) of the 1996 Act by approving, without delays or the imposition of any additional public interest requirements, proposed radio station transactions that comply with the statutory local radio limits. Beyond lacking the authority to reject or delay proposed radio transactions that comply with the statutory ownership caps, the Commission, as shown by the evidence submitted in the pending local radio proceeding and in this proceeding, also lacks any competition- or diversity-related justifications for overriding congressional intent as to the allowable levels of local radio consolidation.

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To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits this reply to certain comments on the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] In the *Notice*, the Commission initiated a comprehensive examination of all its broadcast multiple ownership rules. The Commission specifically requested comment on the characteristics of today's media marketplace (especially the status of competition) and on the policy goals of diversity, competition and localism and whether the ownership rules, or revisions to them, are

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[1] NAB is a nonprofit incorporated association of radio and television stations and broadcast networks. NAB serves and represents the American broadcasting industry.

[2] *Notice of Proposed Rule Making* in MB Docket No. 02-277 and MM Docket Nos. 01-235, 01-317 and 00-244 (rel. Sept. 23, 2002) ("*Notice*").

required to advance these goals in today's marketplace. Comments were submitted in response to this *Notice* by numerous broadcasters, newspaper publishers, trade associations, unions, and media, consumer and other advocacy groups, and they express a wide range of opinions on the Commission's proposals.

In this reply, NAB reemphasizes that the Commission bears the burden of affirmatively justifying retention of the local ownership rules in their current form by empirically demonstrating their benefits in today's competitive marketplace.[3] However, the record in this proceeding does not provide the clear empirical evidence that the Commission must have to meet its burden of justifying retention of the current thicket of broadcast ownership restrictions in light of competitive changes in the marketplace. Commenters calling for retention of the current ownership rules provided a great deal of rhetoric – but quite limited relevant empirical evidence – to support their position. Besides revealing a fundamental mistrust of unregulated commercial markets generally and a visceral dislike of all consolidation in media markets, these commenters have failed to connect their generalized criticisms of "profit-maximizing" media "conglomerates" to grounds (especially any competition-related grounds) warranting retention of each of the specific local ownership rules. In particular, these commenters supporting continued restrictions on local broadcasters have virtually ignored the impact of changes in the media environment (including the growth of multichannel video programming distributors and the

[3] NAB here addresses the four local ownership rules (television duopoly, newspaper/broadcast cross-ownership, radio/television cross-ownership, and local radio). NAB has taken no position on the dual network rule, and joins with the Network Affiliated Stations Alliance in separate reply comments on the national television ownership rule. In addition to retaining the current 35% national television ownership cap, NAB urges the Commission to retain the UHF discount. As discussed in detail in earlier comments, studies show that UHF stations still suffer from both ratings and financial disadvantages vis-à-vis VHF stations. The Commission should also be cautious in altering the UHF discount during the on-going digital transition, especially before digital must-carry rights are determined. *See* Comments of NAB in MM Docket No. 98-35 at 12-13 and Appendices C and D (filed July 21, 1998).

Internet), have exaggerated the ability of traditional media, especially television broadcasters, to dominate both the commercial marketplace and the marketplace of ideas, and have failed to demonstrate the existence of concrete harms that will be directly ameliorated by the retention of ownership restrictions applicable to local broadcasters but not to their competitors.

In contrast, numerous commenters including NAB described how the elimination or loosening of the local ownership restrictions (particularly the television duopoly rule and the newspaper/broadcast cross-ownership ban) are needed to allow local broadcasters to remain competitively viable in a digital, multichannel environment. These commenters in particular stressed that local television broadcasters are facing unprecedented financial challenges, due to growing competition, the continuing decline in network compensation, and the high cost of the digital transition. Indeed, many television broadcasters in medium and small markets – especially those who are not the ratings leader in their markets – are now losing money, and their financial situation can only be expected to worsen. If local broadcasters offering free, over-the-air service (including increasingly costly local news) are to thrive, or even survive, "in a sea of competition,"[4] the Commission must eliminate or reform ownership restrictions on local broadcasters that do not apply to their multichannel competitors. In sum, these broadcast-only restrictions – which were adopted in an era of broadcaster preeminence – no longer serve the Commission's goals of competition, diversity and localism in their current form, but instead prevent local broadcasters from competing on an equitable playing field with newer programming distributors.

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[4] J. Levy, M. Ford-Livene, and A. Levine, OPP Working Paper #37, *Broadcast Television: Survivor in a Sea of Competition* (Sept. 2002) ("*OPP Video Study*").

I. The Commission Bears The Burden Of Affirmatively Justifying Retention Of The Local Ownership Rules.

Long-standing precedent confirms that the Commission can no longer rely on "unverified predictions" to justify retention of the decades-old broadcast ownership rules but must empirically demonstrate their benefits in today's marketplace. *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (court invalidated a FCC criterion for licensing broadcast applicants because, after "years of experience with the policy," the Commission had "no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it").[5] Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") moreover directs the Commission to review all of its ownership rules biennially to determine if they "are necessary in the public interest as the result of *competition*" and to "repeal or modify any regulation . . . no longer in the public interest." Pub. L. No. 104-104, § 202(h), 110 Stat. 56 (1996) (emphasis added). So even beyond the Commission's general "duty to evaluate its policies over time," especially if "changes in factual and legal circumstances" occur, *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992), the Commission has an explicit statutory duty to reexamine its broadcast ownership rules, in light of competitive changes in the marketplace, to determine whether their retention serves the public interest.[6] As Chairman Powell himself recently stressed, Section 202(h) "requires the FCC to

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[5] *Accord Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (gender-based preference in broadcast comparative licensing process was invalidated when FCC introduced no evidence supporting a link between female ownership and programming of any particular kind); *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455, 1457 (D.C. Cir. 1985) (court invalidated cable must carry rules because the FCC had, in 20 years after rules' original promulgation, never substantiated with empirical evidence the speculative assumptions underlying the rules).

[6] Many commenters agreed with NAB that the Commission, if it determines to retain the ownership rules, bears the burden of affirmatively showing with empirical evidence, rather than with speculation, supposition or conjecture, that these rules in their current form still serve the public interest, given competitive changes in the media marketplace. *See, e.g.*, Comments of

presume each [ownership] rule is no longer needed unless we prove otherwise." Each "rule goes away" unless "we can re-justify" it "under current market conditions."[7]

Those commenters favoring retention of the current ownership rules, however, evidently paid little attention to this statutory requirement for the Commission to reevaluate its ownership rules in light of competitive changes in the media marketplace. Many commenters calling on the Commission to retain the existing local ownership regulatory regime without substantive change failed to address adequately – or, indeed, even acknowledge in some instances – the undisputable changes that have occurred in the mass media marketplace in recent decades. As discussed in greater detail below, these commenters failed to recognized that marketplace changes (especially the growth of multichannel video and audio programming distributors) have very significantly increased the level of competition facing traditional television and radio broadcasters and have undermined the competitive position of local broadcasters in today's digital, multichannel marketplace.[8] These commenters consequently provided little information relevant to the Commission's express obligation under Section 202(h) to determine whether its ownership rules still serve the public interest "as the result of competition." Obviously, such comments do not provide the type of evidence needed for the Commission to justify retention of the local

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Bonneville International Corp. at 3; Gannett Co., Inc. at 27; Granite Broadcasting Corp. at 2-3; Morris Communications Corp. at 4; Tribune Co. at 13; Newspaper Association of America at 29.

[7] Opening Statement of FCC Chairman Michael K. Powell at Public Hearing on Media Ownership, Columbia University (Jan. 16, 2003).

[8] Despite the explicit statutory directive for the Commission to examine the ownership rules in light of competition, commenters, such as American Women in Radio and Television, Inc. ("AWRT"), Children Now, *et al*., Communications Workers of America ("CWA"), Office of Communication, Inc. of the United Church of Christ, *et al*. ("UCC"), American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), and American Federation of Television and Radio Artists and Writers Guild of America, East ("AFTRA"), entirely failed to acknowledge the significance of the changes that have occurred in the mass media marketplace and the resultant declining competitive position of local broadcasters.

broadcast ownership rules in their current form, under either Section 202(h) or general principles of administrative law. *See Bechtel*, 10 F.3d at 880.

II. Supporters Of The Existing Local Ownership Rules Do Not, For A Variety Of Reasons, Present A Sufficient Case For Their Retention.

Those commenters supporting the existing local ownership rules without change have not provided the clear empirical evidence that the Commission must have to meet its burden of justifying retention of the rules. Instead of providing such evidence, many commenters engaged in a lengthy rhetorical discussion attacking media consolidation and the supposed evils of profit-maximizing media conglomerates. These commenters conspicuously failed, however, to connect their generalized criticisms of the mass media marketplace with actual harms that will be directly ameliorated by retention of the local ownership restrictions. Certainly these commenters have failed to establish that the alleged harms prevented by the local ownership rules outweigh the significant costs imposed by these rules, especially in smaller markets. *See* Section III. below. Even more critically, commenters urging retention of the current thicket of broadcast-only local ownership restrictions have substantially underplayed the well-documented changes that have occurred in the mass media marketplace, and virtually ignored the significant deleterious effects that these changes have had on the competitive position of local broadcasters. In sum, commenters supporting the existing broadcast regulatory regime have failed to provide evidence warranting the retention of a thicket of broadcast-only local ownership restrictions – which were originally adopted in an era of broadcaster preeminence – in today's multichannel digital environment dominated by highly consolidated cable and Direct Broadcast Satellite ("DBS") operators.

A. Commenters Supporting the Local Ownership Restrictions Rely on General or Anecdotal Criticisms of Media Consolidation, Profit-Driven Conglomerates and Unregulated Markets, Which Bear Limited Direct Relevance to the Ownership Rules at Issue.

As an initial matter, NAB observes that commenters advocating retention of the existing local ownership rules generally reveal a certain distaste for the commercial media and a tendency to dismiss the need for commercial media to operate efficiently and profitably.[9] Congress, however, decided decades ago that the United States would have a predominantly privately-owned commercial system of broadcasting, and broadcasters are therefore properly concerned with their ability to operate efficiently and profitably in a commercial marketplace.[10] Indeed, if the Commission seeks to maintain a system of viable commercial broadcast stations offering free, over-the-air service, then efficiency and the capability of local broadcasters to continue operating profitably must be a central concern of this proceeding. Only competitively viable broadcast stations can serve the public interest and effectively contribute to diversity in local markets by maintaining a significant local presence, including a local news operation. As the Commission concluded over a decade ago, the broadcast "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability." *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2760 (1992) (FCC

[9] *See, e.g.*, Comments of Consumer Federation of American, *et al*. ("CFA") at 23-24, 29 (arguing that the "commercial mass media market," even if "composed of significant numbers of small firms competing aggressively," is inherently unlikely to produce a "vibrant forum for democratic discourse," and that the commercial marketplace will not properly "promote diversity and antagonism" because its "objective" is "to improve efficiency and produce profit" and because "profit maximization" promotes "poor quality" media products); CWA at 33 (referring to the "so-called synergies" that can be gained from co-owned media properties, and dismissing the efficiencies to be derived from common ownership because "efficiency is not the policy goal").

[10] *See, e.g., FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-75 (1940) (the Communications "Act recognizes that the field of broadcasting is one of free competition," and that "Congress intended" each licensee to "survive or succumb according to his ability to make his programs attractive to the public").

loosened the radio ownership rules because the "bleak" revenue and profit outlook for radio stations "substantially threatened" radio's "ability to serve the public interest in the spirit of the Communications Act"). The Commission's task in this proceeding must similarly be to reform its ownership rules to ensure the continued "economic viability" of free, over-the-air broadcasting in a media environment radically changed by, *inter alia*, greater competition, advances in technology, demographic shifts, and changing interests of consumers.[11]

Beyond exhibiting a disdain for commercial media generally, commenters supporting retention of all the broadcast ownership restrictions in particular complained about consolidation in the media and the ill effects of profit-seeking media conglomerates. *See, e.g.,* Comments of AFL-CIO at 27; CFA at 24, 99, 253; AFTRA at ¶ 41; CWA at 30-31; National Association of Hispanic Journalists at 4-6. They have conspicuously failed, however, to establish the essential connection between ownership consolidation and the alleged problems of overly commercialized, profit-maximizing media. Commenters most tellingly failed to establish that it has been "concentration," rather than other factors such as an increasingly competitive media marketplace, the development of new technologies, changing consumer tastes, a decline in the advertising market or economic hard times, that produces this "pressure" on media outlets to "reduce their costs and increase profits." Comments of AFL-CIO at 27. The actual causal link between consolidation and a claimed deleterious obsession with profits is not demonstrated because the effects of these other clearly significant factors are not adequately addressed, or, indeed, even acknowledged.

[11] Amy Korzick Garmer, *American Journalism in Transition: A View at the Top*, A Report of the Fifth Annual Aspen Institute Conference on Journalism and Society at 1-2 (2001) (identifying various forces that have altered the media in recent years).

NAB certainly sees no logical or necessary connection between the common ownership of media outlets and the degree to which media owners are driven by profit motives. After all, why should the owner of a single media outlet automatically be assumed to be more public spirited and less driven by profit motives than the joint owner of a newspaper and a broadcast outlet or the owner of two television stations? Indeed, in today's competitive media environment, the owner of a stand-alone outlet may be more concerned about profits and losses than the owner of a joint media operation because of the struggles of many stand-alone media outlets to even survive in the marketplace, especially during economic downturns. Empirical survey research has also refuted personal histories and anecdotes (such as those set forth by commenters) that "corporate media," as compared to other media, are more concerned about profits than product quality and other nonprofit goals. National surveys of hundreds of newspapers and journalists have shown that "corporate" newspapers actually place less emphasis on profits and more on product quality and other nonprofit goals such as maximizing growth of the organization, utilizing new technology, beating the competition, being innovative, winning reporting awards, and increasing circulation.[12] Empirical evidence therefore refutes the

[12] *See* David P. Demers, *Corporate Newspaper Structure, Profits, and Organizational Goals*, 9 J. Media Econ. 1, 19 (1996); David Demers, *Revisiting Corporate Newspaper Structure and Profit Making*, 11 J. Media Econ. 19, 41 (1998). Corporate newspapers were thought to place relatively less importance on profits because they (i) have a greater division of labor and role specialization that remove editors and other employees from direct concern with the bottom line and increase concern with the news product and other nonprofit matters; (ii) are more financially stable and secure; and (iii) are more likely to be controlled by professional managers, who earn most of their income through salary as opposed to profits. Demers, *Revisiting Corporate Newspaper Structure* at 41. Indeed, it would seem illogical – and contrary to modern managerial theory – to argue that corporate media would place greater emphasis on profits when such media are controlled and managed not by the owners, who benefit directly from any profits earned, but by professional managers, who obtain most of their income through a salary. Critics of corporate media have failed to explain why salaried professional managers should "be more profit-maximizing than entrepreneurs (i.e., owner-mangers), who benefit directly and immediately from profits." David Demers and Debra Merskin, *Corporate News Structure and the Managerial*

sweeping claims of commenters that media conglomerates, unlike independent media entities, have "an *overwhelming* interest in profit-maximizing business practices" or even "an *entirely* profit-driven business model." Comments of CFA at 250, 253 (emphasis added).

Moreover, the Commission should not accept the simplistic implication of these comments that small, independently-owned media are by nature "better" than larger, consolidated media organizations. Certainly a number of empirical studies examining both broadcast and print media have not found that group-owned media are somehow inherently inferior to independently-owned media.[13] In fact, the "size and diversification" of a media

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Revolution, 13 J. Media Econ. 103, 105 (2000). *Accord* C.N. Olien, P.J. Tichenor and G.A. Donohue, *Relation between Corporate Ownership and Editor Attitudes about Business*, 65 Journalism Q. 259, 266 (1988) (finding that "[e]ditors in the individually-owned entrepreneurship . . . are more likely than editors of newspapers under outside [corporate] ownership to mention profit concerns as criteria for judging newspaper performance"); G.A. Donohue, C.N. Olien and P.J. Tichenor, *Structure and Constraints on Community Newspaper Gatekeepers*, 66 Journalism Q. 807, 810-12 (1989) (editors of daily newspapers in larger communities under out-of-state group ownership were less likely than the editors of other daily and weekly newspapers to express high concern about advertising).

[13] *See, e.g.*, John C. Busterna, *Ownership, CATV and Expenditures for Local Television News*, 57 Journalism Q. 287, 288-89 (1980) (finding that the group ownership of multiple television stations, or the cross-ownership of a television station with a daily newspaper in the same market, did *not* lead to lower expenditures for local television news, but, "if anything, both the ownership types seem to garner higher expenditures"); John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, J. Media Econ. 63, 65 (Fall 1988) (television stations co-owned with a daily newspaper in the same local market broadcast more local programming than television stations that were not cross-owned); Stephen Lacy, *Effects of Group Ownership on Daily Newspaper Content*, 4 J. Media Econ. 35, 40, 43-44 (1991) (finding that group ownership had no effect on the allocation of news space and that group-owned newspapers had larger staffs for a given amount of news space, indicating that reporters had more time to devote to writing copy); Dan Drew and G. Cleveland Wilhoit, *Newshole Allocation Policies of American Daily Newspapers*, 53 Journalism Q. 434, 439 (1976) (little difference between group-owned and independent newspapers found when comparing their newshole size, proportion of paper devoted to news, or the types of news included); Lee Becker, Randy Beam and John Russial, *Correlates of Daily Newspaper Performance in New England*, 55 Journalism Q. 100, 108 (1978) (in-depth survey and critique of 109 daily newspapers in New England concluded that "large papers, those with large news holes to fill, and those which are part of large media corporations, are better newspapers than those with small circulation, small news holes and which are individually owned"); Stephen Lacy and Daniel Riffe, *The Impact of*

conglomerate may be "one of the best assets for news organizations trying to cope with market pressures," because a company that "gains significant profits in one area" may "reinvest that money in its news properties." Garmer, *American Journalism in Transition* at 18.[14] As other commenters in this proceeding pointed out, ownership restrictions can "so atomize media ownership," particularly in small markets, that they "actually reduce the media's ability to create local news and public affairs information of any significant depth or breadth." Comments of West Virginia Media Holdings at 10-15 (among the four daily newspapers in the Clarksburg, West Virginia DMA, less than two percent of the non-advertising content is devoted to in-depth coverage of issues of local importance, due to a lack of resources typical of media operations in small markets). Extensive empirical research by numerous scholars has in fact confirmed that larger newspapers produce a higher quality news product than small newspapers.[15] Similarly,

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Competition and Group Ownership on Radio News, 71 Journalism Quarterly 583, 588 (Autumn 1994) (concluding that group-owned news radio stations were "not systemically different from independently owned stations").

[14] *See also* Daniel Brenner, *Ownership and Content Regulation in Merging and Emerging Media*, 45 DePaul L. Rev. 1009, 1027 (1996) (larger companies "can produce greater diversity for society" by financing start-up content activity that smaller entities cannot afford, by combating government censorship and supporting First Amendment freedoms, and by expanding speech diversity as a means to grow their operations).

[15] A 1998 article surveyed the research by a number of different scholars on this question and found that larger newspapers, *inter alia*, (i) proportionately spent more money on news-editorial costs; (ii) make fewer spelling and editing errors; (iii) devote more space to editorials and letters to the editor; (iv) are more likely to have codes of ethics; (v) hire more highly educated journalists; (vi) report more social conflict in their news columns; (vii) conduct more opinion polls; (viii) launch more investigative reporting projects; (ix) win more Pulitzer prizes; and (x) have larger news holes. Demers, *Revisiting Corporate Newspaper Structure* at 24-25. Empirical research has also shown that larger, more "corporate" newspapers are more, not less, critical of mainstream groups and established authorities and news sources, such as mayors and police chiefs. *See* D.P. Demers, *Corporate Newspaper Structure, Editorial Page Vigor, and Social Change,* 73 Journalism & Mass Comm. Q. 857 (1996) (national survey of daily newspapers found that corporate newspapers publish more local editorials and letters to the editor, and a larger number and proportion of editorials and letters that are critical of mainstream groups and

television broadcasters in smaller markets are currently experiencing increasing difficulties in maintaining ever more costly local news operations. *See infra* Section III.A; Smith Geiger, *Newsroom Budgets in Midsize (51-100) and Small Markets (101-210)* (Dec. 2002), Attachment D to NAB Comments ("*Smith Geiger Newsroom Report*").

In opposing all media consolidation, comments advocating retention of the existing broadcast local ownership rules reflect the outmoded regulatory philosophy that 51 different broadcast licensees must be "more desirable than 50" because "there is no optimum degree of diversification."[16] *See, e.g.*, Comments of CFA at 25-26, 29, 153; UCC at 41. As discussed in detail in NAB's initial comments (at 32-34), this regulatory approach of maximizing diversity of ownership at all costs that reached its peak in the 1970s was eventually rejected by the Commission and by Congress. Indeed, the Commission has long since expressly recognized the public interest benefits flowing from joint ownership of media entities.[17]

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institutions); D. Demers, *Structural Pluralism, Corporate Newspaper Structure and News Source Perceptions: Another Test of the Editorial Vigor Hypothesis*, 75 Journalism & Mass Comm. Q. 572 (1998) (a national survey of mainstream news sources (mayors and police chiefs) found that, the more corporate the newspaper, the more these news sources perceived that paper as being critical of them and their institutions). A survey of the existing literature on chain newspapers and editorial page content similarly revealed relatively little support for the hypothesis that chain-owned newspapers are less "vigorous" editorially than independent newspapers (*i.e.*, published fewer editorials about local issues or fewer editorials critical of mainstream groups). *See* Demers, *Structural Pluralism* (of the 18 studies addressing this question, only three supported claim that chain-owned newspapers were less editorially vigorous; seven showed mixed results or little relationship between chain ownership and editorial vigor, and eight indicated that chain newspapers were more vigorous).

[16] *First Report and Order* in Docket No. 18110, 22 FCC 2d 306, 311-12 (1970) (adopting the one-to-market rule preventing any single entity from owning more than one broadcast facility in the same market).

[17] *See, e.g., Report and Order* in MM Docket Nos. 91-221 and 87-8 14, FCC Rcd 12903, 12930 (1999) (allowing local television duopolies "can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station"); *Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741, 1748 (1989)

The record in this proceeding, moreover, shows that common ownership of broadcast outlets in local markets can help keep local broadcasters competitive with multichannel video and audio programming distributors, preserve the financial viability of struggling outlets, especially in small markets, and improve, or at least maintain, the news coverage and services provided by local media, particularly television broadcasters. *See infra* Section III.A.; Comments of NAB at 64-66, 71-83. Unfortunately, the refusal by supporters of the current ownership rules to admit that consolidation has a number of public interest benefits not only flies in the face of reality, but also prevents any discussion by the current regulations' advocates of their costs and whether those costs are outweighed by the alleged benefits of the various rules.[18] Contrary to the implications of commenters decrying media consolidation, the mere fact that consolidation has occurred in the broadcast industry and that there are fewer individual owners of broadcast stations now than prior to 1996 does not automatically mean that harm to the public interest has occurred. After all, there is no recognized optimal number of total broadcast station owners that the Commission should try to maintain for all time and under all marketplace conditions.[19]

(radio/television cross-ownership rule relaxed, as evidence showed that "group-owned stations spend a larger percentage of their budgets on news and overall programming than independent stations" and that group-owned stations may "air more informational programming than non-group-owned stations"); *In re Golden West Broadcasters, Memorandum Opinion and Order*, 10 FCC Rcd 2081, 2084 (1995) ("combinatorial efficiencies derived from common ownership" of broadcast outlets "in local markets were presumptively beneficial and would strengthen the competitive standing of combined stations," which "would enhance the quality of viewpoint diversity by enabling such stations to invest additional resources in programming and other service benefits provided to the public").

[18] *See, e.g.*, Comments of Minority Media and Telecommunications Council, *et al*. ("MMTC") at 41 (stating it was "difficult to conceive of any benefit to the public" from duopolies).

[19] And in any event, the extent of recent consolidation should not be exaggerated. *See, e.g.*, FCC, Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Sept. 2002) (finding that the number of independent

Beyond generally criticizing all consolidation in media markets, comments supporting retention of the local ownership rules reflect a fundamental dislike and distrust of unregulated markets. According to commenters, market forces produce "poor quality" media products and fail to distribute the "good and diverse information" needed by citizens. Comments of CFA at 23-24. The "commercial mass media market" also allegedly fails to "ensure a diverse, antagonistic marketplace for news and information," but only produces "standardized, lowest common denominator products." *Id*. at 24, 29. NAB initially observes that these claims lack specificity, as the Commission could not possibly be expected to take any regulatory action based on a few observers' overall impressions of programming generally. NAB also reminds the Commission that it rejected this anti-market position nearly two decades ago when it determined that broadcast stations would in fact provide an "appropriate mix" of programming (including nonentertainment) in response to market forces.[20]

But even assuming for the sake of argument that market forces do at times produce "poor quality" media products or insufficient amounts of "good and diverse" content, these commenters do not establish that retention of the Commission's broadcast ownership rules generally, or any individual rule specifically, will ameliorate these problems by causing the

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owners of media outlets has increased significantly since 1960); NAB, *Independent Radio Voices in Radio Markets (*Nov. 2001), Attachment B to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) (despite recent consolidation, a very large number of commercial radio stations either remain "standalones," or are part of local duopolies, in their respective markets).

[20] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations, Report and Order* in MM Docket No. 83-670, 98 FCC 2d 1076, 1087 (1984) (eliminating programming guidelines and ascertainment requirements for television stations). In eliminating the broadcast programming guidelines for radio in the early 1980s, the Commission even suggested that "it may be *offensive* to the public interest to require any type of programming be offered in amounts that please the Commission rather than the public whose interest, after all, is intended to be the interest served under the public interest standard." *Deregulation of Radio, Report and Order*, in BC Docket No. 79-219, 84 FCC 2d 968, 1064 (1981) (emphasis added).

production of "better" media products. And, in any event, NAB wonders how the "good" or "poor" quality of media products is to be measured, and who is to be entrusted with judging the quality of such products, if ownership rules were to be justified on the basis that a structurally unregulated media market produces substandard products.[21] Indeed, even asking such questions points to the futility of attempting to justify broadcast regulation on the basis of perceived failings in the quality or content of programming.[22]

Moreover, NAB notes that consumers themselves do not appear nearly as dissatisfied with the quality and content of media products than commenters favoring the retention of broadcast-only ownership regulations. A December 2002 survey conducted by the Mellman Group for NAB found widespread consumer satisfaction with radio stations. Seventy-eight percent of those surveyed stated that local radio stations play an important role in providing news and information in their communities. By a five-to-one margin (65 percent to 13 percent), consumers expressed satisfaction with the news, information and entertainment programming provided by local radio stations, with 77 percent of consumers responding that their local radio

[21] "It is difficult and perhaps constitutionally impermissible for *government* to impose its conception of worthiness or beauty on viewers." Separate Statement of Commissioner Michael K. Powell, *1998 Biennial Review Report*, 15 FCC Rcd 11058, 11147 (2000) (emphasis added).

[22] *See generally* T. Krattenmaker and L. Powe, *Regulating Broadcast Programming* at 311, 315 (1994) (in discussing critics' contentions that broadcasters should produce more and better news and public affairs programming, authors note that "[n]o regulation can make local news harder and better," and observe that these demands stem from the "belief that it is the right of elites to dictate tastes to viewers and listeners"). This "belief" in the "right" to "dictate tastes to viewers and listeners" is certainly reflected in commenters' laments about "turning citizens into passive couch potatoes," and how the media produces "standardized, lowest common denominator products," avoids "culturally uplifting but less commercially attractive content" and "favors entertainment at the expense of information." Comments of CFA at 24-25, 29. NAB remains unconvinced that concerns over broadcasters somehow fostering "couch potatoism" constitute a valid basis for structural ownership regulation. *Id.* at 24.

stations played music that they liked much of the time. And only 17 percent of those surveyed believed that local radio stations are providing less variety than they were five years ago.[23]

A national survey conducted in July 2002 by Arbitron and Edison Media Research[24] had strikingly similar results. In that survey, 74 percent of those surveyed stated that radio stations did a "good" or "very good job" of playing the kinds of music they liked. Seventy percent responded that radio stations did a "good" or "very good job" of providing the news and information they wanted. Sixty-six percent of those surveyed said that they turned to radio first to learn about new music (with 11 percent each turning to the Internet and to television). And 59 percent of consumers questioned said that radio is "getting better lately," while only 19 percent thought that radio was "getting worse lately."[25]

Contrary to the commenters who claimed that broadcasters fail to provide the information needed by citizens (*see* comments of CFA at 23-24), 83 percent of registered voters stated that local broadcasters provided the "right amount" or "too much" time covering the 2002 mid-term

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[23] This survey can be found at www.nab.org/Newsroom/Pressrel/releases/7902analysis.htm.

[24] *Internet 9: The Media and Entertainment World of Online Consumers.*

[25] Both the Mellman Group survey and the Arbitron/Edison Media Research survey directly refute the survey conducted for the Future of Music Coalition ("FMC"), which purported to find considerable consumer dissatisfaction with radio. *See* Future of Music Coalition, *Radio Deregulation: Has It Served Citizens and Musicians?* at 4-6 (Nov. 18, 2002). Moreover, as detailed in a letter from NAB to FMC, many of the questions in the FMC's public opinion survey were structured in a way that would bias most responses. Take, for example, the following question from the FMC survey (at 76): "*Many commercial radio stations today have a short playlist which means they play a limited number of songs and repeat them often during the week. Other stations have a long playlist, which means they play a greater variety and have less repetition during the week*." After this leading statement, the survey essentially asks respondents to choose between "more songs" or "less songs" by asking, "*Which type of station do you prefer*?" See Attachment B, Letter from Kathleen M. Ramsey, NAB Senior Vice President at 1-2 (Jan. 6, 2003). The responses gained from such leading questions cannot be regarded as a reliable indication of consumer opinion. Beyond problems with biased survey questions, problems may also likely exist as to the representative value of the FMC's sample for this survey. *See id*. at 2.

elections. A nationwide poll conducted by Wirthlin Worldwide in late October 2002 found that only 15 percent of registered voters thought that broadcasters were providing "too little time" covering the elections. Forty-four percent of all voters viewed local broadcast coverage of elections, whether in the form of news coverage or candidate debates, as the "most helpful" in selecting a candidate, compared to 18 percent of voters who identified newspaper coverage. Thus, sweeping claims that, due to consolidation, the broadcast media today are failing to serve the interests and needs of the public are not supported by the vast majority of consumers.

B. More Specific Claims of Failures in the Mass Media Marketplace and of the Continued Dominance of Broadcasters Made by Supporters of the Current Ownership Rules Either Bear Little Direct Relationship to the Ownership Rules at Issue or Mischaracterize Broadcasters' Competitive Position in Today's Media Marketplace.

Beyond superficially criticizing consolidated media and unregulated markets as described above, commenters advocating retention of the existing broadcast ownership restrictions did make more specific claims concerning market failures and continued broadcaster dominance in mass media markets. But again, even these apparently more specific assertions lack any direct connection to the various broadcast ownership rules at issue, or are inaccurate representations of the position of broadcasters in today's highly competitive media marketplace.

For example, commenters asserted that certain characteristics of media markets give rise to several "failures" in these markets, including the underserving of minorities and other small or niche groups and the exercise of ownership influence over the organization and content of the media. Comments of CFA at 72-78. Even assuming, for the sake of argument, that media markets may not perfectly reflect consumer preferences or may reflect other distortions, NAB asks what this means in the context of this proceeding. Are commenters asserting that, because there are certain alleged market failures, then the adoption or retention of any sort of structural regulation should automatically be considered appropriate policy? Again, commenters' criticisms of the media marketplace are not specific enough to inform the question of how to address the specific ownership rules at issue in this proceeding. And these criticisms are certainly not sufficient to justify retention of the rules under Section 202(h).[26]

Even the studies previously submitted by commenters and relied upon here fail to establish how retention of the various ownership rules would ameliorate the alleged market failures. For instance, one study presents a case for the seemingly obvious point that markets with more diverse populations tend to have more diverse television programming that is then watched by these more diverse populations.[27] While this may be true, NAB wonders what, if any, implication this has for the broadcast local ownership rules. For example, there should be no reason to assume that, if a local newspaper owned a local radio or television station, that station would be less inclined to provide the minority viewers in that market with minority-oriented programming than would a stand-alone broadcast outlet in that same market. After all, whether separately owned or commonly owned with a local newspaper or another broadcast outlet, any broadcast station in a particular market with a certain minority population will be

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[26] *See Sinclair Broadcast Group, Inc. v. FCC,* 284 F.3d 148, 163 (D.C. Cir. 2002) (finding that the FCC's record in its previous rulemaking on the television duopoly rule had failed to "fill the evidentiary gap"); Opening Statement of FCC Chairman Michael K. Powell at Public Hearing on Media Ownership, Columbia University (Jan. 16, 2003) (to survive judicial scrutiny, ownership rules must be "based on empirical evidence," rather than "sound bites," "anecdotes," or "personal bias").

[27] *See* Joel Waldfogel, *Who Benefits Whom in Local Television Markets?* at 2-3 (Nov. 15, 2001), attached as Appendix B to Comments of Consumers Union, *et al*. in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001) (study will "show that the targeting of local programming to minority viewers is much greater in markets with larger minority populations" and the quantity of "minority-targeted television draws minority viewers to viewing"). This study is again relied upon in this proceeding. *See* Comments of CFA at 59-60, 73-75.

responding to those same minority viewers or listeners.[28] In sum, this study appears to have little relevance to the question of whether any particular broadcast ownership rule should be retained or eliminated.

Another study contends that the "weak competition" allegedly resulting from certain characteristics of media markets[29] "allows owners to earn monopoly profits and to use monopoly rents to pursue their personal agendas," including "political" agendas. Comments of CFA at 72-80, discussing C. Edwin Baker, *Giving Up On Democracy: The Legal Regulation of Media Ownership*, attached as Appendix C to Comments of Consumers Union, *et al*. in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001) ("*Baker Study*"). NAB questions both the basic premises and the conclusions of this study. As an initial matter, competition in today's mass media marketplace is more accurately characterized as "relentless" (Garmer, *American Journalism in Transition* at 2), rather than "weak," as the record in this proceeding clearly demonstrates.[30] NAB also disputes the claim that this supposedly weak competition allows

[28] One could also question whether this study even supports the contention that a significant failure of media markets is to systematically underserve minority populations. A showing that television broadcasters actually do provide more minority-targeted programming in markets with larger minority populations would seem to show that media markets are in fact responsive to the preferences of local viewers and listeners, including minorities.

[29] These characteristics are high first copy (or fixed) costs and the inability to substitute between, or strong preferences for, products. Comments of CFA at 77.

[30] *See, e.g., OPP Video Study* at ii (broadcasters face "continuing audience fragmentation" and "pressure" on "advertising revenues," as "DBS and the expansion in cable availability and channel capacity have created an increasingly competitive environment for television broadcasting"); Testimony of Victor Miller IV of Bear, Stearns & Co., Inc., Transcript of FCC En Banc Hearing on Local Broadcast Ownership at 31-32 (Feb. 12, 1999) (testifying that the "local, free, over-the-air broadcast TV business is becoming progressively more difficult" as "video competition" fragments viewership and "single-channel" local broadcasters "compete for advertising, programming, viewers, and talent against . . . multichannel operators"); *Aggregate Shares of the Top Five Stations in Arbitron's Top 100 Markets: Spring 2001 vs. Spring 1996*, Attachment D to NAB Comments in MM Docket Nos. 00-317 and 00-244 (filed March 27,

broadcast owners in the mass media marketplace to earn "monopoly profits." As has been well documented, increased competition, the costs of the transition to digital television, and the weakened economy and advertising market have all combined to squeeze profits for television broadcasters like never before, especially in small but also in larger markets.[31] Indeed, in such a highly competitive, financially challenging marketplace, many media owners, especially television broadcasters, are struggling to make any sort of profit, let alone "potentially significant monopoly profits." *Baker Study* at 43. *See The Declining Financial Position of Television Stations in Medium and Small Markets*, Attachment C to NAB Comments ("*TV Financial Report*") (finding that the average low-rated network affiliated station in markets 51-175 experienced declining profitability from 1993 to 2001 and suffered *actual losses* in 2001, and that even many high-rated affiliated stations in these markets have experienced declining profits).[32]

2002) (across the top 100 Arbitron markets, the top five radio stations' aggregate listening shares declined an average of 9.1% from 1996 to 2001).

[31] *See, e.g.*, John Smyntek, *Local TV Landscape Could Change, Conditions Ripe for Station Consolidation*, Detroit Free Press at 6E (Oct. 31, 2001) (anticipating consolidation in ownership of Detroit's television stations due in part to poor revenue performance "that will force some small owners with heavy debts to sell"); Jube Shiver, Jr. *Broadcasters Face Prospect of Takeovers*, Los Angeles Times, Part 3/Page 1 (Oct. 22, 2001) (describing how costly transition to digital television has "left many of the nation's" station owners "in debt" and made them likely targets for takeovers by larger media companies); Steve McClellan, *Small Towns, Big Problems*, Broadcasting & Cable at 20 (Aug. 6, 2001) (describing the difficult economic circumstances faced by television stations in markets ranked 75th and below); Steve McClellan, *Bleak News Gets Even Bleaker*, Broadcasting & Cable at 12 (Nov. 12, 2001) (describing steep decline in revenue and earnings for "networks and stations alike"); David Lieberman, *Small TV Stations Reel Under Order to go Digital*, USA Today at 1B (July 17, 2002) (industry analysts agree that small market stations have serious problems with financing digital transition, as small station owners are "lucky" to make "$300,000 a year in free cash flow," and "[i]t can cost $3 million to convert to digital").

[32] *See also* Steve McClellan and Dan Trigoboff, *Benedek Couldn't Hang On*, Broadcasting & Cable at 6 (April 1, 2002) (reporting bankruptcy filing of Benedek, the owner of 23 medium and small market affiliates); *Inside Radio* at 1 (Nov. 18, 2002) (2002 "will record the most

NAB furthermore disputes that these alleged "monopoly profits" are used routinely by media owners to "indulg[e]" or "subsidiz[e]" their "personal ideology." *Baker Study* at 43-44. Recent studies by Dr. David Pritchard certainly "found *no* evidence of ownership influence on, or control of, news coverage" of the 2000 Presidential campaign by the commonly-owned newspaper and broadcast properties examined in Chicago, Milwaukee and Dallas.[33] Other scholars have specifically concluded that media owners are constrained by marketplace pressures and economic incentives from "control[ling] content in ways they prefer and in ways" divergent from the preferences of "readers, listeners, or viewers."[34] Especially in today's extraordinarily

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bankruptcy filings by radio licensees" since the late 1980s and early 1990s). Newspapers are also suffering financially due to the decline in the advertising market and competition from new technologies, including the Internet. *See, e.g.*, Alwyn Scott, *Lean Times for Advertising Budgets, Media Firms Are Squeezed in Downturn*, Seattle Times at D1 (Nov. 25, 2001) (noting that some newspapers have been pushed "into the red," and residents fear that Seattle "could lose one of its daily newspapers"); Margery Beck, *Buffett: Hard Times Ahead for Papers*, AP Online (April 29, 2001) (investor Warren Buffet predicted "hard times for the newspaper industry" because the Internet "is scooping newspapers not only on news, but in cheap accessibility" and is "siphoning" off "advertising dollars").

[33] David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L.J. 31, 49 (2001) (emphasis added). Rather interestingly, Dr. Pritchard noted in this study that the three media corporations being examined all favored repeal of the newspaper/broadcast cross-ownership rule, "an outcome that was much more likely" if Bush defeated Gore. *Id*. at 38. This position did not, however, produce a coordinated or consistent "slant" toward Bush in the coverage of the campaign by the corporations' various cross-owned media properties. *Id*. at 49. Dr. Pritchard's findings in his second study on this issue for the FCC did not contradict these initial findings. *See also* Ronald Hicks and James Featherston, *Duplication of Newspaper Content in Contrasting Ownership Situations*, 55 Journalism Q. 549, 551, 553 (1978) (finding that "absolutely no duplication in opinion content," such as editorials, political columns, editorial cartoons and letters to the editor, occurred in two cities where the morning and afternoon papers were commonly owned, and concluding that it was possible "to have real competition in a local, jointly owned situation").

[34] Timothy J. Brennan, *Vertical Integration, Monopoly, and the First Amendment*, J. Media Econ. 57, 67-68 (Spring 1990) (explaining that "profit maximization, *even under monopoly*, limits the divergence between the content a monopolist provides and the content most desired by readers, listeners, or viewers," and that "*competition*" also "limits the incidence" of media firms restricting communication by "not transmitting the content" that "consumers want") (emphasis added). *Accord* David Haddock and Daniel Polsby, *Bright Lines, the Federal Communications*

competitive media environment, the "incidence" of problems with media firms "control[ling] content in ways they," rather than consumers, "prefer," should be extremely limited. Brennan, *Vertical Integration, Monopoly, and the First Amendment* at 68. Empirical research has also shown that, as media "becomes more corporatized," owners "play a lesser role in making decisions about editorial content."[35] Certainly the *Baker Study* contained little empirical support for its contention that media owners utilize their "monopoly profits" to control content in ways that further their own personal or political agendas, at the expense of the preferences of consumers.[36] Accordingly, this study provides scant support for claims that structural regulations generally – or any of the broadcast ownership rules in particular – are warranted because media markets are seriously distorted by the exercise of ownership influence over the organization and content of the media.[37]

Commission's Duopoly Rule, and the Diversity of Voices, 42 Fed. Comm. L.J. 331, 348-49 (1990) (concluding that the "great majority of those who operate broadcast stations" do not appear driven "by the desire to mold public opinion and attitudes").

[35] Demers and Merskin, *Corporate News Structure* at 115-16 (finding that, as newspapers become more corporate, editors and reporters play a greater role in making decisions affecting editorial content and owners and publishers play a lesser role). *Accord* Benjamin Compaine, *Global Media*, Foreign Policy (Nov./Dec. 2002) ("ownership matters" less with corporate ownership than in the "old days of media moguls" such as William Randolph Hearst who "were attracted to the media" because they "had political agendas"). Certainly commenters in this and previous ownership proceedings have insisted that they do not impose a single editorial viewpoint or otherwise monolithically control the content aired on or printed by their commonly owned media outlets. *See, e.g.*, Comments of Morris Communications Corp. at 8; Gannett Co., Inc. at 7-8; Belo Corp. at 4-5 and Statement of Robert W. Decherd, Chairman of the Board, President and Chief Executive Officer.

[36] This portion of the *Baker Study* (at 44-45) cited a single source describing the book publishing industry to "illustrate" such claims.

[37] And certainly the record in this proceeding does not establish that owners of consolidated media are somehow more likely than the owners of stand-alone outlets to distort media content for ideological or other personal reasons.

Beyond failing to establish that certain alleged market failures in any way warrant retention of the existing local ownership restrictions, supporters also attempted to justify retention of these rules by greatly exaggerating the extent to which broadcasters, especially television stations and the networks, continue to dominate the mass media marketplace. Claims that retention of the broadcast ownership rules is justified because the media marketplace has not undergone any "dramatic change" in recent decades are simply inaccurate (comments of CFA at 98), as are claims about the extent to which television broadcasters "still dominate[]" the viewing audience and the advertising market. *Id.* at 116.[38]

Certainly other commenters – and even the Commission itself – in this and earlier proceedings have provided ample evidence refuting claims that the mass media marketplace has not experienced any "dramatic" competitive changes in recent years. Comments of CFA at 98. According to the Commission, the audience share of network-affiliated stations has dropped significantly since 1975, as the number of subscribers to cable television and DBS has grown rapidly.[39] Bear, Stearns submitted comments in the pending proceeding on the newspaper/broadcast cross-ownership ban detailing (1) the decline in the circulation, household penetration and total advertising revenue share of newspapers since 1975, and (2) the increase in competition in the video marketplace for television broadcasters and the consequent loss of

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[38] And as discussed above, a number of commenters failed even to acknowledge that competitive changes have occurred at all in the mass media marketplace. *See supra* note 8.

[39] *See Order and Notice of Proposed Rulemaking* in MM Docket Nos. 01-235 and 96-197, FCC 01-262 at ¶¶ 9, 11 (rel. Sept. 20, 2001) (prime time audience share of affiliates of ABC, CBS, and NBC was 95% in 1975 but the prime time audience share of all commercial stations today (affiliates of the seven networks and independent stations) is only 61%; meanwhile, the combined audience share of basic and premium cable networks has grown to 48%); *OPP Video Study* at 20, 22 (cable has "cut substantially into the broadcast audience," and "broadcast [viewing] shares are likely to continue to fall").

audience share and advertising revenue share since 1975.[40] Tribune similarly documented the fragmentation in the media marketplace, with ratings declines for the television networks and local stations, dramatic plunges in listener shares for radio stations, and circulation declines for daily newspapers. *See* Comments of Tribune Co. in MM Docket Nos. 01-235 and 96-197 at 31-34 (filed Dec. 3, 2001) (noting a 50 percent or greater decline in the shares of the top-rated television stations from 1975 to today in markets such as New York City, Miami and Hartford). Commenters in this comprehensive proceeding similarly discussed the increasingly fragile financial condition of free, over-the-air broadcasting, which relies on advertising as its sole source of revenue, in comparison to other competing media, which enjoy dual revenue streams.[41]

Even in areas such as news where television broadcasters have traditionally dominated, fewer viewers are watching local and national broadcast news, and this drop in viewership is due to least in part to competition from other news sources, including cable and the Internet. According to recent research, regular viewership of local broadcast news has fallen from 77% in 1993 to only 57% in 2002, and the regular audience for national network news has similarly dropped from 60% of the public in 1993 to 32% today (which is approximately the same size as

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[40] *See* Comments of Bear, Stearns in MM Docket Nos. 01-235 and 96-197 at 7-11, 13-22 (filed Dec. 3, 2001). The Commission has similarly noted that broadcasters face continuing "pressure on broadcast advertising revenues," and that cable operators are becoming serious competitors in local advertising markets. *OPP Video Study* at ii, 134-135. *See also* Statement of Professor Jerry A. Hausman at 2-3, Exhibit 1 to Comments of Clear Channel Communications, Inc. (in a study to determine whether cable advertising "provide[d] a competitive substitute for radio advertisers," the author concluded that "changes in cable advertising prices lead to changes in radio advertising prices," demonstrating "that cable advertising, along with broadcast television advertising and newspaper advertising, is a substitute for radio advertising").

[41] *See, e.g.*, Comments of Duhamel Broadcasting Enterprises at 6; Granite Broadcasting Corp. at 9-13; Media General, Inc., Cosmos Broadcasting Corp. and Block Communications at 5; Alaska Broadcasting Co., Inc., *et al*. at 4-5.

the total cable news audience).[42] Thus, the claim by supporters of the current ownership rules that "viewership of local broadcast news has not dropped off" is simply inaccurate. Comments of CFA at 107. In sum, assertions that the existing broadcast ownership rules should be retained because the media environment generally has not substantially changed in recent decades, and because television broadcasters in particular still dominate the marketplace, do not reflect the reality of today's highly competitive mass media market and should be rejected by the Commission.

Advocates of the broadcast ownership restrictions have similarly overstated the degree of concentration that exists in media markets. *See* CWA at 26-28 (alleging that consolidation has greatly concentrated television viewing share in the hands of fewer owners); Comments of CFA at 154, 190 (contending that there has been "[d]ramatic increases in concentration" in media markets and that broadcast markets are "highly concentrated"). But again, the evidence provided does not support the claims asserted – and certainly does not justify retention of the specific ownership rules at issue in this proceeding.

For example, CWA submitted data purporting to show that viewership in local television markets is highly concentrated among a small number of owners. *See* Comments of CWA at 26-

[42] Survey Report, Pew Research Center for the People & the Press, *Public's News Habits Little Changed by September 11* at 5 (June 9, 2002) ("*Pew 2002 News Report*"). Other sources have confirmed this significant decline in the viewing of broadcast television news. *See Internet Sapping Broadcast News Audience*, Pew Research Center for the People & the Press (2001) (available at www.people-press.org/media00rpt.htm) (noting the "rapid emergence of the Internet as a news source," a decline in regular viewership of local television news from 64% to 56% between 1998 and 2000, and a decline in regular viewership of network television news from 38% to 30% in that period); *The Shrinking Audience for Local TV News*, Newslab Report (1999) (available at www.newslab.org/nonview-1.htm) (in 1995, 72% of those surveyed said they watched local news regularly, but in 1998 only 64% fell into the category of regular viewers); Angela Powers, *Toward Monopolistic Competition in U.S. Local Television News*, 14 J. Media Econ. 77 (2001) (reporting that "nationwide viewers of local television news declined from 71% in 1995 to 59% in 1999" due at least in part to cable and perhaps the Internet).

27 and Table 3. But in determining the television viewership shares of the top four stations in 16 selected markets, CWA only considered local market commercial broadcast television stations, and excluded viewing of out-of-market television stations, all noncommercial stations, and, most significantly, all cable and satellite channels/networks. CWA therefore seriously undercounted the number of television "voices" available in local markets,[43] and overestimated the level of viewership concentration in these markets.[44] Such data cannot be seen as accurately reflecting the degree of viewership concentration in any local video market. Indeed, recent research clearly shows that the viewing of in-market broadcast television stations has steadily *decreased* over the past five years, and that, in many markets, well under half of the total day viewing is attributable to local broadcast television stations.[45] Contrary to the assertions of commenters such as CWA and CFA, viewership in local television markets is obviously not "highly concentrated" in the

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[43] As NAB demonstrated in a study attached to its initial comments, consumers, especially those in smaller markets, routinely and easily access a substantial number of "out of market" television and radio outlets. *See BIA Financial Network, Out-of-Market Listening and Viewing: It's Not to be Overlooked* at 12-14 (Jan. 2003) ("*BIA Out-of-Market Voices Study*") (in some smaller DMAs, over 25% of the total television viewing is of stations located in adjacent DMAs).

[44] It should be obvious that, if cable, out-of-market commercial broadcast, and noncommercial broadcast station viewing is completely ignored, then the top in-market commercial broadcast television stations will receive a significantly higher share of the remaining television viewing that is counted. *See, e.g*, Comments of Tribune Co. in MM Docket Nos. 01-235 and 96-197 at 36-37 (filed Dec. 3, 2001) (pointing out that, in New York and Los Angeles – two markets where CWA decried the high level of concentration in television viewership – cable channels often enjoy higher local audience shares than broadcast stations).

[45] *See BIA Out-of-Market Voices Study* at 15-16. In the smallest DMAs (rank 101+), only 39.7 percent of those markets' total day viewing, on average, is attributable to in-market broadcast television stations, with the majority of the viewing attributable to cable/satellite channels, broadcast stations located in adjacent markets, and other market broadcast television stations carried on cable systems. In DMAs 51-100, only 50.0 percent of the total day viewing is attributable to in-market broadcast television stations, and in *no* market grouping does the percent of total day viewing attributable to local broadcasters reach 60 percent. Moreover, the viewing of in-market television stations has declined by 17 percent in just the last five years.

hands of a small number of local broadcasters – and is certainly not sufficiently concentrated as to require the retention of the broadcast local ownership rules in their current form.

Clearly, commenters in this proceeding reached the conclusion that broadcasters, especially television broadcasters, still dominate the mass media marketplace only by significantly understating or by virtually ignoring the competition provided by multichannel video services. *See, e.g.*, Comments of CFA at 116, 123-24 (arguing that "TV still dominates the media landscape," and dismissing MVPDs such as DBS as "a small competitive fringe"). Certainly these commenters completely failed to acknowledge the effects that multichannel video and audio service providers have had on broadcasters and their competitive position in the modern media marketplace. In just the past few decades, broadcasters have lost their preeminent position in the marketplace, and many local broadcasters are now struggling to maintain their audience and advertising shares at a level allowing them to continue operating profitably. *See, e.g., TV Financial Report* (showing actual losses by low-rated network affiliated stations in medium and small markets in 2001, and declining profits by even many high-rated stations in these markets from 1993 to 2001); *Inside Radio* at 1 (Nov. 18, 2002) (2002 "will record the most bankruptcy filings by radio licensees" since the late 1980s and early 1990s).[46] Given such a

[46] *See also Ninth Annual Report*, MB Docket No. 02-145, FCC 02-338 at ¶¶ 5, 13, 79, 80 (rel. Dec. 31, 2002) (in report assessing competition in the market for delivered video programming, FCC found that (i) the total number of subscribers to MVPDs continues to increase; (ii) advertising revenues for television broadcasters declined 12% from 2000 to 2001, while cable programming networks experienced a 3.8% increase in advertising revenues in 2001; (iii) "[a]udience levels" for television broadcasters "continue to decline as they have for many years"; (iv) during the 2001-2002 television season, broadcast television stations accounted for a combined average 58.9 share of prime time viewing (and a 52.4 share of total viewing) among all television households, *down* from a 63 prime time and a 56.2 total day share in the previous season; and (v) during the 2001-2002 season, nonbroadcast networks accounted for a combined average 57 share of prime time viewing (and a 58.8 share of total day viewing) among all television households, *up* from a 52.6 prime time and a 54.7 total day share in the previous season.

fiercely competitive media environment, it is not surprising that commenters have failed to justify with empirical evidence the retention of the current broadcast-only regulations in light of "competition." Section 202(h), 1996 Act.

Finally, if broadcasters today do seem more concerned about profits today than in the past -- as commenters supporting continued ownership restrictions insisted[47] -- then that is simply the natural result of operating in an ever more competitive environment against multichannel competitors that enjoy dual revenue streams. NAB submits that the Commission cannot reasonably expect broadcasters *not* to be deeply concerned about maintaining profitability in today's competitive marketplace.[48] The Commission, moreover, should share this concern if it wishes to ensure a competitively viable and vibrant system of free, over-the-air broadcasting that truly contributes to diversity in local media markets. As previously recognized, the broadcast "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability." *Report and Order*, 7 FCC Rcd at 2760.

C. Beyond Ignoring the Growing Competition in the Commercial Marketplace, Supporters of the Existing Broadcast Ownership Regulatory Regime Also Understate or Ignore Significant Changes in the Information Market Relevant to Diversity Concerns.

[47] *See, e.g.*, Comments of AFTRA at ¶ 42; AFL-CIO at 49 (contending that broadcast stations in the past were interested in "service to the local community" and strove to achieve the "highest quality of journalism," but media companies today are only concerned with "profit levels"). Frankly, NAB doubts that there was some "golden age" of journalism in the past when media companies were unconcerned with profits and only cared about journalistic excellence.

[48] After all, it has been federal policy to increase competition and diversity in the media marketplace by promoting the development of new video providers. *See, e.g., Ninth Annual Report* in MB Docket No. 02-145, FCC 02-338 at ¶ 7 (Dec. 31, 2002) (discussing how Congress intended to promote growth of DBS by passing Satellite Home Viewer Improvement Act of 1999). Having helped create this more competitive mass media marketplace, the Commission cannot pretend to be surprised if the formerly dominant participants in that market now exhibit greater concern with increasing their efficiency and maintaining their profitability than in the past.

As NAB has previously observed, if the Commission is most concerned about "the impact of concentration on diversity in the marketplace of ideas" – as supporters of ownership rules most fervently contend – it must be careful in defining the market so as not to "overestimate the degree of concentration," as advocates of ownership restrictions have done.[49] In an "era of rapidly converging media technologies, and the equally rapid development and diffusion of alternatives to mainstream media," it is "increasingly important to consider the presence and impact of substitutes" to traditional media such as broadcast outlets. Bates, *Concentration in Local Television Markets* at 17. Indeed, nearly two decades ago, the Commission concluded that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media" (such as newspapers, magazines and periodicals) "as well." *Report and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 17, 25 (1984) (specifically finding that "these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire" and "are substitutes in the provision of such information"). Today, with the recent emergence of, *inter alia*, the Internet and video and audio satellite services, the "information market relevant to diversity concerns" is broader and more varied than ever before. *Id*.

Although supporters of the existing ownership restrictions have valiantly tried to convince the Commission that little has changed in the mass media marketplace in recent years, any objective review of the record in this proceeding demonstrates otherwise. In light of the expansion in the number of traditional broadcast outlets and the "rapid development and

[49] Benjamin J. Bates, *Concentration in Local Television Markets*, J. Media Econ. 3, 17 (Fall 1993) (arguing that using the "same market definition to consider the impact" of "concentration on the price of advertising" to also consider "the impact of concentration on diversity in the marketplace of ideas" would "be to seriously overestimate the degree of concentration" in the marketplace of ideas).

diffusion of alternatives" to these "mainstream media," including MVPDs and the Internet, the Commission has no defensible empirical basis for retaining the current broadcast ownership regulatory regime. Bates, *Concentration in Local Television Markets* at 17. Just as commenters' arguments that broadcasters, especially television stations, still commercially dominate the mass media marketplace were inaccurate (*see supra* Section II.B.), claims that broadcasters still dominate an essentially unchanged "information market" are also inaccurate. *See, e.g.*, Comments of UCC at 23; CWA at 5-8; AFL-CIO at 12-13.

NAB and other commenters, both in this and in earlier proceedings, have, for example, documented the tremendous growth in the number and variety of traditional broadcast and new media outlets during the past several decades.[50] Some commenters in this proceeding asserted that this expansion in the number of outlets has produced only "more variety," rather than "more diversity" (comments of CFA at 157), but this argument seems an exercise in semantics. It simply defies reality to claim that media markets in the past – which were dominated by three broadcast networks offering one channel of analog programming each – somehow offered more "variety" or "diversity" than today's digital, multichannel environment. *See, e.g.,* Michael K. Powell, *Should Limits on Broadcast Ownership Change?* USA Today at 11 (Jan. 22, 2003) (in the "so-called Golden Age of television," news "was limited to a 15-minute evening broadcast and five-minute snippets throughout the day," in contrast to the choices for news, public affairs,

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[50] *See, e.g.*, Comments of NAB at 8-14; Comments of Hearst-Argyle Television, Inc. in MM Docket Nos. 01-235 and 96-197 at 5-10 and Exhibit 1 (filed Dec. 3, 2001); David Pritchard, *A Longitudinal Study of Local Media Outlets in Five American Communities*, Appendix A, Comments of Viacom Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002); FCC, Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Sept. 2002); Separate Statement of Commissioner Michael K. Powell, *1998 Biennial Review Report*, 15 FCC Rcd 11058, 11141-48 (2000).

educational, and entertainment programming for every niche offered today by broadcast stations, cable, satellite and the Internet).

Despite FCC studies to the contrary, a number of commenters also contended that the "public does not substitute among the different media" and therefore consumers remain uniquely dependent on traditional media, especially television broadcasters, for news and information. Comments of AFL-CIO at 9; AFTRA at III.B. This categorical claim clearly cannot be supported. Although substitution between various media for both entertainment and informational purposes is not complete, it is certainly substantial. *See* Joel Waldfogel, *Consumer Substitution Among Media* at 3, 39 (Sept. 2002); Nielsen Media Research, *Consumer Survey on Media Usage* (Sept. 2002) ("*Nielsen Consumer Survey*") (showing considerable inter-media substitution).

Several commenters, as well as the author of a critique of the various FCC studies, criticized the *Nielsen Consumer Survey* for focusing on how people thought they would behave in terms of media usage in the future and how they would change their media usage if certain types of media became unavailable.[51] Certainly the Nielsen survey did inquire whether people expected to use various media more or less often in the future and how they would expect to use other media if a medium they currently used were no longer available – and the responses to these questions "suggest[ed] a *high* degree of substitutability," as even the critics of this survey admitted. *FCC Studies Critique* at 12 (emphasis added). These commenters moreover ignored

[51] These questions were criticized as focusing on how people "think they would behave, not necessarily how they actually would behave," and that it would be sounder to "look[] at what people do," rather than "what people say they will do." Dean Baker, *Democracy Unhinged, More Media Concentration Means Less Public Discourse: A Critique of the FCC Studies on Media Ownership* at 13-14 (Dec. 2002) ("*FCC Studies Critique*"). This study was attached to the comments of the AFL-CIO and CWA and was also relied upon by AFTRA.

the fact that the *Nielsen Consumer Survey* also included many questions inquiring as to how consumers *currently* use the media to obtain news and information, and that these questions showed that consumers use a variety of media to obtain both national and local news and information.[52] Thus, the accuracy of the predicted behavior reported by Nielsen is strongly supported by the consistent evidence of current usage patterns.

NAB additionally points out that, if it were true that consumers did not substitute among media, there would appear to be no explanation for the considerable decline in both broadcast television news viewership and newspaper consumption, which has coincided with the growth of cable television and the development of the Internet and which other observers have attributed to the emergence of these outlets. *See supra* Section II.B. (describing decline in viewership of both local and national broadcast television news, which has been attributed in large part to competition from cable and the Internet).[53] The Commission itself has documented the

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[52] For example, the survey showed that consumers today use a variety of media – including television, newspapers, radio, the Internet and magazines – to access both local and national news. *See Nielsen Consumer Survey* at Tables 001-006, 009-014, 097 and 098 (inquiring what news sources consumers had used in the *past seven days*). The Nielsen survey also inquired as to the amount of time that consumers currently spend each day using various types of media. These responses again showed that consumers utilize a wide range of media, including broadcast television, cable and satellite television, radio, newspapers, magazines and the Internet. *See* Tables 083-094. Among consumers who obtain national and/or local news from television, a high number reported watching *both* types of news on cable or satellite, rather than broadcast, channels in the *past week*. *See id.* at Tables 008, 016. A considerably higher number of households also currently reported subscribing to cable television than to a newspaper. *See id.* at Table 079. These responses directly refute claims that cable television has not become a significant source of news and information for consumers.

[53] In addition to documenting the decline of broadcast television news viewership and the rise in cable news viewership, the *Pew 2002 News Report* noted the steady decline in newspaper readership, especially among people under 30 but even among people in the 35-49 age category. *See id*. at 3-5, 10 (in five year period from 1997 to 2002, the percentage of people who responded "yes" when asked if they had a chance to read a newspaper yesterday declined by nine percent). Various sources have attributed this decline in newspaper readership to the growth of the Internet. *See, e.g., Content Intelligence Study Probes Newspaper Web Site Usage and Attitudes*, Business Wire (July 12, 2001) (research study by Content Intelligence shows that

continuing growth of local and regional cable news services and has noted that cable news "networks are increasingly moving into smaller markets." *OPP Video Study* at 126.[54] The regular audience for national broadcast network news has already dropped to roughly the same level as the total cable news audience, *Pew 2002 News Report* at 5, and this trend toward smaller viewing audiences for local and national broadcast news will likely only continue, as the audience for broadcast television news is older than the audience for cable news. *Id*. at 8.

And certainly no one can seriously contend that cable and satellite channels are not substitutes for broadcast television in the provision of entertainment programming. *See supra* Section II.B. (discussing in detail the significant decline in audience share and advertising revenues experienced by television broadcasters, the rapid rise in the number of MVPD subscribers, and the audience share gains made by cable/satellite networks). A very recent report also strongly indicates that the Internet now competes with television generally for viewers.[55] According to this report, Internet users spend about 30 percent less time per week watching television than non-Internet users, and this difference in the amount of television viewing time is growing. *See 2003 UCLA Internet Report* at 33. This report's finding (at 34) that "television is

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"newspaper readership is negatively impacted by Web adoption across all age groups"); *Study Reveals 52 Percent of People Over 55 Feel Web Is More Important than Newspapers*, Business Wire (June 27, 2001) (study found that "the population that uses newspapers most – those aged 55 and older – say the Internet is a more important medium to them than newspapers in a direct comparison by a conclusive margin of 52 to 37 percent"); Newspaper Association of America, *Leveraging Newspaper Assets: A Study of Changing American Media Usage Habits*, 4, 7 (2000) (people between the ages of 18 and 24 are just "as likely to use the Internet for news and information as they are to read a newspaper," and even among 18-34 year olds, the audience for newspapers is "only slightly larger" than the audience for the Internet).

[54] *See also* www.ncta.com/industry_overview/programList.cfm and www.rtnda.org/resources/nonstopnews/executive.html for a listing of dozens of local and regional cable news channels across the country.

[55] *See* UCLA Center for Communication Policy, *The UCLA Internet Report: Surveying the Digital Future, Year Three* at 33-34 (Feb. 2003) ("*2003 UCLA Internet Report*").

becoming the casualty of increasing Internet use" directly refutes claims by the opponents of ownership deregulation that the "public does not substitute among the different media." Comments of AFL-CIO at 9; AFTRA at III.B.

Beyond greatly understating the degree of consumer substitutability between the various media, including broadcast and cable television and the Internet, commenters supporting continued ownership restrictions on broadcasters additionally minimized the impact of the Internet, essentially contending that the Internet has little or no relevance when evaluating the ownership rules in the current media marketplace. *See, e.g.*, Comments of AFTRA at ¶ 23; AFL-CIO at 12-13 (new media outlets, including cable and the Internet, have only a "marginal role in providing news and information to the general public"); CFA at 64-66, 124 (emphasizing "commercialization" of the Internet and its orientation to "early adopters" with high "income and education" levels and its failure to provide "little if any local content"). NAB believes these commenters have fundamentally mischaracterized the value and impact of the Internet.

No one can seriously dispute that the Internet enables consumers to access easily a wide variety of national and even global sources of news and information. As the Pew Research Center for the People & the Press states, the "Internet has established itself as a major source of news and information," with "35% of Americans go[ing] online for news at least once a week" and "25% of Americans go[ing] online for news at least three times a week." *Pew 2002 News Report* at 2, 13, 15 (also reporting an 11% increase in number of people going online for political news specifically in just the past two years). In fact, these estimates of the number of people who use the Internet to obtain news and information may be conservative, as other sources have reported that closer to *half* of Americans use the Internet for news.[56]

And as the Newspaper Association of America ("NAA") has pointed out, the Internet is also developing into "a rich source of local news and information." Websites "offering local news" are reported to have "significantly higher levels of customer satisfaction than sites offering national news." Comments of NAA in MM Docket Nos. 01-235 and 96-197 at Appendix I, 18 (filed Dec. 3, 2001). Other commenters in this proceeding have also demonstrated considerable recent growth in locally-oriented Internet sites, which cover a wide range of topics, including politics and government, campaigns and candidates, religion, education, health and business. *See* Comments of Media General, Inc. at 22-23, 67-68 and Appendices 9-14.

Federal, state and local governments, moreover, have established web sites that are used by growing numbers of Americans to conduct research, gather information on a range of issues, including political, send comments to government officials, and even to conduct business with the government.[57] A recent special report in the National Journal focusing on the best public-

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[56] *See Internet Grows as News Source*, abcNEWS.com (Oct. 17, 2001). Certainly these reports directly contradict claims of commenters about the "marginal" nature of the Internet as a source of news and information. *See* Comments of AFL-CIO at 13 (stating that "only about 4 percent of consumers use the Internet for news").

[57] For example, in 2001, 55% of adult Internet users in the United States visited a government website, and 50% of online adults visited a state or local government site specifically. NUA, *US Net Users Turning to E-Government* (Jan. 16, 2002) at www.nua.com/surveys. More than a quarter of all Americans use government websites to gather information. *See* NUA, *Americans Embrace E-Government* (April 3, 2002) at www.nua.com/surveys. As of April 2002, 68 million Americans had used government websites, an increase of 28 million in only two years. It is estimated that 42 million people have used government sites to research policy issues, while 23 million people used them to send comments to government officials. Around 14 million people also used the sites to gather information on voting, while 13 million used them to participate in online lobbying. NUA, *Americans Flock to Government Sites* (April 30, 2002) at

policy related websites has identified many accessible, informative sites relating directly to, *inter alia*, political, economic and social issues, public affairs, and state issues. *See Guide to the Web*, National Journal at 3738 (Dec. 8, 2001).[58] Commenters discounting the role of the Internet in providing news and information, particularly political and state or local news, also ignore the fact that many websites, including those maintained by states and localities, allow citizens to access political and other information directly, without the intermediation of the media at all.[59] The

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www.nua.com/surveys. And very recent reports show that "Americans increasingly are using the Internet to participate in the federal regulatory process." Cindy Skrzycki, *U.S. Opens Online Portal to Rulemaking*, Washington Post at E01 (Jan. 23, 2003) (Bush Administration just introduced a new web site intended to "enable anyone with a computer and Internet access to find every federal regulation that is open for comment, read it and submit their views").

[58] For example, the recommended sites include one that reports on the status of congressional and state legislative redistricting, one that follows all legislation offered in all state legislatures and Congress, and another focusing on state courts and the administration of justice at the state level. Yet another website allows access to 500,000 state documents that include legislative policy reports, current and past legislation, statutes, and 50-state surveys. Still other state-specific sites are recommended, one of the best being for the state of New Jersey. Moreover, none of the above-described websites are controlled by a major media entity, and therefore represent "independent" voices. *See Guide to the Web* at 3773, 3776, 3783.

[59] *See, e.g.*, Deb Price, *Candidates Hit E-Campaign Trail*, Detroit News at A1 (Nov. 26, 1999) (from candidates' points of view, one of "main advantages" of campaigning on the Web is the ability to "get out their political message 24 hours a day without having it filtered by the news media"); Rinker Buck, *Turning Away from TV Debates, Candidates Embracing Internet as Alternative*, Hartford Courant at A1 (Oct. 17, 2000) (Internet allows voters to bypass "traditional" media filters, and to "go online and talk to real people and other voters"); Mary Clare Jalonick, *Campaigning on the Internet*, Campaigns & Elections (Sept. 2002) (candidates are now using Internet "as an integral component of all aspects of the campaign," including targeting issue voters, raising funds, and coordinating volunteers' efforts); Ben White, *The Campaign on the Web*, Washington Post at A07 (May 28, 2000) (reporting on innovative use of Internet by congressional candidates, including a candidate's interactive website that allowed visitors to post questions at any time and have the candidate answer them personally); Kevin McDermott, *The Web Snares More Candidates Than Ever This Year*, St. Louis Post-Dispatch at A1 (July 17, 2000) (in Missouri alone in the 2000 election season, more than 80 political candidates actively campaigned on the Web, from those for U.S. Senate and governor to local candidates for sheriff); Lesley Rogers, *Finding Candidates' Spending Reports Can Be Done with a Point, Click*, Wisconsin State Journal at 1B (Sept. 7, 2000) (voters in Dane County, Wisconsin can access the campaign finance reports of candidates for county office via Internet).

Web furthermore allows citizens something that no other existing medium offers – a platform from which to speak to the entire world, cheaply and easily.[60]

In addition, no one can seriously contend today that the Internet is merely an "early adopter" technology utilized only by an educated, wealthy elite presumed to be overwhelmingly non-minority. In 2002, 71.1 percent of Americans went online, and 59.4 percent of Internet users now have Internet access at home. *2003 UCLA Internet Report* at 17. Half of the adult Hispanic population in the U.S. is now online, and Hispanics are the fastest growing ethnic group online and the third largest online group overall.[61] A majority of African-Americans also now go online, and African-American households are going online at a more rapid rate than white households.[62] Rather interestingly, a higher proportion of African Americans than whites report using the Web as an important source of election information.[63] Women are now more likely

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[60] *See Reno v. ACLU*, 521 U.S. 844, 870 (1997) (Internet "provides relatively unlimited, low-cost capacity for communication of all kinds," and through it "any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox" or a "pamphleteer"); Compaine, *Global Media* (while "an activist with a dial-up Internet connection and 10 megabytes of Web server space cannot easily challenge Disney for audiences," an "individual or a small group can reach the whole world and, with a little work and less money, can actually find an audience"). Even CFA, which discounts the impact of the Internet, quoted Professor Lawrence Lessig, who explained that the "press" at the time the Constitution was written "was much like the Internet today," as the "cost of a printing press was low, the readership was slight, and anyone (within reason) could become a publisher." Comments of CFA at 71.

[61] NUA, *U.S. Hispanic Online Population Soars* (July 17, 2002) at www.nua.com/surveys; NUA, *Half of U.S. Hispanics Use the Net* (Jan. 25, 2002) at www.nua.com/surveys.

[62] *Pew 2002 News Report* at 13; NUA, *54 Percent of U.S. Now Online* (Feb. 5, 2002) at www.nua.com/surveys.

[63] James Thurber, Erin O'Brien and David Dulio, *Internet Campaigning*, Roll Call (Feb. 26, 2001) (recommending that campaigns interested in targeting African-American voters would do well to consider the web because 71 percent of African-Americans in survey reported that "the Internet was an importance source of election information while only 54 percent of whites offered the same assessment").

than men to be frequent Internet users,[64] and Internet growth has exploded among women with children in particular.[65]

Furthermore, this trend toward ever-higher Internet usage will only accelerate in the future, as the young are among the most frequent Internet users and are the least likely to use traditional media, especially newspapers. College students are the "most wired group in the U.S.," with 93 percent of them regularly using the Internet.[66] "Younger Americans tend to focus more on radio, magazines, and the Internet for their news," and have "abandon[ed] newspapers." *Pew 2002 News Report* at 8-10 (only one quarter of "those under age 30 report having read a newspaper yesterday," and just 19 percent of those under 30 "regularly watch the nightly network news").

For all these reasons, the Internet cannot simply be dismissed from the Commission's deliberations as it considers the "repeal or modif[ication]" of the broadcast ownership rules. Section 202(h), 1996 Act. Although the ultimate impact of the Internet on traditional media, on the conduct of public affairs and political life, and on the economy and society as a whole cannot

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[64] *See* NUA, *Women More Likely to be Frequent Net Users* (Sept. 27, 2001) at www.nua.com/surveys (although female Internet users are less likely to have years of online experience, Content Intelligence reports that women are three to six times more likely than men to become frequent Internet users within two years); NUA, *More and More U.S. Women Online* (Jan. 21, 2002) at www.nua.com/surveys (number of at-home female Internet users in U.S. increased more rapidly than the number of male users in 2001, so that women now account for 52% of home Internet users).

[65] *See* NUA, *American Mothers Get Online* (May 8, 2002) at www.nua.com/surveys (mothers spend longer online each week than teenagers, and 93 percent of them use the Internet to get news and current events information, while 90 percent go online to obtain local information); NUA, *Mothers Say Goodbye TV, Hello Internet* (April 18, 2002) at www.nua.com/surveys (Reuters reporting that women with children are watching less television and using the Internet more).

[66] NUA, *College Kids Are the Most Wired Group in U.S.* (July 31, 2002) at www.nua.com/surveys.

yet accurately be judged, a casual dismissal of the Internet as a mere "shopping mall" or as a fading "dot.bomb" phenomenon is clearly inappropriate, particularly in considering its impact on the marketplace of ideas. Comments of CFA at 125-126.[67] In sum, commenters calling for retention of the existing broadcast ownership rules have significantly mischaracterized the nature of the "information market relevant to diversity concerns," *Report and Order,* 100 FCC 2d at 25, by refusing to acknowledge the extent to which consumers utilize new media (especially cable, satellite and the Internet) for both informational and entertainment purposes, and the substantial impact that this consumer migration to alternative technologies has had on traditional media, particularly television broadcasters and newspapers.

D. Commenters Further Erroneously Attribute a Variety of Perceived Ills to Ownership Consolidation or Otherwise Inappropriately Regard Structural Ownership Regulation as the Answer to Asserted Problems.

Beyond very questionably blaming consolidation for the perceived poor quality of the modern media and journalism generally (*see supra* Section II.A.), commenters calling for retention of the existing broadcast ownership regime erroneously blame media consolidation for additional specific perceived ills or incorrectly see continued regulation as the answer to certain identified problems. For example, several commenters erroneously attributed the decline in the number of new television and radio stations licensed in recent years to ownership consolidation. *See* Comments of AFTRA at ¶¶ 10-14, 122; AFL-CIO at 5-6, 9; CWA at 16-20. Indeed, this erroneous assertion was one of the *primary* points made in the critique of the FCC's ownership

[67] *See, e.g.*, David Manasian, *Digital Dilemmas: A Survey of the Internet Society* at 17, The Economist (Jan. 25, 2003) (arguing that the web "will increase demands for direct democracy" and "may well" cause "a shift of power away from political elites to ordinary citizens"); *2003 UCLA Internet Report* ("a primary objective of the UCLA Internet Project" will be "to monitor the social implications of declining television viewing as the Internet evolves").

studies relied upon by these commenters.[68] But commenters contending that the weakening of the ownership rules and resulting consolidation in recent years has resulted in slower growth in the number of new media outlets, and a halt in the growth of educational television stations, only reveal their ignorance about the broadcast industry and Commission licensing policies. *See* Comments of AFTRA at ¶ 14; CWA at 16; AFL-CIO at 9.

The slowdown in the licensing of all television stations, including educational, in the 1990s is correctly attributed to the fact that the Commission *ceased* licensing new analog television stations in the mid-1990s to conserve spectrum for the transition to digital broadcasting.[69] The decline in the rate of licensing of new radio stations similarly has nothing to do with ownership consolidation but results from the lack of vacant channels for new stations[70] and from legal difficulties with the Commission's broadcast licensing policies. In 1993, the D.C. Circuit Court of Appeals invalidated a key criterion used by the Commission to select among competing applicants for radio and television broadcast licenses. *See Bechtel*, 10 F.3d 875.

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[68] *See FCC Studies Critique* at iv-v, 3, 15-18, 20-22 (emphasizing that the FCC's studies showed a sharp decline in the number of new radio and television stations, especially educational television stations, in recent years, noting that this "slowdown" in growth in new stations "coincided" with changes in the ownership rules, and concluding that "relaxed regulation presumably played a role" in the slower growth in the number of educational television stations).

[69] In fact, the Commission ceased accepting applications for new television stations in 30 major markets as early as 1987. In 1996, the Commission determined not to accept any further applications for new analog television stations. *See Sixth Further Notice of Proposed Rule Making* in MM Docket No. 87-268, 11 FCC Rcd 10968, 10989, 10992-93 (1996). Finally, in 1997, the Commission eliminated all existing vacant allotments for analog television stations, both commercial and noncommercial, thereby "end[ing]" the "licensing of new" analog television stations. *Sixth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 14588, 14639 (1997).

[70] The AM band is essentially full and not available for new licensing of any significance. *See Report and Order* in MM Docket No. 95-31, 15 FCC Rcd 7386, 7435 (2000) ("AM is a mature service, already quite crowded, and in which little spectrum is available"). The FM band is quite saturated in urban areas, although some channels remain available for licensing in smaller communities and sparsely populated rural areas.

Following that decision, the Commission was forestalled from awarding any new radio or television licenses where there were competing applicants because it lacked a legally approved method of deciding among the applicants.[71] And although Congress in 1997 granted the Commission the authority to select among competing applicants for broadcast licenses by auction, legal difficulties arising from whether noncommercial applicants could be required to participate in auctions for licenses on commercial broadcast spectrum has resulted in further lengthy delays in the licensing of any new radio stations where two or more applicants are competing for the license.[72] Thus, commenters are completely mistaken when they attribute a decline in the rate of licensing of new broadcast outlets to past changes in ownership rules or to consolidation, and their doing so only reveals their eagerness to blame all sorts of perceived ills on media consolidation.

Other commenters urged the Commission to retain the current broadcast ownership rules to "protect the important interests of children" and to ensure sufficient original programming, especially television, for children. Comments of Children Now, *et al*. at 3. Yet these commenters failed to establish empirically how retention of the current broadcast ownership regulatory regime will further the interests of children specifically. For instance, Children Now, *et al*. (at 5-7) asserted that broadcasters are currently failing to serve the needs of children, so

[71] Thus, even before the Commission ceased the licensing of new analog television stations in the mid-1990s to conserve spectrum for digital broadcasting, the *Bechtel* decision had effectively prevented the Commission from licensing new television stations where there were competing applicants.

[72] *See National Public Radio, Inc. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (court prohibited the use of auctions to award licenses for commercial spectrum where applicants include both commercial and noncommercial entities). This court decision and the constraints it imposed on the FCC's range of options for resolving licensing situations involving both commercial and noncommercial applicants has caused the indefinite postponement of an auction for new FM licenses, which was originally scheduled to begin in February of 2001.

NAB wonders how the retention of existing (and assertedly ineffective) rules would somehow result in the needs of children being met. These commenters also speculated that, if the television duopoly rule were modified or eliminated, one owner "could" control two stations in the same market and "potentially repurpose" the same children's educational programming across these stations to satisfy the FCC's "three hour rule" on children's programming. *Id.* at 16. However, commenters failed to cite even a single example where existing duopolies, or stations with Local Marketing Agreements, have in fact engaged in this behavior. The Commission clearly cannot rely on such pure speculation as justification for retaining the television duopoly rule, under either Section 202(h) or existing case law. *See, e.g., Lamprecht,* 958 F.2d 382.[73] And the connection between retaining the existing ownership regulatory regime and promoting children's programming is even less clear for the other ownership rules.[74] Vague claims that various rules disadvantaging local broadcasters in today's competitive marketplace are needed to protect the interests of children must accordingly be rejected by the Commission.

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[73] NAB also observes that, if the Commission were to liberalize the television duopoly rule to allow duopolies in most markets and if any serious problem did develop with commonly owned television stations fulfilling their children's programming obligations, then the Commission could clarify the children's programming rules to address that limited problem directly. It would be regulatory overkill of the worst sort, however, to continue preventing the formation of duopolies in most markets because of the possibility that some television stations, if permitted to be commonly owned, would somehow attempt to evade the children's television programming rules.

[74] For example, the common ownership of television and radio stations in the same market, or a television station and a newspaper, could have no effect whatsoever on the television station's requirements to provide children's educational programming.

A number of commenters also argued for retention of the existing broadcast ownership rules to protect ownership opportunities for minority groups and women.[75] These commenters assert, *inter alia*, that industry consolidation has caused increased station prices, which makes it difficult for minorities and women to acquire stations, as they have traditionally experienced greater difficulties than others in raising capital. *See, e.g.*, Comments of NOW at 5-6; UCC at 18.

As an initial matter, NAB notes that the evidence that increased consolidation must inevitably cause a disproportionate decline in minority ownership is less than clear cut.[76] For example, since 1998, "[a]ll minority groups have increased their radio ownership."[77] But NAB, in any event, cannot agree that keeping the broadcast industry undercapitalized and the values of broadcast stations artificially low through restrictions on the ownership of broadcast outlets is the optimal way to address the question of minority and female participation in the broadcast industry. Instead, NAB strongly supports the reinstatement of a tax certificate program that would give companies tax credits or other benefits if they sold broadcast properties to minorities or women. In particular, NAB has endorsed the bill proposed by Senator McCain to provide tax incentives to those selling broadcast stations to socially and economically disadvantaged

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[75] *See, e.g.*, Comments of National Organization for Women ("NOW") at 2; MMTC at 17; National Association of Black Owned Broadcasters, Inc. and the Rainbow/Push Coalition, Inc. at 6; UCC at 17; AWRT at 6-7.

[76] Certainly consolidation does cause a decline in the overall number of separate owners, whether minority or nonminority.

[77] National Telecommunications and Information Administration, *Changes, Challenges, and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* at 38 (Dec. 2000). *See also* Kofi A. Ofori, *Radio Local Market Consolidation & Minority Ownership* at 10-12, Attached as Appendix One to Comments of MMTC in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) (showing increase in the number of minority owned and controlled radio stations since 1997).

businesses ("SDBs").[78] NAB regards the Commission's previous tax certificate program as one of the more effective policies in promoting minority ownership of broadcast stations. Reinstatement of a similar program, such as Senator McCain's proposal, should also prove to be successful, and would certainly be a much more direct and effective method of encouraging minority ownership than structural ownership regulations, which serve to competitively disadvantage all broadcasters to the benefit of their multichannel competitors. After all, a properly capitalized and competitively viable broadcast industry will be to the benefit of all broadcasters, minorities and nonminorities alike.[79]

III. The Commission Should Eliminate Its Cross-Ownership Rules And Maintain Limited Same-Outlet Restrictions.

Because, as set forth in detail above, the record in this proceeding does not contain clear empirical evidence justifying retention of the existing rules in light of competition, as required by Section 202(h), the Commission cannot retain the rules in their current form. The question therefore becomes how the Commission can best reform the rules to better reflect today's

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[78] *See* NAB News Release, *Statement from NAB President and CEO Edward O. Fritts on Sen. McCain Bill Creating Tax Incentives for Broadcast Ownership Diversity* (Jan. 30, 2003).

[79] NAB also actively supports various industry initiatives to promote diversity in ownership and employment. In 2000, NAB pledged $1.25 million to establish the Gateway Fund, which provides a 50 percent match to cover the costs of training programs for entry-level broadcast industry employees, and the Broadcast Leadership Training Program, which provides direct training for members of groups that are underrepresented in the ranks of broadcast ownership. In 1999, the broadcast industry created a major investment fund designed to increase ownership of television and radio stations by minorities and women. Beyond these voluntary private initiatives, NAB also does not object to certain proposals made by MMTC in this proceeding to promote minority ownership of broadcast outlets. For example, MMTC has urged the Commission to permit the owner of a television duopoly or a radio/television combination to sell the stations together to an SDB, even if, under the normal operation of the FCC's ownership rules, the combined stations could not be sold as a group. *See* Comments of MMTC at 107-108. Although NAB would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser (*see* NAB's comments at 83-84), whether an SDB or not, NAB does not oppose MMTC's proposal.

competitive multichannel marketplace in which broadcasters are no longer preeminent. Several commenters in this proceeding agreed with NAB that the Commission should decline to adopt a case-by-case approach or a voice-dependent single local ownership rule.[80] These commenters agreed that a case-by-case approach would cause considerable marketplace uncertainty, undue administrative delays, higher transition costs for applicants and increased administrative burdens for the Commission. Almost all commenters who addressed the issue also agreed with NAB that a single local ownership rule would be unworkably complex, would raise virtually insoluble problems as to the comparison and weighing of differing types of media, and would be vulnerable to judicial challenge.

Given the lack of support in the record for these two proposals, NAB again urges the Commission to adopt another option mentioned in the *Notice* – eliminating 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," and maintaining limited "restrictions" on "same-outlet" ownership in local markets so as to preserve "competition among those outlets that directly compete with each other." *Notice* at ¶ 110. Consistent with this option, and with considerable support in the record, NAB urges the Commission to repeal the newspaper/broadcast and radio/television cross-ownership rules; to reform the television duopoly rule so as to allow the formation of duopolies in medium and small markets; and to comply with congressional intent by giving full effect to the local radio ownership standards set forth in the 1996 Act. Because of the very extensive record already assembled in previous proceedings on the newspaper/broadcast cross-ownership and local radio rules, NAB will focus in these replies on the need to reform the television duopoly rule.

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[80] *See, e.g.*, Comments of Bonneville International Corp. at 8-11; Tribune Co. at 29-30; Paxson Communications Corp. at 6-7.

A. Reform of the Duopoly Rule Is Urgently Needed to Provide Financial Relief for Struggling Local Television Broadcasters.

As NAB set forth in detail in its initial comments (at 70-83), the Commission must, in light of the declining financial performance of medium and small market television stations, reform the television duopoly rule to allow the formation of duopolies in these markets. A number of factors – including increasing competition from cable and other sources, the costs of the digital transition, and the decline of network compensation – have combined to squeeze the profits of local television broadcasters in medium and small markets like never before. The *TV Financial Report*, as discussed above and in NAB's comments, clearly demonstrates the declining financial position of smaller market television stations in recent years, particularly for those stations not among the ratings leaders in their markets.[81] Certainly the financial pressures on these low-rated stations are sufficiently severe to call into question their continued viability as independent operations. And given the considerable and growing expense of maintaining local news operations, as documented in the *Smith Geiger Newsroom Report*, some television stations

[81] This *Report* examined the profitability of ABC, CBS, Fox and NBC affiliated television stations in DMAs ranked from 51-175 in 1993, 1997 and 2001. It shows that the average low-rated affiliated station in these markets not only experienced declining profitability from 1993 to 2001, but, as of 2001, the average low-rated station experienced *negative* profitability. NAB also wants to emphasize the steepness of these declines in profitability. For example, in markets 101-125, the average low-rated station suffered an astounding *581% decline* in pre-tax profits from 1993 to 2001, and low-rated stations in markets 76-100 and 126-150 experienced average *declines of 320% and 301%*, respectively. And even the highest-rated stations in many medium and small markets experienced declining profits from 1993 to 2001. *See TV Financial Report* at 5-9 (showing declining profits for the average high-rated affiliated stations in markets 51-75, 76-100 and 126-150). NAB also observes that this *Report*, if anything, understates the dire financial situation of a number of television stations in medium and small markets. This study only examined the profitability of major network affiliates, which are presumably the strongest and most financially secure stations in their markets. Stations affiliated with emerging networks and unaffiliated stations were not examined in this study, and these stations, which usually receive considerably lower viewing shares than major network affiliates, are likely suffering even greater financial difficulties.

have already and greater numbers in the future will be forced by financial considerations to forego providing local news in medium and small markets.[82] Reform of the duopoly rule to allow smaller market television stations to combine should therefore enhance both diversity and localism.

Many broadcasters in this proceeding submitted comments and studies in agreement with NAB, and additionally provided detailed descriptions of the affirmative benefits that television duopolies can provide in local markets. In contrast, commenters opposing any reform of the current broadcast ownership rules failed to acknowledge, let alone discuss the significance, of the competitive or financial challenges facing smaller market television broadcasters.

1. The Record Strongly Supports Modifying the Duopoly Rule to Allow Duopolies in Medium and Small Markets.

Expressly citing many of the same reasons identified by NAB, numerous local television broadcasters in this proceeding argued that the Commission must allow duopolies in medium and small markets, and called for either reform or elimination of the existing duopoly rule.[83] These commenters, for example, agreed that television broadcasters are facing unprecedented financial challenges, due to competition from cable and DBS, the decline (and expected future

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[82] The *Smith Geiger Newsroom Report* found that the "costs of starting up and maintaining a local television news operation in medium and small markets continue to increase," while "audience" share and "revenue" are "more and more difficult to come by." *Id*. at 2, 15. Because acquiring alternative programming (such as syndicated programming) "represents a much lower cost than news production," one can therefore only expect more local stations to "forego their news" for the "cheaper, less financially risky, and often more profitable option of acquired programming." *Id*. at 13-15.

[83] *See* Comments of Coalition Broadcasters; Nexstar Broadcasting Group, LLC and Quorom Broadcast Holdings LLC ("Nexstar"); Belo Corp.; Alaska Broadcasting Co., Inc., *et al*.; Duhamel Broadcasting Enterprises; Granite Broadcasting Corp.; Gray Television, Inc.; Hearst-Argyle Television, Inc.; Media General, Inc., *et al*.; Pappas Telecasting Companies; Paxson Communications Corp.; and Sinclair Broadcast Group, Inc.

elimination) of network compensation, and the costs of the digital transition.[84] Just as NAB emphasized that television duopolies will strengthen local broadcasters in competing against MVPDs (*see* comments at 19-20, 78, 82), other commenters stressed the challenges of advertising-dependent local broadcasters competing against MVPDs with dual revenue streams, especially now that cable operators can acquire broadcast television stations in the same local market.[85] Indeed, it has been asserted that the "multiple channel capacity" possessed by cable operators by itself "makes a case" for allowing television broadcasters to form duopolies.[86]

Perhaps most significantly, broadcasters discussing the duopoly rule uniformly emphasized the intense financial pressures on rural and small market television broadcasters, and the urgent need for these broadcasters to be able to adopt more efficient ownership patterns.[87] These commenters specifically stressed (1) the restricted revenue opportunities for local broadcasters in smaller markets, due to the modest amount of total advertising dollars available in these markets; and (2) the substantial and disproportionate burden that the costs of the digital transition – which are not appreciably less for smaller market stations than for large market

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[84] *See, e.g.*, Comments of Alaska Broadcasting Co., Inc., *et al*. at 4-5; Coalition Broadcasters at 6; Granite Broadcasting Corp. at 12; Media General, Inc., *et al*. at 5.

[85] *See, e.g.*, Comments of Duhamel Broadcasting Enterprises at 5-6; Granite Broadcasting Corp. at 3-5; Sinclair Broadcast Group, Inc. at 3-4; Bear Stearns, Transcript of 2002 Television Industry Summit at 39-40 (Nov. 26, 2002) (statements of John Lansing of E.W. Scripps Co. and Jerald Fritz of Allbritton Communications). Some commenters also emphasized cable's growing share of the local advertising market, as a result of the development of cable "interconnects." *See, e.g.,* Comments of Granite Broadcasting Corp. at 9; Bear Stearns, Transcript of 2002 Television Industry Summit at 24-28 (statements of Jerald Fritz of Allbritton Communications, Paul McTear of Raycom Media and John Lansing of E.W. Scripps Co.).

[86] Bear Stearns, Transcript of 2002 Television Industry Summit at 138 (statement of Shaun Sheehan of Tribune Co.).

[87] *See, e.g.*, Comments of Duhamel Broadcasting Enterprises at 3-5; Coalition Broadcasters at 4-6; Granite Broadcasting Corp. at 12; Gray Television, Inc. at 17-18; Media General, Inc., *et al*. at 5; Alaska Broadcasting Co., Inc., *et al*. at 4-5.

stations – place on small market broadcasters with this limited revenue potential.[88] And in light of the marginal and declining financial position of many broadcasters in medium and small markets, a number of commenters discussed the threat posed to local news operations in these markets.[89] Clearly, this articulated threat to the maintenance of local news operations in medium and small markets is very real. Media General compiled a list of 40 "selected press accounts" of cut backs in local television newscasts from 1998-2002. *See* Comments of Media General, Inc. at Appendix Three, Attachment B.[90]

Comments in this proceeding therefore clearly demonstrate that retention of the television duopoly rule in its current form will, in all likelihood, result in the elimination of local news operations at a number of additional stations and even the failure of some local stations, especially the lowest-rated ones. *See, e.g.*, *Smith Geiger Newsroom Report* at 13 (anticipating that more "local stations may look to exit the local news business"); *TV Financial Report* at 10

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[88] *See, e.g.*, Comments of Coalition Broadcasters at 6; Duhamel Broadcasting Enterprises at 4; Gray Television, Inc. at 15, 17-18; Media General, Inc., *et al*. at 5. *See also* Bear Stearns, Transcript of 2002 Television Industry Summit at 120-21, 154, 233-34, 238 (statements of Gary Chapman of LIN TV Corp., Walter Ulloa of Entravision Communications, James Yager of Gray MidAmerica Television, and Paul McTear of Raycom Media, all asserting that duopoly relief is needed even more in smaller markets, especially due to the costs of the DTV transition and the lower profit margins in smaller markets).

[89] *See, e.g.*, Comments of Alaska Broadcasting Co., Inc., *et al*. at 5-6 (duopoly rule places local news "service at risk," as the "costs of maintaining a local news operation are substantial and can be prohibitive for a struggling" smaller market broadcaster); Granite Broadcasting Corp. at 13 (if local television broadcasters cannot consolidate, they must cut costs, such as by decreasing "costly locally-produced news"); Gray Television, Inc., at 18-19 (allowing duopolies would help reverse recent trend of smaller market stations cutting back or eliminating their local news operations); Media General, Inc., *et al*. at 5 (without duopoly relief, "increasingly expensive" local television news may suffer or even be eliminated in many markets).

[90] And NAB notes that this list is not complete. Beyond the 40 instances cited by Media General, a shorter list of television stations that have eliminated locally produced newscasts in recent months included at least two additional stations (KTKA in Topeka, Kansas and WPXT in Portland, Maine). *See TV News: Down the Tube*, Columbia Journalism Review at 8 (Sept./Oct. 2002).

(study showed "a clear and consistent decline in the financial position of many smaller market broadcasters" from 1993-2001, such that the average low-rated network affiliate in markets 51-175 suffered actual losses in 2001). Those commenters opposing any change in the local ownership rules, however, failed even to acknowledge the competitive or financial challenges facing local television broadcasters today, let alone consider the deleterious effects that such pressures could have on local service. To the contrary, these commenters simply flatly opposed any reform of the duopoly rule because allowing duopolies would allegedly result in less local news programming or would decrease the public's access to diverse sources of news and information.[91] Such claims should not dissuade the Commission from liberalizing the duopoly rule because the record shows that duopolies are urgently needed in smaller markets to preserve local news operations (or even to ensure the continued economic viability of lower-rated stations), thereby ultimately *promoting* consumers' access to diverse local news and other programming. *See* Economists Incorporated, *Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality* at 2, Attached to Comments of Fox Entertainment Group, Inc., *et al*. (study concluded that stations that are part of a commonly-owned local station group or same-market LMA are "significantly more likely to carry local news than other stations, even after controlling for other factors").

In addition to preserving existing local news operations, or even the existence of certain stations, in medium and small markets, the record also clearly shows other benefits to be derived from permitting television duopolies in local markets of all sizes. Commenters with duopolies and Local Marketing Agreements have in particular demonstrated that these same-market combinations – beyond merely preserving existing news operations – can also improve news

[91] *See, e.g.*, Comments of Children Now, *et al*. at 27; AFTRA at ¶ 33; UCC at 40; AFL-CIO at 47.

operations and other programming and can lead to the commencement of such operations at stations formerly without any locally produced news. For example, Nexstar Broadcasting and Quorom Broadcast Holdings stated that their LMAs in markets such as Billings, Montana and Erie, Pennsylvania have allowed them to launch several additional weekday and weekend newscasts, to improve existing newscasts including weather reporting, and to air local high school sporting events. *See* Comments of Nexstar at Appendix A. Similarly, when Belo acquired its second station in four different markets (Seattle, Phoenix, Spokane and Tucson), none of these stations provided local news. Common ownership has allowed two of these "second" stations to commence daily newscasts, and a third station will shortly launch a daily newscast. *See* Comments of Belo at 22. Owning duopolies in these four markets has also enabled Belo to air more public affairs programming (both weekly programming and specials on such topics as the Northwest's energy problems). *See id*. at 23-24. The Coalition Broadcasters also provided extensive and detailed information as to how same market combinations have allowed them to improve news and other services to their communities. In a variety of markets from Honolulu to Grand Rapids to Hartford, duopolies and LMAs have enabled the Coalition Broadcasters to modernize the plant and equipment of their stations; to improve their stations' newsgathering capabilities by investing in satellite news vans and Doppler weather radar; to greatly expand local news operations and launch newscasts on stations formerly without local news; to air local college and high school sports programming; to produce greater amounts of other local programming, including specials and weekly local public affairs shows; and to air greater amounts of programming focusing on minority communities and on younger viewers. *See* Comments of Coalition Broadcasters at 15-33. These detailed and specific recitations of the public benefits flowing from existing ownership combinations are in stark contrast to the speculative (or even erroneous) claims of harm presented by some opponents of deregulation.

Beyond improving and expanding news, public affairs and other local programming, stations in duopolies and LMAs have also outpaced standalone stations in the transition to digital broadcasting. A comparison of UPN and WB affiliates in markets ranked 51-100 found that only 30% of standalone UPN/WB stations are currently broadcasting in digital, while 55.6% of the UPN/WB stations in duopolies or LMAs are broadcasting in digital. And all of the stations in duopolies or LMAs had at least filed for a digital construction permit, compared to only 75% of the standalone stations. *See* Comments of Coalition Broadcasters, Attachment B. Permitting duopolies in medium and small markets will therefore clearly promote the public interest by "encourag[ing] broadcasters," especially those outside of the top markets, "to offer digital television as soon as possible." *Fifth Report and Order* in MM Docket No. 87-268, 12 FCC Rcd 12809, 12812 (1997).

A study by BIA Financial Network has also confirmed that duopolies and LMAs result in significant efficiencies for the stations and benefits for the public. This study examined seven duopoly/LMA arrangements, and found that the stations in these ownership arrangements significantly increased both their audience share and advertising revenue and that they outperformed similarly situated standalone stations in comparably-sized markets.[92] This increase

[92] BIA Financial Network, *Television Local Marketing Agreements and Local Duopolies: Do They Generate New Competition and Diversity?* (Jan. 2003), Attachment A to Comments of Coalition Broadcasters (finding that the seven stations increased their Local Commercial Share by an average of 3.2 points after entering into an LMA or duopoly, and increased their revenue, on average, by 250.7%).

in audience share is particularly significant, as it shows that the duopoly or LMA allowed the stations to improve their programming services to the public, thereby attracting more viewers.[93]

In sum, the record provides ample support for the Commission to reform the duopoly rule to allow duopolies in medium and small markets. Just as the Commission acted in 1992 to liberalize the local radio ownership rules when the radio industry (and particularly smaller stations) were suffering financially, the Commission should similarly act here to ensure the "economic viability" of local television broadcasters and therefore their "ability to function in the 'public interest, convenience and necessity.'" *Report and Order*, 7 FCC Rcd at 2760. The current duopoly rule "prevent[s] valuable efficiencies from being realized," and relaxing the rule will not only enable local television stations "to improve their competitive standing" in today's multichannel marketplace, the resulting efficiencies "may also play a significant part in improving the diversity of programming available to the public." *Id*. at 2760-61. NAB moreover emphasizes that the "trends" that already threaten the profitability of medium and small market broadcasters "are unlikely to be reversed," *id*. at 2760, and, in fact, NAB has previously explained that the financial situation of smaller market television stations will only continue to worsen.[94] If the Commission, as commenters urged, wishes to "protect" a reasonable

[93] And beyond these myriad benefits, duopolies do not cause competitive harm in local markets. A study by Robert Crandall, Senior Fellow in Economic Studies at the Brookings Institution, found no evidence that a "multi-station arrangement" (*i.e*., a duopoly or LMA) "within a single DMA allows the provider to increase its advertising rates." Dr. Crandall therefore concluded that "the goal of these arrangements is to improve operating efficiency through cost reduction, rather than to increase" advertising prices. Robert W. Crandall, *The Economic Impact of Providing Service to Multiple Local Broadcast Stations within a Single Geographic Market* at 4, Exhibit 1 to Comments of Sinclair Broadcast Group, Inc.

[94] *See* Comments of NAB at 74-75 (network compensation payments are expected to be further reduced or eliminated entirely in the future, and stations in smaller markets, which have generally not fully completed the digital transition, must still bear the costs of this transition).

"level of free TV access,"[95] including such costly programming as local news – a goal NAB strongly supports – then the Commission must reform the television duopoly rule to ensure the continued economic viability of local broadcasters providing free, over-the-air service in medium and small markets.

2. The Commission Should Adopt a Presumptive "10/10" Rule for Allowing Television Duopolies in all DMAs.

To preserve the competitiveness and financial viability of television stations and their local news operations, NAB in its initial comments urged the Commission to adopt a presumptive "10/10" rule for allowing television duopolies in all DMAs. Under this standard, two stations each with a year-long average 7:00 a.m.-1:00 a.m. viewing share of less than 10 could be commonly owned, and a station with a viewing share of 10 or more could be co-owned with another station with a share of less than 10. Waivers should be considered by the Commission to allow duopolies not meeting the 10/10 standard or triopolies on a case-by-case basis, considering such factors as the competitive conditions in specific markets, the preservation of failed or failing stations, the promotion of the digital transition, and the maintenance of existing, or the establishment of new, local news operations at stations struggling with the increasing costs of providing local news.

The advantages of this reformed duopoly rule are obvious and numerous. As an initial matter, the rule is clear and would be simple for the Commission and for licensees alike to understand and apply. NAB's proposed rule would provide greatly needed financial relief for

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And certainly competition from MVPDs will not lessen in the future, but will only intensify as more nonbroadcast networks are offered on cable and satellite systems growing in capacity.

[95] Comments of Information Policy Institute at 7, 24 (fearing that an increasing number of content options will migrate to a "for-fee" model, and stressing the need to maintain some level of "free TV access").

stations in medium and small markets that, as discussed above, are facing seriously declining economic conditions. The rule would in particular provide regulatory relief for struggling low-rated stations by allowing two lower-rated stations to combine to form a stronger entity, or by permitting a lower-rated station (many of which are currently or will in the future be unprofitable) to combine with a profitable, competitively viable higher-rated station. At the same time, NAB's proposal would still promote the FCC's traditional goals of diversity and competition by preventing the combination of two higher rated stations in the same market, absent additional compelling circumstances. Permitting duopolies in DMAs of all sizes should also promote competition in local media markets more generally by enhancing the competitiveness of local broadcasters vis-à-vis cable system operators.[96] A number of other broadcasters have recognized the advantages of NAB's proposal and have already endorsed it.[97]

NAB believes moreover that its 10/10 proposal is entirely defensible on economic and policy grounds. The utilization of viewing shares in this proposed rule is appropriate, as they reflect each station's share of *total* viewing in each DMA, taking into account the viewing of broadcast stations located outside the market and of cable networks/channels. Given the high levels of viewing of out-of-market broadcast stations in some DMAs and the significant competitive position of MVPDs in all local video markets today, NAB's proposal for a revised duopoly rule appropriately takes cable/satellite, as well as out-of-market broadcast station,

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[96] *See* Haddock and Polsby, *Bright Lines* at 332 (calling on the FCC to allow broadcast television duopolies to "intensify the pressure on cable systems from over-the-air competition").

[97] *See* Comments of Duhamel Broadcasting Enterprises at 2; Coalition Broadcasters at 11; Pappas Telecasting Companies at 13-15; Paxson Communications Corp. at 30-31.

viewing into account.[98] The 10/10 rule is also, in a sense, continuously self-correcting so that it reflects the competitive conditions and the status of individual stations in each DMA as they change over time.[99]

In addition, the choice of a 10 viewing share as the presumptive "cut-off" point for allowing duopolies – which was selected after reviewing audience share data from all television markets – is appropriate because it separates market-leading stations from non-leading stations on a reasonably consistent basis across DMAs of varying size. According to BIA's evaluation of the 10/10 proposal, a "threshold level of ten" appropriately weighs two competing concerns – "aiding underperforming local television stations and preventing harmful concentration" – in a "simpl[e] and effective[]" manner. *BIA 10/10 Analysis* at 4. More specifically, BIA's evaluation concluded that it "strongly appears" that the 10 viewing share threshold allows for substantial relief of underperforming stations. *Id.* at 6. For example, in *all* DMAs (with only a single exception) that have a minimum of three local over-the-air television stations, there is at least one station whose viewing share is below 10 and significantly below the other stations' viewing shares.[100] The 10 share threshold therefore will allow in all markets, from the largest to the

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[98] *See* Attachment A, BIA Financial Network, *The NAB's Proposed 10/10 Rule for Evaluating Future Local Television Duopolies: Why 10 as a Threshold Makes Sense* at 2-3 (Feb. 2003) ("*BIA 10/10 Analysis*") (explaining that the "strength" of the 10/10 proposal is that it incorporates the impact of all the video entertainment choices available in local communities).

[99] In applying the rule, the viewing shares of the stations proposed to be commonly owned would be based on an average of the four Nielsen "books" prior to the filing of a transfer or assignment application with the FCC. Use of the four latest Nielsen books will enable this duopoly standard to reflect, for example, the declining viewing shares of broadcast stations in the DMA at issue due to continuing growth in the viewing shares of cable/satellite networks within the market. *See BIA 10/10 Analysis* at 3-4.

[100] And it is clear that stations in this situation are suffering financially. *See TV Financial Report* at 10 (finding that the average lowest-rated major network affiliate in markets 51-175 suffered declining profitability from 1993 to 2001 and actual losses in 2001).

smallest, some combination of existing stations, thereby providing financial relief for underperforming stations in all of these markets. *BIA 10/10 Analysis* at 6.

At the same time, however, the 10 threshold will prevent two strong stations, both of which attract more than 10 percent of the local viewing audience, from dramatically increasing their combined viewing share by merging. *Id.* at 5. In most markets with at least three local over-the-air stations, the proposed 10/10 rule would not allow the two strongest local stations with the highest viewing shares to combine. *Id.* at 6. Thus, the 10/10 proposal should not raise any "concern[s] about local combinations that would result in too much concentration in local markets." *Id.* at 5.[101]

NAB believes that the *BIA 10/10 Analysis* provides an adequate basis for the Commission to adopt the 10/10 duopoly rule proposal.[102] NAB accordingly strongly urges the Commission to adopt this proposal, which should provide substantial financial relief to struggling television broadcasters, especially those in medium and small markets, while at the same time safeguarding the Commission's traditional competition and diversity concerns.

B. The Record Supports Elimination of the Newspaper/Broadcast Cross-Ownership Rule and the Radio/Television Cross-Ownership Rule.

As NAB argued in the pending proceeding on the newspaper/broadcast cross-ownership rule and in initial comments in this proceeding, the Commission should repeal the cross-

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[101] NAB also emphasizes that the 10 threshold should only be regarded as a presumption. The Commission on a case-by-case should still consider allowing combinations of stations both of which have viewing shares of 10 or more, if no competitive concerns are raised due to the particular circumstances of the case and a waiver of the 10/10 presumption is otherwise justified.

[102] *See Sinclair*, 284 F.3d at 162 (although "substantial deference" is "to be accorded to the Commission's line drawing, the Commission cannot escape the requirements that its action not 'run[] counter to the evidence before it' and that it provide a reasoned explanation for its action") (citations omitted).

ownership ban. Despite several attempts commencing in the 1940s, the Commission has never justified its prohibition on common ownership of newspapers and broadcast facilities in the same market. It has consistently failed to establish the existence of any competitive or other concrete harms arising from newspaper/broadcast cross-ownership. Certainly the FCC's entirely speculative diversity rationale for adopting the rule in 1975 can no longer support its retention, especially given consumers' ability today to access a much wider array of increasingly substitutable broadcast and nonbroadcast outlets to obtain news and information. *See supra* Section II.C. Indeed, the case for repealing this anachronistic ban is now compelling because it inhibits the development of new innovative media services, especially digital and on-line services that have features of both the electronic and print media, and precludes struggling broadcast and newspaper entities, particularly those in smaller markets, from joining together to improve, or at least maintain, existing local news operations. NAB accordingly agrees with the considerable number of commenters who argued that the record warrants elimination of the newspaper cross-ownership ban.[103]

As with the television duopoly rule, NAB wishes to emphasize the need for regulatory relief for broadcasters in smaller markets. Newspaper/broadcast combinations would allow both newspapers and broadcasters – which, as discussed in Section II. above, are facing unprecedented competition in a digital, multichannel environment – to maintain their financial viability and to strengthen their operations, especially in smaller markets. Allowing newspapers

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[103] *See* Comments of Gannett Co., Inc.; Cox Enterprises, Inc.; West Virginia Media Holdings, LLC; Block Communications, Inc.; Bonneville International Corp.; Hearst-Argyle Television, Inc.; Hearst Corporation; Newspaper Association of America; Tribune Co.; Paxson Communications Corp.; Belo Corp.; Dispatch Broadcast Group; and Morris Communications Corp. Indeed, many of these commenters asserted that the Commission should already have eliminated the cross-ownership ban based on the record in the proceeding specifically addressing the newspaper rule, which has been pending for some time.

and broadcast stations to combine "would have a positive economic impact upon these businesses" by increasing "operating cash flow" between "9% and 22%," and "could have a significant impact on efficiency of operations in smaller markets, especially for marginally performing newspapers and television stations."[104] As set forth in detail in Section III.A., television broadcasters in smaller markets (particularly those who are not the ratings leader in their markets) are currently facing unprecedented financial challenges. Some small and medium market television broadcasters have consequently already experienced difficulties in maintaining their local news operations, and many more are likely to struggle to retain these operations in the future, especially as they bear the considerable costs of their transition to digital broadcasting. *See also supra* Section II.B. & C. (noting that newspapers are too suffering financially, due to declines in circulation and loss of readership to competitors, including the Internet). The repeal of the newspaper/broadcast cross-ownership rule would therefore help maintain the financial viability of broadcast and newspaper operations in smaller markets, forestall likely cut backs in local television news services, and even encourage the development of new broadcast news

[104] Bond & Pecaro, *A Study to Determine Certain Economic Implications Of Broadcasting/Newspaper Cross-Ownership*, attached as Appendix B to NAB Comments in MM Docket No. 98-35 at 5, 26 (filed July 21, 1998). This study found that efficiency gains from joint ownership of newspaper and broadcast operations would be the most significant in proportional terms to small market radio and television stations, "where even small cost savings can create a sharp increase in operating profits." *Id*. at 5. *Accord* Lorna Veraldi, *Carpooling on the Information Superhighway: The Case for Newspaper-Television Cross-Ownership*, 8 St. Thomas L. Rev. 349, 365-66, 369-70 (1996) (cost savings from allowing newspaper/broadcast combinations "could mean the difference between extinction and survival for some newspapers and television stations," and should "encourage better local service by rewarding production of local news with increased revenue from multiple uses of the same production resources").

operations.[105] In this way, repeal of the cross-ownership rule should enhance both diversity and localism.

Other commenters similarly emphasized that "medium and small market broadcasters and newspaper publishers, and their respective communities . . . are most in need of regulatory relief and . . . would experience the greatest benefits from eliminating the rule." Comments of Bonneville International Corp. at 8. Owners of newspaper and broadcast outlets in smaller markets emphasized that repeal of the cross-ownership ban is needed to allow them to "compet[e] with national media conglomerates like Comcast, Liberty Media, and AOL Time Warner." Comments of Block Communications, Inc. at 1-2. Commenters also described how small market newspapers and broadcast stations lack the "resources necessary to develop and sustain strong local news coverage." Comments of West Virginia Media Holdings at 11.[106] As this commenter thoughtfully observed, a "large number of independent voices that lack the resources to create and publish news and public affairs information of importance to the community can hardly be said to further the public discourse so central to the First Amendment values the Commission," and commenters opposing all media consolidation, say they "desire[] to protect." *Id.* at 15.

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[105] *See, e.g., M Street Daily* at 1 (Dec. 7, 2001) (reporting that newspaper publisher Knight-Ridder is "poised to buy" radio stations "it could flip to all-news" if the FCC relaxes the newspaper/broadcast cross-ownership rule, and also speculating that other newspaper owners, particularly Gannett, would "return to radio" if the rule were relaxed).

[106] The efficiencies resulting from the "combination of broadcast stations and newspapers" would, for example, "create the financial wherewithal to increase salaries and thereby attract and retain more experienced news personnel, create bureaus in the state capital and Washington, D.C., purchase more advanced equipment, enhance web-based news operations, and expand significantly the depth and breadth of local news coverage." Comments of West Virginia Media Holdings at 13.

Finally, NAB reemphasizes that the record in the pending proceeding on newspaper cross-ownership has shown the myriad benefits to be gained from newspaper/broadcast cross-ownership in markets of all sizes.[107] Commenters in this proceeding similarly stressed that common ownership of newspapers and broadcast outlets (pursuant to grandfathering or waivers) has promoted a greater range of locally produced programming, including news, sports and entertainment/variety; encouraged development of innovative Internet services and other news services such as regional/local cable news networks; enabled the creation of news bureaus in other cities; permitted improved news coverage, such as faster access to breaking news, better coverage of political candidates and government officials, and the development of more in-depth, multi-part stories; expanded community involvement; improved coverage of local emergencies; and improved news coverage of underserved communities, such as the Hispanic population.[108] And beyond these many benefits, common ownership of newspaper and broadcast outlets does not, according to several studies, cause competitive harm in local markets, even in smaller ones. *See* Economists Incorporated, *Behavioral Analysis of Newspaper-Broadcast Cross-Ownership Rules in Medium and Small Markets* at 10-11 (Jan. 2002), attached to Reply Comments of Media General, Inc. in MM Docket Nos. 01-235 and 96-197 (filed Feb. 15, 2002) (concluding that cross-ownership of newspapers and broadcast stations had "no significant" effects on the price of advertising by the cross-owned newspapers "across markets of all sizes," and also finding that "cross-ownership has no effect on advertising" in smaller markets specifically).[109]

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[107] *See* Comments of NAB in MM Docket Nos. 01-235 and 96-197 at 34-43 (filed Dec. 3, 2001); Reply Comments of NAB in MM Docket Nos. 01-235 and 96-197 at 12-17 (filed Feb. 15, 2002).

[108] *See, e.g.*, Comments of Media General, Inc. at 15-20; Belo Corp. at 3-4; Gannett Co., Inc. at 4-7; Dispatch Broadcast Group at 8-9; Morris Communications Corp. at 5-6.

[109] Earlier similar studies relating to the question of competitive harms from media cross-ownership reached similar results. *See* Kent Mikkelsen, Economists Incorporated, *Horizontal*

In light of the comments and empirical evidence previously submitted to the Commission in the pending proceeding on newspaper cross-ownership, and the additional submissions in this proceeding, the Commission should repeal the anachronistic newspaper/broadcast cross-ownership ban. The Commission has even less basis for retaining the newspaper cross-ownership rule today than it had for adopting the rule in the less competitive and less diverse media environment of 1975, and therefore the Commission must, under Section 202(h), "repeal or modify" it.

NAB similarly urges the Commission to eliminate the radio/television cross-ownership rule. As explained in NAB's initial comments, the rule does nothing to advance the public interest under current marketplace conditions. The rule is no longer needed to ensure diversity in local markets, but in its current form primarily serves to limit radio station ownership arbitrarily. With television and radio broadcasters facing unprecedented competition from cable, DBS, and satellite and Internet radio, a cross-ownership rule applicable only to local radio and television broadcast stations is inequitable and outdated. Particularly if the Commission retains the local radio ownership rule and the television duopoly rule in some form (as NAB has recommended), no plausible reason exists to also retain the cross-ownership rule, as any diversity or competition concerns can be addressed more directly by these other local rules. Given the relatively limited significance of the radio/television cross-ownership rule in its current form, the rule attracted little attention from most broadcast commenters, although questions were raised as to the need

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and Vertical Structural Issues and the Newspaper-Broadcast Cross-Ownership Ban (Dec. 2001), attached as Appendix IV to Comments of Newspaper Association of America in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001); Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules*, attached as Appendix B to Comments of Newspaper Association of America in MM Docket No. 98-35 (filed July 21, 1998); *Ex Parte* of Media General, Inc. in MM Docket Nos. 01-235 and 96-197 (filed May 3, 2002).

for the radio/television cross-ownership rule given the existence of both the television duopoly and the local radio ownership rules. *See* Comments of Paxson Communications Corp. at 34. NAB agrees, and again requests the Commission to repeal this rule.

C. The Commission Has No Legal or Policy Basis for Cutting Back on the Levels of Local Radio Consolidation Expressly Permitted by Congress.

As NAB discussed in the pending proceeding on local radio station ownership and in initial comments in this proceeding, the Commission has no statutory authority – as well as no basis grounded in either diversity or competition concerns – to override Congress' judgments in the 1996 Act about ownership consolidation in local radio markets. Congress' determinations as to the appropriate levels of local radio ownership set forth in Section 202(b)(1) of the 1996 Act are definitive, and the Commission must accordingly approve, without delays or the imposition of any additional public interest requirements, proposed radio transactions that comply with these statutory numerical limits.[110] NAB furthermore emphasizes that the Commission should not attempt to cut back on the level of ownership concentration specifically allowed by Congress by changing, at this juncture, its long-standing method of defining radio markets and for counting the number of stations in a market.[111]

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[110] Numerous commenters in the pending radio ownership proceeding agreed with NAB on this point. *See, e.g.*, Comments of MBC Grand Broadcasting, Inc. at 3-6; Radio One, Inc. at 4; Cumulus Media Inc. at 3-4; Entercom Communications Corp. at 2-3; Clear Channel Communications, Inc. at 4-10; Nassau Broadcasting II, LLC at 3-5; and Cox Radio, Inc. at 3-4 in MM Docket Nos. 01-317 and 00-244.

[111] In comments in MM Docket No. 00-244 (filed Feb. 26, 2001), NAB discussed in detail why the Commission should refrain from changing its well-established "contour overlap" method of defining radio markets and its method for counting the number of stations in a market.

None of the FCC's recent radio market research, and none of the complaints expressed by critics of consolidation in this proceeding,[112] has any bearing whatsoever on the Commission's lack of authority to override Section 202(b)(1) of the 1996 Act, in which Congress expressly established the number of radio stations that could be commonly owned in local markets of varying sizes. Beyond lacking the authority to reject or delay proposed radio transactions that comply with the statutory ownership caps, available empirical evidence moreover provides no competition or diversity-related justifications for thwarting congressional intent as to the allowable levels of local radio consolidation. A variety of studies previously submitted to the Commission indicate that even consolidated radio groups are unable to exercise undue market power in the radio marketplace, due to the volatility of ratings and audience shares received by radio stations,[113] the declining listening shares earned by even market leading stations,[114] and increased competition from a variety of media outlets. Given the lack of reliable evidence in the record that increased ownership concentration has caused significantly higher advertising rates or other tangible harm in the marketplace, the Commission – even if it possessed the legal authority

[112] A number of commenters claimed that consolidation in radio markets has caused a decline in the diversity of radio programming and the growth of anti-competitive business practices. *See, e.g.*, Comments of AFL-CIO at 56-60; UCC at 36-39; AFTRA at ¶¶ 62-73. As summarized below, and as discussed in more detail in NAB's reply comments in the local radio proceeding (MM Docket Nos. 01-317 and 00-244, filed May 8, 2002), these and other complaints about the effects of radio consolidation are not supported by the available empirical evidence. Complaints about the alleged "monopolistic" business practices of individual radio group owners also seem beyond the scope of this general rulemaking.

[113] *See* BIA Financial Network, *Volatility in Radio Market Shares* (March 2002), Attachment C to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) (finding that the audience shares earned by radio stations are quite volatile and that stations are able to make very significant gains in their shares over short periods of time by altering their formats).

[114] *See Aggregate Shares of the Top Five Stations in Arbitron's Top 100 Markets: Spring 2001 vs. Spring 1996*, Attachment D to NAB Comments in MM Docket Nos. 00-317 and 00-244 (filed March 27, 2002) (across the top 100 Arbitron markets, the top five radio stations' aggregate listening shares declined an average of 9.1% from 1996 to 2001).

– simply has no basis upon which to decline to give full effect to the local radio ownership standards set forth in Section 202(b) of the 1996 Act.

In addition to the evidence submitted in the pending proceeding on local radio ownership, commenters in this proceeding provided further evidence demonstrating that existing levels of radio consolidation have not caused tangible competitive harm in the marketplace. In an earlier study using actual advertising rates charged by 121 stations in 37 Arbitron markets, Professor Jerry Hausman of the Massachusetts Institute of Technology concluded that radio ownership consolidation did not lead to higher advertising prices.[115] For this proceeding, Professor Hausman extended his previous study by collecting advertising rate data charged by stations in additional radio markets that have experienced significant increases in ownership concentration, and performed additional analyses of the effect of concentration on advertising prices. Professor Hausman again "conclude[d] that there is no evidence that the increases in consolidation that occurred between 1995 and 2001 led to increases in the price of radio advertising," even "in markets where two firms control over eighty percent of radio market revenue."[116]

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[115] *See* Statement of Professor Jerry A. Hausman at 2-7, attached as Appendix C to Comments of Viacom Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002). *Accord* Stephen Stockum, *The Pricing of Radio Advertising: Does Market Concentration Matter?* at 3, Attachment B to Comments of Cumulus Media in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) (study of over 3000 radio stations concluded that "high levels of market concentration among local radio stations do not result in higher [advertising] prices").

[116] Statement of Professor Jerry A. Hausman at 3, 8, Exhibit 1 to Comments of Clear Channel Communications, Inc. Like NAB (*see* comments at 94-97), Professor Hausman also criticized the FCC's study on radio advertising prices, which found that consolidation has caused a small but statistically significant increase in the price of radio advertising. *See* FCC, Keith Brown and George Williams, *Consolidation and Advertising Prices in Local Radio Markets* (Sept. 2002). According to Professor Hausman, the FCC's study, *inter alia*, (i) used limited and incomplete price data; (ii) did "not take into account changes in the prices of substitutes for radio advertising"; and (iii) used only one measure of concentration, so that their results "depend on the precise way in which concentration is measured." Hausman Statement at 12-17. Other commenters similarly criticized the FCC's radio advertising price study for failing to take into

Beyond the lack of any reliable evidence in the record demonstrating competitive or other tangible harms from post-1996 radio consolidation, available empirical evidence similarly shows no diversity-related harms that would warrant any attempts to thwart congressional intent as to the allowable levels of local radio consolidation. Consumers today have access to more varied radio programming than ever before, due to the expansion in the number of radio stations, the growth in the number of program formats, and the development of new technologies, including satellite radio and Internet streaming. Studies by NAB in 1999, Steven Berry and Joel Waldfogel in 1999, BIA Financial Network in 2002, and MIT Professor Jerry Hausman in 2002 have all shown steady increases in the number of programming formats available in local radio markets since 1996. Several of these studies also established a causal link between increased ownership consolidation and this increased programming diversity. *See* Comments of NAB at 36-37 for a discussion of these studies. Another even more recent study by Bear Stearns similarly found that (1) there were approximately seven percent more "core" formats available in 2001 than in 1996, and (2) when all the variations of the "core" formats are counted, more than 250 formats are currently available cumulatively across all Arbitron markets. *See* Bear Stearns Equity Research, *Format Diversity: More from Less?* (Nov. 2002).

Significantly, this recent growth in the number of programming formats has included an explosion in the airing of formats designed to appeal to different ethnic groups including African-American and Hispanic listeners, such that these formats are now "three of the top ten

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account the availability of substitutes, such as newspaper or television advertising, and for failing to control for changes in the quality or attractiveness of radio advertising. *See* Economists Incorporated, *Comment on FCC Ownership Study #4*, Attached to Comments of Fox Entertainment Group, Inc., *et al*.

most popular formats across the country."[117] Spanish language stations have in particular increased in number in recent years.[118] Various sources have furthermore explicitly attributed this growth in the number of stations airing formats intended to attract minority listeners to consolidation.[119] The number of stations with news, talk or other informational formats has also exploded over the past several years. *See R&R Today* at 2 (April 18, 2002) (1,133 radio stations are currently programmed with a news/talk format, making it the second-most common programming format in the country).

And not only has the number of different formats increased in local radio markets since 1996. The FCC's study on playlist diversity additionally "suggest[ed] that diversity has grown significantly among stations *within* the same format and within the same city," and stated that stations with the *same* "formats competing within the same market appear to differentiate themselves to appeal to their listeners."[120] Thus, "listeners in local radio markets may have experienced increasing song diversity" since 1996. *FCC Music Diversity Study* at 18.[121]

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[117] Katz Media Group, *Spring 2002 National Format Averages and Share Trends* at 1 (Nov. 8, 2002) ("*Katz Media Spring 2002 Study*").

[118] *See* BIA Financial Network, Mark R. Fratrik, *State of the Radio Industry: What Is Going On With Radio Formats?* at Table 2 (Jan. 2002).

[119] *See, e.g.*, *Katz Media Spring 2002 Study* at 1; Comments of West Virginia Radio Corp. and Comments of Journal Broadcast Corp., MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001).

[120] FCC, George Williams, Keith Brown and Peter Alexander, *Radio Market Structure and Music Diversity* at 16 (Sept. 2002) ("*FCC Music Diversity Study*") (emphasis added).

[121] NAB stresses the significance of this conclusion that song diversity has increased *within* local radio markets because diversity within markets is the type of diversity most important to radio listeners. One critique of the FCC's study made much of the fact it also indicated that playlists for stations within the same format have grown *slightly* more uniform *across* local markets. *See FCC Studies Critique* at 18 (finding it a cause for concern that there might be "fewer distinct songs, across the nation, broadcast on the radio" because of a supposed "national policy to promote the production of a diversity of songs, as evidenced by government support for the

Clearly, radio stations consistently bring new music and new artists to listeners, as it has been estimated that, in 2002, nearly 3,000 new songs debuted on radio and over 550 new artists first appeared on radio.[122] The Commission accordingly has no cause for concern that listeners today lack access to diverse entertainment and informational radio programming, especially in light of their ability to access radio programming originating from outside their local markets.[123]

Moreover, despite recent consolidation within the broadcast industry and especially within local radio markets, the Commission should not be concerned about consumers' ability to access programming from a number of independently owned media outlets.[124] And to ensure that the level of consolidation within the radio industry is not exaggerated, NAB wishes to

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production of music and the education and training of musicians"). NAB believes this concern to be mistaken because consumers in local markets have little interest in the diversity of songs nationwide, but care about the diversity of songs played by radio stations that they can receive. After all, a radio listener in Portland, Maine has a very limited interest in the playlist of radio stations in Portland, Oregon. In any event, the approach of this FCC study – which compared only the "top ten" playlists for stations in March 1996 and March 2001 – may have biased the study toward understating the amount of song diversity. The airing of additional songs beyond the most very popular is precisely the type of diversity that should be examined.

[122] *See* Attachment C, *Radio Industry Fact Sheet* at 1 (citing *Media Base, 2002*).

[123] *See BIA Out-of-Market Voices Study* at 5-12. This study confirmed that listeners easily and routinely access many more radio stations than those assigned to their Arbitron markets. In fact, on average, just over two-thirds (67.7%) of the listening within a market is attributable to commercial radio stations listed by Arbitron as being "home" to that market. In some Arbitron markets *most* of the radio listening is to radio stations that Arbitron does not assign to the listeners' geographic market. Significantly, the level of listening to in-market stations decreases with market size, thereby showing that consumers in smaller markets with relatively fewer stations more frequently access out-of-market stations to enhance the diversity of their programming choices.

[124] *See, e.g.*, FCC, Scott Roberts, Jane Frenette, and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Sept. 2002) (showing that the number of independent owners of media outlets in local markets increased significantly between 1960 and 2000); *Independent Radio Voices in Radio Markets* (Nov. 2001), Attachment B to NAB Comments in MM Docket Nos. 01-317 and 002-44 (filed March 27, 2002) (showing that large numbers of commercial radio stations either remain "standalones," or are part of local duopolies, in their respective markets).

correct an error made in one of the FCC's studies in using BIA data to calculate the revenue shares of radio group owners.[125] In this study, the percentages of total radio industry revenues attributed to the group owners are overestimated because BIA's online database does not include revenues for *all* radio stations.[126] As a result, rather than the 10 largest radio groups earning two-thirds of the industry's revenue, the true share of revenues earned by the top 10 owners is still under one-half.[127] In sum, the radio industry remains much less consolidated than other media sectors, including cable, DBS, movie studios and the recording industry, where five music labels account for 84 percent of album sales.[128] The case for any Commission action to address concentration in the radio industry therefore appears particularly weak.

Beyond lacking the authority to reject or delay proposed radio transactions that comply with the statutory ownership caps, the Commission, in light of all the available empirical evidence, also lacks any competition- or diversity-related justifications for overriding congressional intent as to the allowable levels of local radio consolidation. NAB again calls upon the Commission to give full effect to the local radio ownership standards set forth in Section 202(b) of the 1996 Act, to retain its established method of delineating radio markets, and

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[125] *See* FCC, George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance* at Appendix C (Sept. 2002).

[126] BIA issues a separate "all industry" estimate that is considerably higher than the sum of the revenue estimates for the stations in the online database. BIA estimates the total revenues of the radio industry at approximately $16.2 billion, rather than the $11.8 billion reflected in the revenues of the radios stations included in the online database.

[127] NAB notes that the Future of Music Coalition made this same mistake in its November 2002 submission in this proceeding. *See* FMC, *Radio Deregulation: Has It Served Citizens and Musicians?* at 3 (Nov. 18, 2001) (erroneously stating that 10 companies control two-thirds of radio revenue nationwide). As NAB pointed out in a letter to the FMC, BIA itself has publicly disputed FMC's calculation of radio industry revenue shares. *See* Attachment B, Letter from Kathleen M. Ramsey, NAB Senior Vice President at 1 (Jan. 6, 2003).

[128] *See* Attachment C, *Radio Industry Fact Sheet* at 1.

to cease its unauthorized practice of "flagging" for further review proposed radio station transactions that comply with the congressionally established numerical ownership limitations.

IV. Conclusion.

The record in this proceeding does not provide the clear empirical evidence that the Commission must have to meet its burden of justifying retention of the existing local broadcast ownership regulatory regime under Section 202(h). Instead of providing evidence showing that the local ownership rules still serve the public interest "as the result of competition," commenters supporting retention of the rules supplied a lengthy jeremiad against all consolidation in media markets and the alleged evils of profit-maximizing media conglomerates. These commenters conspicuously failed, however, to connect their generalized criticisms of the mass media marketplace with actual harms that will be directly ameliorated by retention of each of the local ownership restrictions. Certainly these commenters have failed to establish that the alleged harms prevented by the local ownership rules outweigh the significant costs imposed by these rules, especially in smaller markets.[129]

But even more critically, commenters urging retention of the current regime of broadcast-only local ownership restrictions have substantially underplayed the well-documented changes that have occurred in the mass media marketplace, and virtually ignored the significant deleterious effects that these changes have had on the competitive position of local broadcasters in recent years. By essentially disregarding the growth of cable, DBS, satellite radio and the Internet, commenters supporting ownership restrictions have greatly exaggerated the ability of

[129] "[I]t is not sufficient for a regulation to articulate desirable goals. The regulation must promise to materially advance those goals, and whatever costs it imposes must be outweighed by the benefits the regulation creates; furthermore, if the goals could be achieved in a less costly manner, then the latter should be the approach selected." Krattenmaker and Powe, *Regulating Broadcast Programming* at 309.

traditional media, especially television broadcasters, to continue dominating both the commercial marketplace and the marketplace of ideas.

In contrast, commenters calling for reform of the existing broadcast ownership regime have presented a convincing case for change. Numerous commenters described how the elimination or loosening of the local ownership restrictions (particularly the television duopoly rule and the newspaper/broadcast cross-ownership ban) is needed to allow local broadcasters to remain competitively viable in a digital, multichannel environment. These commenters in particular stressed that local television broadcasters are facing unprecedented financial challenges, due to growing competition, the decline of network compensation and the high cost of the digital transition. Indeed, evidence provided by NAB shows that many television broadcasters in medium and small markets – especially those who are not the ratings leader in their markets – are now losing money, and their financial situation can only be expected to worsen. Commenters also provided detailed and specific examples of the concrete public interest benefits that flow from existing local ownership combinations, particularly television duopolies and newspaper/broadcast combinations.

In sum, if the Commission wishes to ensure that free, over-the-air local broadcasters remain economically viable and capable of "serv[ing] the public interest in the spirit of the Communications Act" by providing costly services such as local news, *Report and Order*, 7 FCC Rcd at 2760, then the ownership restrictions that apply to broadcasters, but not to their highly consolidated multichannel competitors, must be eliminated or reformed. The evidence in this proceeding clearly shows that the existing broadcast-only restrictions – which were adopted in an era of broadcaster preeminence – no longer serve the Commission's goals of competition, diversity and localism in today's digital, multichannel environment, but instead prevent local broadcasters, especially television stations, from competing on an equitable playing field with newer programming distributors.

To maintain the broadcast "industry's ability to function in the 'public interest, convenience and necessity,'" *id.*, NAB requests the Commission to eliminate the newspaper/broadcast cross-ownership ban and the radio/television cross-ownership rule and to reform the television duopoly rule to allow duopolies in medium and small markets. NAB also urges the Commission to give full effect to the local radio ownership standards established in the 1996 Act by approving, without delays or the imposition of any additional public interest requirements, proposed radio station transactions that comply with the statutory local radio limits.

Respectfully submitted,

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February 3, 2003

ATTACHMENT A

The NAB's Proposed 10/10 Rule for Evaluating Future Local Television Duopolies: Why 10 as a Threshold Makes Sense

Mark R. Fratrik, Ph.D.

Vice President, BIA Financial Network

February 3, 2003

The NAB's Proposed 10/10 Rule for Evaluating Future Local Television Duopolies:

Why 10 as a Threshold Makes Sense

In its recent submission to the Commission in the biennial review of the local television ownership rules, the National Association of Broadcasters proposed a different approach for the Commission to evaluate proposed acquisitions of one local television station by the owner of another local television station. Under the NAB proposal, the Commission would "adopt a presumption that television duopolies in all DMAs meeting a '10/10' standard are in the public interest."[1] Under that 10/10 standard, a station with an average[2] total day (7AM – 1 AM) household-viewing share of less than ten could be combined with any other local station no matter what its share. Stations with an average viewing share of ten or more could *not* be combined with another local television station that also has a viewing share of 10 or more, absent a waiver from the Commission.

I have been asked to evaluate whether adoption of this proposed standard would be an appropriate revision to current communications policy. This evaluation, contained in this report, will examine whether the proposed rule, and specifically the viewing share threshold of ten, provides a sufficient safeguard against undue concentration while at the same time permits local television stations to enter into arrangements that will strengthen their competitive position and their ability to serve their local communities.

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1 Comments of the National Association of Broadcasters, In the Matter of 2002 Biennial Regulatory Review, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, and 00-244, p. 79.

2 Averaged across the most recent four ratings periods.

Based upon my experience analyzing the local television station industry[3] and my review of relevant market data, I strongly believe that the proposed 10/10 standard does provide that safeguard against undue concentration in the present video marketplace, while also allowing television stations to form local duopolies that are necessary for them to effectively compete. Furthermore, the ten threshold proposed in this standard appears to be the most appropriate for weighing these disparate goals.

The strength behind the proposed 10/10 standard is simply that it incorporates the impact of all of the video choices now readily available in local communities. The household viewing share utilized in the standard represents the true competitive position of broadcast television stations in their local markets. For example, the share that is used recognizes the impact that out-of-market broadcast television stations have in providing alternative viewing choices.[4]

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3 My current curriculum vita is attached. I am presently Vice President of BIA Financial Network, Inc., a business valuation and financial consulting firm that specializes in media and telecommunications. My present duties include researching the local television and related industries as well as aiding in the revenue estimates for television and radio stations included in the company's publications and other products. From February 1985 through December 2000, I was on the staff of the Research and Planning Department at the National Association of Broadcasters, first as Director of Financial and Economic Research, and then starting in 1991 as Vice President/ Economist, where I conducted numerous studies including the NAB's annual financial survey of commercial television stations. The Commission has relied on these studies in numerous decisions. Prior to my tenure at NAB, I was a Staff Economist with the Federal Trade Commission where I worked on antitrust cases and industry studies.

4 The amount of out-of-market viewing is quite substantial in a number of markets, thereby providing additional options for local communities. In five markets, more than a quarter of the actual viewing is attributable to commercial stations located in adjacent markets (Lafayette, IN, Mankato, MN, Zanesville, OH, St. Joseph, MO, Harrisonburg, VA). See Mark R. Fratrik, *Out of Market Listening and Viewing: It's Not To Be Overlooked*, p. 13, Attachment A, Comments of the National Association of Broadcasters, In the Matter of 2002 Biennial Regulatory Review, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership

In addition, that share incorporates the impact of the additional viewing choices provided by multichannel video providers, such as local cable systems and satellite delivered services. The competitive impact that these alternative delivery systems have had on local over-the-air television stations is quite dramatic. In a recent study of television stations in seven markets, it was noted that in May of 1993, 76.6% of the total day audience was viewing local commercial stations in these seven markets, on average, and by May of 2002, that percentage had dropped to 53.3%.[5] Clearly, local communities today have many more video choices, and the household viewing share utilized in the proposed 10/10 standard incorporates that added competition.

Further, all industry observers believe that the level of competition will continue to grow, and as a result, the viewing shares of local broadcast stations will continue to be affected by the choices afforded to local communities. The number of cable networks is likely to increase[6] while existing cable networks will continue to improve their lineup of programs. If stations respond to that added competition by improving their own programming, then their local viewing shares will reflect that commitment. If viewers decide that alternative programming is more attractive, then the stations' lower viewing

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of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, and 00-244, p. 9.

[5] See M. Fratrik, *Television Local Market Agreements and Local Duopolies: Do They Generate New Competition and Diversity?*, Attachment A, Comments of LIN Television, Raycom Communications, and Waterman Broadcasting, In the Matter of 2002 Biennial Regulatory Review, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, and 00-244.

[6] With the introduction and adoption of digital cable systems throughout the U.S., the number of new cable networks to be offered by these cable systems will continue to rise.

shares will reflect that viewer switch. Therefore, by using the proposed NAB measure, the Commission will have a standard that continuously reflects the relative positions of local over-the-air television stations in their respective local video markets.

Given that the household viewing share reflects the impact of the many choices available to local consumers, the threshold level of an average ten share also identifies the cases where local over-the-air stations need some regulatory relief to be effective competitors in their markets. At the same time, utilizing a threshold level of ten will prevent harmful concentration from occurring. This weighing of concerns – aiding underperforming local television stations and preventing harmful concentration – is simply and effectively accomplished with the proposed viewing share level of ten.

The need for helping underperforming stations has been clearly shown. In many markets, even those with very few over-the-air television stations, some stations do not generate substantial and sustainable audiences. For example, in several markets with only three local over-the-air television stations, one of the stations generates noticeably smaller audiences than the other two local stations.[7] Hence, in those markets, as well as in other markets with a slightly higher number of local over-the-air television stations, these underperforming stations with smaller audiences face serious financial difficulties.

[7] For example, in Topeka, KS, the ABC affiliate has an average (over the four survey periods of Nov. 01 through Jul. 02) 5.8 share while the CBS and NBC affiliates both have over a 15 share (CBS affiliate: 19.0, NBC affiliate: 15.5). Similar situations occur in the Terre Haute, IN and Wilmington, NC markets among other markets.

The recent study on the financial status of medium and smaller market stations submitted by NAB shows the perilous situations of these low rated stations.[8] As they conclude,

> "A review of television station profitability in smaller markets reveals that profit margins are already at risk today, especially for the lower rated affiliated stations. It is clear that these stations show not only *declining* profitability in the years examined, but also are now at a stage where the average low rated station shows *negative* profitability. Declining network compensation coupled with increasing news expenses adds to the tenuous financial situation of these small market stations."[9] [italics in original]

Beyond providing relief to struggling stations, there should also be concern about allowing local combinations that would result in too much concentration in local markets. Allowing two stations to combine into one operation when these stations individually are attracting more than ten percent of the local viewing audience seems exactly the type of combination that should be prevented. In those situations (i.e., stations exceeding the ten share threshold being allowed to merge), the new local combined operation created would attract over a fifth (rather than only a tenth) of all the local viewing. That appears

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[8] That study actually understates the financial strain of low rated stations, as the study only examines the financial performance of stations affiliated with the four major networks (ABC, CBS, Fox, and NBC). In many of these markets, stations affiliated with the other networks as well as independent stations attract substantially smaller audiences, generate less revenues, and are more likely not to be profitable.

[9] See T. Ottina, *The Declining Financial Position of Television Stations in Medium and Small Markets*, Attachment C, Comments of the National Association of Broadcasters, In the Matter of 2002 Biennial Regulatory Review, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Station in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, and 00-244, p. 4.

to be more consolidation than may be needed to obtain the efficiencies of combined operations while preserving diverse local television services.[10]

While preventing the possibility of undue concentration, the threshold selected should not imperil the relief of those stations that are in "tenuous financial situations." It strongly appears that the ten viewing share threshold allows for the relief of the underperforming stations. In all television markets (with only a single exception) that have at least three local over-the-air stations, there is at least one station with a share below the ten level and significantly below the other stations' audience shares.[11] These stations that have audience shares that are significantly below the other stations are exactly the low rated stations shown in the submitted NAB financial study to be generating losses. Therefore, the ten-threshold level provides sufficient relief so that in all these markets, from the largest to the smallest, some combination of the stations could lead to strengthening the financial conditions of these underperforming stations.

But at the same time, in most of these television markets with at least three local over-the-air stations, there would be some combinations of stations that would be prevented by the proposed standard. In other words, the proposed 10/10 rule would not allow the two strongest (in terms of attracting the largest audiences) local over-the-air stations to combine operations in most of these markets.

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[10] This concern about one local operation having more than one-fifth of the local audience is a general statement. There could be cases where, due to many other factors (e.g., the number of local competitors), there would be little, if any, concern about that local operation exercising market power.

[11] That one exception is in Joplin, MO, market rank of 142, where the average audience shares of all three local over-the-air stations are above ten and are close to each other.

In conclusion, there is a great need for regulatory relief allowing local over-the-air television stations to combine. Due to the impact of competition from new and improved sources, many local television stations are in perilous financial condition, threatening their ability to serve their local markets. This challenge is especially pronounced in medium and smaller sized markets. At the same time, however, there should always be concern about allowing too much consolidation of local over-the-air television stations. The NAB’s proposed 10/10 rule appears to strike the correct balance between those two goals.

Moreover, after reviewing audience share data from every television market, the ten threshold appears to most accurately separate the competitively stronger stations from weaker stations that are struggling to attract sufficient audience share to remain competitively viable. Unlike any alternative proposal for reforming the duopoly rule of which I am aware, the 10/10 proposal is not only simple and easy to apply, but functions well in markets of every size.

Curriculum Vitae
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Education

Ph.D., 1981, Economics, Texas A&M University, College Station, TX
M.S., 1978, Economics, Texas A&M University, College Station, TX
B.A., 1976, Mathematics and Economics (honors), State University of New York at Binghamton

Professional experience

2001 – Present

BIA Financial Network

Vice President

- Consulting in litigation and tax-related cases
- Developing of new broadcasting and related industry research offerings
- Speaking at industry forums

Fall 2002

The Johns Hopkins University

Adjunct Professor, *The Political Economy of Mass Communications*

1985 – 2000

National Association of Broadcasters

Vice President/Economist 1991 – 2000

- Supervised the Research and Planning Department.
- Conducted primary research about the broadcasting and related industries, used for testimony before the Congress and in filings at the FCC and other governmental agencies.
- Conducted research and studies included in publications and reports distributed by NAB.
- Presented results of primary research and other analyses at industry forums.

Director of Financial and Economic Research 1985 -- 1991

- Supervised the collection and dissemination of the annual industries financial reports

1980 – 1985

Federal Trade Commission
Bureau of Economics
Staff Economist

- Conducted analysis of proposed mergers and other arrangements.
- Conducted analyses of industry practices to evaluate economic impact.
- Participated in litigation support in several antitrust cases.

Professional activities

Broadcast & Cable Financial Management Association – Board Member 2001-2004
American Economic Association – member
Southern Economic Association – member
Journal of Media Economics – reviewer
Journal of Broadcasting and Electronic Media - reviewer

Articles

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Radio Industry Revenue: Radio Revenues: Is the Bloom Back?, 2002, BIA Financial Network

State of The Television Industry:

Television Transactions 2000, 2001, BIA Financial Network.
Television Industry Revenues – 2000 & Beyond, 2001BIA Financial Network.
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1994 FM Subcarrier Market Report, (with Kenneth Springer), 1994, National Association of Broadcasters.

The 1993 Tax Act: What it Means (editor), 1993, National Association of Broadcasters.

Fair Market Value of Radio Stations: A Buyer's Guide, 2nd edition (with Bruce Bishop Cheen), National Association of Broadcasters, 1990.

RadiOutlook: Forces Shaping the Radio Industry (with John Abel & Richard Ducey), April 1988, National Association of Broadcasters.

Targeting Radio's Future: Radio '87, (with John Abel & Richard Ducey), September 1987, National Association of Broadcasters.

The Small Market Television Manager's Guide (editor), 1987, National Association of Broadcasters.

Tax Reform: Effects on Broadcasters and Broadcasting (editor), 1987, National Association of Broadcasters.

"The New Audio Marketplace: Challenges and Opportunities for Broadcasters," (with Richard Ducey) NAB Special Report, September 1985.

"The New Audio Marketplace: Challenges and Opportunities for Broadcasters," NAB Special Report, September 1985.

<u>Policy Research</u>

"Television Local Market Agreements and Local Duopolies: Do They Generate New Competition and Diversity?" Attachment A, Comments of LIN Television, Raycom Communications, and Waterman Broadcasting, FCC Biennial Regulatory Review, January 2003.

"Out of Market Listening and Viewing: It's Not To Be Overlooked," Attachment A, Comments of the National Association of Broadcasters, FCC Biennial Regulatory Review, January 2003.

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Infinity Radio, Inc. vs. Elena Whitby, et. al., Fifteenth Judicial Circuit, Florida, ongoing.

Copyright Arbitration Royalty Panel, witness for National Association of Broadcasters, ongoing.

ATTACHMENT B

National Association of
NAB
BROADCASTERS®

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January 6, 2003

SENT VIA MESSENGER AND FAX

Ms. Jenny Toomey
Executive Director
Future of Music Coalition
1615 L Street NW
Suite 520
Washington, DC 20036

Dear Ms. Toomey:

A cursory analysis of the Future of Music Coalition's (FMC) November 18th, 2002 study, *Radio Deregulation: Has It Served citizens and Musicians*, has uncovered several severe methodological errors. Among the most blatant:

The study misused BIA's data to incorrectly calculate industry revenue shares. Apparently, the researchers did not fully understand BIA's database and therefore calculated an industry revenue total of approximately $11 billion. However, BIA itself estimates the industry total as closer to $16.2 billion. This error skewed the study's analysis of industry revenue share. As Radio Business Report's November 18th morning "e-paper" noted, BIA itself disputes FMC's computations. After interviewing BIA's own analyst, RBR concluded, "You could reproduce the FMC results, but to do so you'd have to commit an error at some point."

Many of the questions in the FMC's public opinion survey were structured in a way that would bias most responses. Several survey questions include slanted, paragraph-long lead-ins that could clearly influence respondents' answers.

- For example, on page 83, the surveyor describes Low Power FM (LPFM) as, "*non-commercial stations whose radio signals travel only a few miles and specialize in music and information of interest to people in the immediate area. They may offer special programming such as ethnic or eclectic music, business or farm news, talk shows on science, literature, religion, art, community matters and so on.*" Following this laudatory description, the survey attempts to gauge respondents' interest in LPFM programming and asks whether elected officials should support or oppose increasing the number of Low Power FM stations allowed.

- On page 81, the interviewer reads to respondents, *"For many years the federal government limited the number of radio stations one company could own in a region. In 1996, Congress relaxed the limits and, as a result, many locally owned stations were purchased by large corporations. Now, a handful of large corporations own many stations in a particular region and across the country. At the same time, the number of locally owned or independent stations is declining*." Such language panders to negative preconceptions respondents might hold regarding corporate ownership without even alluding to any potential benefits these organizations might bring to local radio.

- On page 76, the interviewer reads, "*Many commercial radio stations today have a short playlist which means they play a limited number of songs and repeat them often during the week. Other stations have a long playlist, which means they play a greater variety and have less repetition during the week.* " After this leading statement, the survey essentially asks respondents to choose between "more songs" or "less songs" by asking, "*Which type of station do you prefer?*"

Any survey sample that is used to project survey results to an entire population should reflect the same characteristics of that population. Many of FMC's findings call into question the representative value of FMC's sample. As just one glaring example, the survey asserts that 16% of Americans over age 14 listen to Low Power FM stations (Appendix II-9). By FMC's own admission, in September 2002, there were 40 Low Power FM stations on-air nationwide. For FMC's survey sample to be representative of the entire population, these 40 LPFM stations, all with broadcast coverage areas of less than 10 miles (most of them in rural locales), would have 35 million regular listeners.

Clearly, the National Association of Broadcasters and the Future of Music Coalition have entirely different views on the state of radio, listener satisfaction with the medium, and the direction in which the industry is headed. While there may be room for divergence of opinion, neither side should muddy the debate with inaccurate and misleading research. We are confident that in the interest of good faith and basic fairness, the Future of Music Coalition will publicly disavow this study and its highly questionable conclusions upon learning of these fundamental flaws.

Sincerely,

Kathleen M. Ramsey

ATTACHMENT C

FACT SHEET

Future of Music Coalition Circulates Flawed Study Containing Inaccurate Conclusions About the Radio Industry

The Future of Music Coalition's (FMC) study released in November regarding radio ownership deregulation and consolidation contains inaccurate conclusions that have been refuted by numerous governmental and respected research organizations. Studies contravening FMC's conclusions include a November 2002 report by Bear Stearns, a September 2002 Federal Communications Commission (FCC) white paper, and a July 2002 Arbitron/Edison Media survey. In addition, a December poll conducted by the Mellman Group found wide listener satisfaction with the state of modern radio.

In their report, FMC puts forth a number of assertions that other studies have shown to be myths.

Myth: Diversity of programming on radio's airwaves is decreasing.

Fact: Radio diversity has been, and is in fact, increasing.

- The FMC study actually makes this point: "From 1996 to 2000, format variety - the average number of formats available in each geographic market - increased in both large and small markets."
- An FCC report finds that song diversity has remained largely the same since 1996.
- A Bear Stearns paper examining format diversity concludes that the Telecommunications Act of 1996 has led to an increase in format diversity by 7 percent (1996 to 2001), resulting in more than 250 formats.
- Radio brings new music and new artists to people every day.
  - Nearly 3,000 new songs debuted on the radio last year. *(Media Base, 2002)*
  - Over 550 new artists first appeared on the radio last year. *(Media Base, 2002)*
- An examination of the number of Spanish speaking stations before and after the Telecommunications Act of 1996 shows that prior to the Telecommunications Act there were 400 Spanish language stations. Today, there are more than 600.

Myth: The Telecommunications Act of 1996 has made radio ownership an oligopoly.

Fact: With nearly 4,000 separate companies owning radio stations in America, radio is one of the least consolidated mediums. Consider other mediums:

- Five music labels account for 84 percent of album sales,
- A handful of movie studios account for 99 percent of industry revenues
- In cable TV, the top 10 MSO's account for 89 percent of industry revenues.
- By way of contrast, the top ten radio station owners account for 49 percent of industry revenues.

Myth: Consumers are dissatisfied with radio.

Fact: According to Arbitron/Edison Media Research (which uses more reliable samples of 3,000 respondents compared to FMC's 500):

- Three-quarters of Americans use radio every day;
- 95% of Americans tune into local radio weekly;
- Almost 70% of consumers say that radio provides them with news and information they value;
- Almost 75% say "radio does a good job of playing the kinds of music they like";
- 66% say that radio is where they turn first for new music;
- 30% of respondents are using radio "more frequently" compared to other media;
- And, radio trails only TV as the medium consumers cite as "most essential" to their lives.

The Coalition asserts that radio listenership is in rapid decline due to consolidation. Clearly, however, Americans continue to value radio even as the arrivals of cable and satellite television, the Internet, VCRs, DVDs, Personal Video Recorders, and other new mediums have vastly widened consumers' range of entertainment choices.

All of these points are further evidenced in the following studies.

- *Radio Market Structure and Music Diversity*; Federal Communications Commission; September 2002. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A18.doc

- *Format Diversity: More or Less*; Bear Stearns; 11.04.02 http://www.nab.org/FormatDiversity/Format Diversity - More from Less.pdf

- *Internet 9: The Media and Entertainment World of Online Consumers*; Arbitron/Edison Media Research; September, 2002 http://www.arbitron.com/downloads/I9Presentation.pdf

- *Has Format Diversity Continued to Increase?* BIA Financial Network; 06.03.02 http://www.nab.org/Newsroom/Issues/ownership/FormatDiversity060502.pdf

- Information from *Mellman Group* Poll Conducted December 17-19 http://www.nab.org/Newsroom/Pressrel/releases/7902.htm

We also recommend that you examine these articles on format diversity, available at NAB's website at: http://www.nab.org/FormatDiversity/You%20Make%20the%20Call.pdf

Clearly, there is a preponderance of evidence indicating that radio remains vibrant, diverse, and local. Bottom line: the Future of Music Coalition's study was written to promote an activist agenda with a disregard for objectivity.