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

To: The Commission

REPLY COMMENTS OF
NEXSTAR BROADCASTING GROUP, L.L.C. AND
QUORUM BROADCAST HOLDINGS, LLC

Submitted by

Howard M. Liberman
Elizabeth A. Hammond
DRINKER BIDDLE & REATH LLP
1500 K Street, NW
Suite 1100
Washington, D.C. 20005
(202) 842-8800

Attorneys for
Nexstar Broadcasting Group, L.L.C.
Quorum Broadcast Holdings, LLC

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SUMMARY

Nexstar Broadcasting Group, L.L.C. ("Nexstar") and Quorum Broadcast Holdings, LLC ("Quorum") respectfully submit joint reply comments in the Commission's biennial ownership rule making proceeding. Nexstar and Quorum reply to several comments which raise competition and diversity issues. In addition, Nexstar and Quorum provide feedback regarding the National Association of Broadcaster's ("NAB") "10/10" proposal.

Several commenters advocate retaining the Local TV Multiple Ownership Rule (Section 73.3555(b) of the Commission's rules) in order to preserve competition. However, as Nexstar and Quorum stated in their comments, retaining this rule is not necessary to protect competition. Nexstar submits an antitrust analysis which shows that sufficient tools to preserve competition can be found in the Clayton Act and the DOJ/FTC Merger Guidelines. In addition, Nexstar and Quorum submit evidence that programmers have significant leverage and do not need an artificial rule to protect them.

Nexstar and Quorum commend NAB for its proposal in support of relaxing the Local TV Multiple Ownership Rule; however, NAB's "10/10" proposal will not provide adequate relief for medium and small market broadcasters because this proposal fails to account for the financial difficulties that even dominant stations in such markets are facing. Furthermore, NAB's proposal does not account for total market viewing or skewed ratings periods.

Nexstar and Quorum also respond to several specific comments which assert that preservation of the Local TV Multiple Ownership rule is necessary to ensure diversity of viewpoints. Many of these commenters provided blanket generalizations in support of their positions. Therefore, Nexstar and Quorum provide specific information to help the Commission understand that blanket generalizations should not be used to justify retention of a rule.

As numerous medium and small market broadcasters recognize, relaxation of the Local TV Multiple Ownership Rule is indispensable for the preservation of local news broadcasts in countless markets. Accordingly, Nexstar and Quorum urge the Commission to allow common ownership of two commercial stations in all markets where there are four or more such stations.

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Nexstar Broadcasting Group, L.L.C. ("Nexstar") and Quorum Broadcast Holdings, LLC ("Quorum"), by their attorneys, respectfully submit these joint reply comments in response to the Commission's *Notice of Proposed Rulemaking* ("NPRM") in the above-captioned proceeding.[1] Specifically, Nexstar and Quorum provide further comment with regard to the Local TV Multiple Ownership Rule, Section 73.3555(b) of the Commission's rules.

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[1] In these comments, "Nexstar" and "Quorum" include their respective subsidiaries, which own a total of 24 television stations.

I. INTRODUCTION.

On January 2, 2003, Nexstar and Quorum jointly submitted comments in this proceeding urging the Commission to relax the Local TV Multiple Ownership Rule to allow common ownership of two commercial TV stations in all markets where there are four or more such stations.[2] Nexstar and Quorum demonstrated that relaxing the Local TV Multiple Ownership Rule would not harm the Commission's diversity, competition or localism goals. In support, Nexstar and Quorum provided the Commission with detailed information about the efficiencies and benefits achieved through their operations in markets where Nexstar or Quorum owns a television station and provides certain services, such as news programming and facilities maintenance, to a second, separately-owned station in the same market. Nexstar and Quorum provided evidence that ownership of two television stations in one market can increase diversity and localism – generating increased local news and public affairs programming – and that competition would not be harmed by such ownership.

In these reply comments, Nexstar and Quorum respond to the comments of several other parties and address the ratings share proposal set forth in comments submitted by the National Association of Broadcasters.

II. RELAXATION OF THE LOCAL TV MULTIPLE OWNERSHIP RULE WILL NOT HARM COMPETITION.

Some commenters suggest that the Local TV Multiple Ownership Rule must be retained in its present form in order to preserve competition. For example, AFL-CIO states that "media competition . . . is suffering under the weight of the media consolidation that has already occurred, and will only worsen with further deregulation of the remaining ownership controls."

2 Comments of Nexstar Broadcasting Group, L.L.C. and Quorum Broadcast Holdings, LLC submitted January 2, 2003 (hereinafter "Nexstar/Quorum Comments").

Comments of American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") at p. 33. Children Now et al. states that reduced competition among buyers and sellers tends to decrease innovation (in children's programming). *Comments of Children Now et al.* at p. 17. Children Now et al., therefore, concludes that media consolidation will lead to fewer decision-makers who will be unlikely to invest in new children's programming and that the rules are necessary to preserve innovation and quality in children's programming. *Id.* at p. 20.

Yet neither of these commenters addresses the fact that mergers under a relaxed Local TV Multiple Ownership rule would continue to be governed by existing antitrust laws. Nor do these commenters explain why the antitrust laws are insufficient for determining whether a local market will remain competitive if an owner seeks to own more than one station. As Nexstar and Quorum stated in their comments, "competition analysis" is best left to the Department of Justice and the Federal Trade Commission. *Nexstar/Quorum Comments* at p. 14. In further support of this position, attached hereto as Exhibit A is an Antitrust Analysis prepared on behalf of Nexstar. This analysis clearly establishes that the DOJ Merger Guidelines and the Clayton Act are adequate for maintaining local market competitiveness. Nexstar and Quorum urge that such analysis is the most appropriate manner to determine whether a local market will remain competitive.

Nexstar and Quorum also note that their comments explained why the current Local TV Multiple Ownership Rule is not necessary to protect programmers. They stated that programmers have many choices when seeking an outlet for new programming, including cable television outlets such as "The WEB," a Warner Brother local cable channel for markets smaller than the top-100. *Nexstar/Quorum Comments* at p. 16. Attached hereto as Exhibit B is a recent article from *Broadcasting & Cable* which confirms the power of programmers in placing syndicated programming in smaller markets. The article points out that medium and small market stations are not being allowed even to compete for two potentially profitable new syndicated programs because the syndicated programmers apparently are finding The WEB to be more cost-effective than working with local stations. *Broadcasting & Cable*, January 23, 2003, p. 3. This is just one example of why the Local TV Multiple Ownership Rule is not necessary to protect programmers.

III. NAB'S PROPOSED STANDARD FOR RELAXING THE LOCAL TV MULTIPLE OWNERSHIP RULE WILL NOT PROVIDE ENOUGH RELIEF.

National Association of Broadcasters ("NAB"), in its comments, proposes to allow duopolies in medium and small markets based on station ratings. NAB proposes that the Commission allow duopolies in all Designated Market Areas when one of the two combining stations has a ratings share of less than 10 based on a year-long average from 7:00 a.m. to 1:00 a.m. *Comments* of *NAB* at p. 79. Nexstar and Quorum agree with NAB that the current duopoly rule is "completely ineffective in ameliorating the deteriorating financial condition of television broadcasters in the majority of markets." *Id.* However, Nexstar and Quorum believe NAB's "10/10 proposal" does not go far enough in providing relief to many medium and small market broadcasters because it limits permissible duopolies to only the very weakest stations in the market, thereby failing to take into account market realities. Under NAB's proposal, in the majority of markets, owners would be limited to creating duopolies only with second stations that are affiliated with the UPN, WB and Fox networks and would be unable to jointly own two ABC, NBC or CBS affiliates. NAB's proposal also presumes that a station with a 10 ratings share or greater is not experiencing financial difficulty – an unsupported assumption.

NAB's proposal also fails to account for ratings on a total market basis – i.e., the proposal does not account for the viewers lost to cable, satellite or other MVPD programming.[3] Moreover, using a rating share basis does not take into account anomalies in ratings periods. For example, all NBC affiliates experienced significant ratings spikes in the February 2002 measurement period due to the NBC network carriage of the Winter Olympics, which in turn artificially raised the average ratings for those stations for the year-long period which included this ratings period. Accordingly, Nexstar and Quorum continue to urge the Commission to allow common ownership of two commercial TV stations in all markets where there are four or more such stations (subject, of course, to the antitrust laws).

IV. RELAXATION OF THE LOCAL TV MULTIPLE OWNERSHIP RULE WILL NOT HARM DIVERSITY.

Several commenters also assert that the Local TV Multiple Ownership Rule remains necessary to protect diversity.[4] In support of their position, these commenters make blanket generalizations which do not provide sufficient evidence to justify retaining the Local TV Multiple Ownership Rule. Nexstar and Quorum herein provide information which will allow the Commission to see that such generalizations cannot be relied upon as it considers relaxation of the Local TV Multiple Ownership Rule.

Nexstar and Quorum are disturbed that NABOB broadly attributes the statements and actions of one television broadcast station owner to the entire television broadcast industry.

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[3] NAB acknowledges this shortcoming to its proposal but does not set forth a remedy. *Comments of NAB* at p. 79.

[4] *Comments of National Association of Black Owned Broadcasters and the Rainbow/Push Coalition, Inc.* ("NABOB") at p. 4; *Comments of the Office of Communication of the United Church of Christ, Black Citizens for a Fair Media, Civil Rights Forum, Philadelphia Lesbian and Gay Task Force, and Women's Institute for Freedom of the Press* ("UCC et al.) at pp. ii, 4; *Comments of Children Now et al.* at p. 27; and *Comments of the American Federation of Television and Radio Artists and Writers Guild of America, East* ("AFTRA") at para. 6.

NABOB asserts that "it is impossible for consolidation to increase viewpoint diversity," but solely on the basis of comments made by one TV executive. *Comments of NABOB* at pp. 4-5. Nexstar and Quorum believe it to be manifestly unfair for the Commission to hold the rest of the broadcast industry accountable for the comments of one broadcaster, particularly when many broadcasters disagree with those comments.

Such blind attribution does a major disservice to those broadcasters, including Nexstar and Quorum, who actively mandate a local community focus for their stations. Nexstar and Quorum encourage their local managers to focus on those local matters which the local managers determine are of importance to the local community, not those matters which Nexstar's or Quorum's chief executives believe are important. In fact, Nexstar and Quorum's corporate management, including their chief executive officers, do not play any meaningful role in determining news content in their local markets.[5] Neither company has plans to centralize local news facilities in one location because such centralization would make it impractical to adequately meet the needs of the local community. For example, a weather report originating in Texas for Nexstar's Erie station could not adequately forecast a major winter storm coming across Lake Erie. Conversely a Pennsylvania facility would not be able to provide adequate tornado information to a Texas station. Furthermore, Nexstar and Quorum recognize that if their stations are not meeting the needs of local viewers, such viewers will choose a station's news that does meet their needs.

[5] Both Nexstar and Quorum do have corporate news personnel. These persons primarily support the local general managers and news directors through activities such as recruitment and training. These persons also provide guidance in how to provide better coverage of local issues. Each company's local general mangers and news directors have final authority to determine the content of their stations' news broadcasts. Nexstar and Quorum also note that AFTRA finds fault with the fact that local station contracts are negotiated by corporate personnel. Comments of *AFTRA* at para. 47. Such negotiations at a corporate level free-up local management to focus on producing quality news programming while ensuring corporate hiring standards are adhered to.

Nexstar and Quorum are equally troubled by UCC et al.'s assertion that national network practices should somehow require the retention of the Local TV Multiple Ownership Rule. UCC et al. spend several pages deploring the purported network practice of failing to report stories due to commercial and competitive pressures. *Comments of UCC et al.* at pp. 4-7.[6] Even if, as UCC et al. suggest, national networks are promoting their own agendas, this does not impact news reporting at the local station level and should not be a consideration in any discussion about relaxing the Local TV Multiple Ownership Rule.

UCC et al. also complain that consolidation of local broadcast outlets would hurt the public interest by limiting citizens' access to important local information and hindering the ability of local organizations to deliver information to the public. *Comments of UCC et al.* at pp. 15-16. In support, UCC et al. provide letters from public interest organizations noting their difficulty in obtaining local station coverage of information such organizations would like to transmit to the public. *Id.* Nexstar and Quorum note that all but one of the letters are from organizations in major television markets where a vast number of organizations compete for access to local media. It is highly speculative for UCC et al. to assert that what is practiced in major television markets is (or would be) standard operating procedure in medium and small markets. Many Quorum and Nexstar managers actively participate with such organizations in their communities to ensure the public does have access to important information.[7]

Several commenters also suggest that consolidation has harmed the amount and diversity of news broadcast in duopoly markets. Although Nexstar and Quorum, with one exception, do not operate total duopolies, they each have arrangements in several markets wherein they provide

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6 AFTRA also makes this assertion in its comments. *Comments of AFTRA* at paras. 48-50.

7 For example, Quorum-owned stations routinely have guests from local area health, family, welfare and educational organizations appearing in local news segments.

news production services to another station in the market. *See Nexstar/Quorum Comments* at p. 3. In the majority of their "shared services markets" the joint news operations have not resulted in a reduction or loss of news programming. And, in several markets, including Peoria, Illinois, Amarillo, Texas and Springfield, Missouri, the total number of news broadcast hours produced by Nexstar or Quorum for its own station and the other station has actually increased.[8] Nor has shared news production unduly harmed diversity of news coverage in these markets. A review of the news broadcasts produced by Quorum for its station KLBK-TV and for VHR Broadcasting owned KAMC-TV (Lubbock, Texas) for the 10:00 p.m. newscasts on January 28 and 30, 2003 shows that although there is some overlap of stories covered (which is to be expected), each station also covered stories not covered by the other station. *See* Exhibit C. A similar review of the newscasts produced by Nexstar and broadcast on its station KSNF and Mission Broadcasting owned KODE-TV (Joplin, Missouri) for December 9 and December 13, 2002 shows that although there is some overlap in stories covered (again as expected) the stations also cover different news stories. *See* Exhibit D.

Another commenter, Sandra M. Ortiz, Executive Director of the University of Southern California Center for Communication Law and Policy, states in her comments that "it would be irresponsible to ignore the fact that . . . taking advantage of the economies of scale means trimming staff and reducing other news resources." *Comments of Sandra M. Ortiz* at p. 20. Nexstar and Quorum acknowledge that economies of scale may mean shifting of resources in order to better take advantage of the joint operations; however, they dispute that economies of

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8 After entering into an outsourcing agreement with an affiliate of Sinclair Broadcast Group in Peoria, Illinois, Nexstar launched a 9:00 p.m. newscast on the Sinclair station. And after entering shared services agreements in Amarillo, Texas and Springfield, Missouri, Quorum either launched or expanded newscasts on the other station. In Billings, Montana, Quorum initiated the first newscasts broadcast on its own station, KSVI, as well as on station KHMT, providing local viewers with two new choices for local news. Quorum notes that in not just its shared services markets, but generally across the stations it owns, it has increased the amount of news programming and other public affairs programming broadcast on its stations after acquisition.

scale automatically means a reduction of news staff. For example, in Springfield, Missouri and Amarillo, Texas – markets in which Quorum produces news for a second station – Quorum has added six additional members to its Springfield staff, including an additional producer and two anchor/reporters, and five additional members to its Amarillo staff, including an additional producer and reporter. Nexstar also added news production staff in Peoria, Illinois and Erie, Pennsylvania – markets where Nexstar produces news for a second station. Further, rather than decreasing the resources available for news production, Nexstar has significantly <u>increased</u> the resources available in many of its markets by purchasing (i) updated computer equipment for its newsrooms, (ii) weather radar equipment and (iii) live news production equipment. Quorum also improved news resources, having installed an advanced automated technical equipment and a virtual reality set in Billings, Montana, and advanced weather radar equipment in Lubbock and Amarillo, Texas.

Children Now et al. request that the Commission take into account the special needs of children, asserting that any relaxation of the Local TV Multiple Ownership Rule would result in lesser children's programming due to "repurposing." *Comments of Children Now et al.* at pp. 13-14. Nexstar and Quorum first note that the "repurposing" examples provided by Children Now et al. involve programming repurposing at the network level – for example, Nickelodeon programming appears on CBS; ABC broadcasts children's programming from the Disney Channel, ABC Family and Toon Disney. *Id.* Accordingly, Children Now et al.'s complaint about loss of diversity in children's programming is inappropriate at the local station level and not relevant to the discussion of relaxation of the Local TV Multiple Ownership Rule.

Children Now et al. also raise the specter of one owner repurposing educational and informational programming across all of its stations in a local market. *Id.* at 16. As Nexstar and

Quorum stated in their comments, programming broadcast on stations in the same local market will be different as a result of different network affiliations. *Nexstar/Quorum Comments* at pp. 10-12. Accordingly, if the Commission relaxes the Local TV Multiple Ownership Rule to allow common ownership of two stations in one market, it is extremely likely that children's programming broadcast on both stations will remain diverse due to the separate network affiliations maintained for each station.

Finally, AFTRA asserts that although there has been "a proliferation of new types of media outlets . . . it is undeniable that the overall growth rate in the number of media outlets in general has decreased at the same time media ownership has become more concentrated." *Comments of AFTRA* at para. 10.[9] AFTRA then attempts to correlate consolidation with a decrease in the growth rate of the number of media outlets. *Id.* at paras. 11-14. Actually, these do not correlate. A significant cause of the reduction in the growth of new broadcast outlets is the Commission's inability to award construction permits for new stations because of various Commission proceedings. For example, no construction permits (other than permits issued pursuant to settlement agreements) have been awarded for new FM stations in many years. Until the Commission resolves its pending rulemaking proceeding *Reexamination of the Comparative Standards for Noncommercial Educational Applicants; Association of America's Public Television Stations' Motion for Stay of Low Power Television Auction (No. 81)*, Second Further Notice of Proposed Rulemaking, FCC 02-44, February 25, 2002, the Commission cannot determine to whom to issue FM new construction permits. With respect to new TV outlets, no construction permits have been or will be awarded until such time as the DTV transition is completed and spectrum again becomes available for new television stations. Accordingly, it is

9 *Comments of AFL-CIO* at p. 5.

disingenuous to imply that consolidation is somehow responsible for the decrease in the growth rate of the number of new media outlets.

When considering whether to relax the Local TV Multiple Ownership Rule, the Commission should remember that blanket generalizations such as those discussed above do not provide sufficient evidence to justify keeping the rule as it currently exists.

V. RELAXATION OF THE LOCAL TV MULTIPLE OWNERSHIP RULE IS NECESSARY FOR THE SURVIVAL OF LOCAL NEWS IN MEDIUM AND SMALL MARKET STATIONS.

As many current television broadcast owners recognize, relaxation (or repeal) of the Local TV Multiple Ownership Rule is necessary for the survival of local news in many markets. For example, Gray Television, Inc. states

> [T]elevision duopolies can render it economically feasible for the stations involved to provide a greater amount of local content (including local news broadcasts) than they would if they were to remain independent. The efficiencies and synergies that can arise through the shared use of production facilities . . . can make the difference between profit and loss, which, in turn, determines whether or not such local content makes it onto the stations' schedules.

Comments of Gray Television, Inc. at p. 17.

Duhamel Broadcasting Enterprises elaborates on the stark realities facing many small market stations – such broadcasters are faced with the choice of (i) *reducing staff and locally originated programming*; (ii) consolidating with other stations; and (iii) perishing. *Comments of Duhamel Broadcasting Enterprises* at pp. 5-6 (emphasis added).

Granite Broadcasting Corporation states:

> [E]limination of unnecessary regulatory barriers [such as the Local TV Multiple Ownership Rule] that prevent marketplace corrections would improve the plight of local television broadcasters and viewers that depend on them. Removal of the duopoly rule is especially appropriate given that the brunt of the public interest harms fall upon financially-disadvantaged consumers who rely on free, over-the-air broadcast television as their primary source of news and information.

Comments of Granite Broadcasting Corporation at pp. 11-12.

As Nexstar and Quorum have demonstrated, they not only have retained local news in their shared services markets, but also have generally enhanced the local news product broadcast on the involved stations. Relaxation of the Local TV Multiple Ownership Rule will allow Nexstar, Quorum and other medium and small market broadcasters to achieve further efficiencies through joint purchasing and totally integrated facilities. Without such relaxation, local news likely will continue to become an endangered species in medium and small markets.

VI. CONCLUSION.

Nexstar and Quorum again emphasize that duopoly relief is imperative in medium and small markets to ensure station survival and the full transition to DTV. The efficiencies generated through duopoly operations will help ensure (i) continued station viability, (ii) viable news operations and (iii) the conversion of medium and small market stations to full-power digital operations.

WHEREFORE, for the foregoing reasons, Nexstar and Quorum respectfully urge the Commission to relax the Local TV Multiple Ownership Rule to allow common ownership of two commercial TV stations in all markets where there are four or more such stations.

Respectfully submitted,

NEXSTAR BROADCASTING GROUP, L.L.C.

and

QUORUM BROADCAST HOLDINGS, LLC

By: Howard M. Liberman

Howard M. Liberman
Elizabeth A. Hammond
DRINKER BIDDLE & REATH LLP
1500 K Street, NW
Suite 1100
Washington, D.C. 20005
(202) 842-8800

Their Attorneys

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EXHIBIT A

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To: The Commission

ANTITRUST ANALYSIS SUBMITTED ON BEHALF OF NEXSTAR BROADCASTING GROUP, L.L.C.

Prepared by:

Paul H. Friedman
Reid B. Horwitz
DECHERT LLP
1775 Eye Street, NW
Washington, DC 20006
(202) 261-3300

February 3, 2003

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ANTITRUST ANALYSIS SUBMITTED ON BEHALF OF NEXSTAR BROADCASTING GROUP, L.L.C.

I. <u>The FCC Should Defer to the Antitrust Division on Antitrust Issues.</u>

The FCC should eliminate its local television multiple ownership rule ("Local TV Ownership Rule"), 47 C.F.R. § 73.3555(b), and end its practice of conducting its own antitrust review of the same transactions reviewed by the Antitrust Division. The FCC's merger review under its "public interest" authority is superfluous for the purpose of preserving competition, is a wasteful use of scarce government resources, and imposes harmful costs on the broadcast industry which may have the effect of precluding pro-competitive acquisitions to the detriment of consumers and viewers. The FCC should rely on the competition analysis conducted by the Antitrust Division rather than conducting its own dual antitrust review.

The D.C. Circuit in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), *reh'g and reh'g en banc denied* (August 12, 2002), held that the FCC had acted arbitrarily and capriciously in excluding non-broadcast media as "voices" in its "eight voices exception" to the Local TV Ownership Rule while defining certain non-broadcast media as "voices " in other media ownership rules. *Id.* at 155. Following this decision, the FCC initiated a rulemaking to reassess this and other media ownership rules.[1]

The FCC asks whether these media ownership rules, including, *inter alia,* the Local TV Ownership Rule, are still necessary to promote competition in the marketplace.[2] The FCC also

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[1] *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, Cross-Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, and Definition of Radio Markets*, MB Docket No. 02-277, MM Docket Nos. 01-235, 01-317, 00-244, Notice of Proposed Rulemaking, FCC 02-249 (rel. September 12, 2002) [hereinafter *Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review*].

[2] *Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review*, at ¶ 75.

asks, to the extent the Local TV Ownership Rule does not facilitate competition but does further the other goals of diversity or localism, whether the balance of its effects argues for keeping, revising or abolishing the rule.[3] The FCC also seeks comment on how it should define its competition policy goal. Among the myriad questions posed by the Commission is whether the FCC should analyze the competitive nature of the market or rely on the promotion of diversity to alleviate any competitive concerns.[4] The FCC also questions whether structural ownership limits such as the kind now in place are the best means to promote competition in the media market, or would another regulatory framework be more appropriate.[5] The FCC also seeks comment on whether media concentration which may harm advertisers is a concern more appropriately addressed by the antitrust agencies.[6]

Nexstar submits these reply comments to address the FCC's questions and to respond to comments submitted by others. These comments address specifically the following:

- The Local TV Ownership Rule imposes arbitrary ownership limitations.
- The Local TV Ownership Rule is unnecessary to preserve present and future competition.
- No special laws or rules are needed beyond the Clayton Act to protect competition in any particular industry.
- The Antitrust Division has invested significant resources in reviewing media mergers, especially those involving radio and television broadcasters, and is the most well-qualified agency to provide a national perspective.
- Review of any proposed media consolidation resulting from the modification or elimination of the Local TV Ownership Rule is manageable from a law

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3 *Id.*

4 *Id.* at ¶ 52.

5 *Id.* at ¶ 55.

6 *Id.* at ¶ 59.

enforcement perspective and should not be viewed as a reason for retaining this rule.

- The FCC's "public interest" authority is superfluous for the purpose of preserving competition, and dual merger review imposes needless costs and may chill legitimate pro-competitive merger activity.

II. The FCC Should Eliminate its Local TV Ownership Rule Because This Rule is Unnecessary to Preserve Present and Future Competition.

A. The Clayton Act Proscribes Anticompetitive Mergers.

1. The Clayton Act.

There are three federal antitrust statutes that govern the legality of mergers and acquisitions. Section 1 of the Sherman Act prohibits mergers if they constitute a "contract, combination . . . or conspiracy in restraint of trade." 15 U.S.C. § 1. Section 5 of the Federal Trade Commission ("FTC") Act proscribes mergers if they constitute an "unfair method of competition." 15 U.S.C. § 45. Unlike the other two statutes, Section 7 of the Clayton Act, 15 U.S.C. § 18, is specifically directed at mergers. It prohibits acquisitions of stocks or assets

> where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition . . . may be substantially to lessen competition, or to tend to create a monopoly.

Virtually all mergers which would otherwise violate Section 1 of the Sherman Act or Section 5 of the FTC Act would also violate Section 7 of the Clayton Act. The case law and government guidelines interpreting this provision are the bulwark of U.S. merger policy.

2. The Government's Horizontal Merger Guidelines.

The 1992 Horizontal Merger Guidelines issued jointly by the Department of Justice and the FTC describe the basic presumptions that the federal antitrust agencies apply in analyzing mergers.[7] The analytical objectives of the Merger Guidelines are the same as those of Section 7.

The Merger Guidelines reflect "mainstream economic thinking," *Community Publishers v. Donrey Corp.*, 892 F. Supp. 1146, 1153 n.6 (W.D. Ark. 1995), *aff'd sub nom.*, *Community Publishers, Inc. v. DR Partners*, 139 F.3d 1180 (8th Cir. 1998), and the hypothetical monopolist paradigm upon which the Guidelines are based have "been embraced, to varying degrees, by enforcement officials throughout the English-speaking world."[8] The Guidelines define competition in practical terms and mandate a look at all relevant evidence instead of blindly focusing on any single statistical test. They are intended to provide general guidance to all industries, including broadcasting. Indeed, they have been routinely incorporated into the FCC's merger review standards, as discussed *infra*.[9]

B. The Clayton Act is Better than Regulatory Bright Line Standards at Preserving Competition.

1. The Current Regulatory Bright Line Rule Lacks any Empirical Support.

As discussed above, the D.C. Circuit already has held that the Local TV Ownership Rule as currently enforced is arbitrary. The Local TV Ownership Rule permits "duopolies" only

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7 U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992) (with Apr. 8, 1997 revisions to Section 4 on efficiencies), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (rev. 1997).

8 Gregory J. Werden, The 1982 Merger Guidelines and the Ascent of the Hypothetical Monopolist Paradigm, at 7 (June 4, 2002) (paper prepared for the 20th Anniversary of the 1982 Merger Guidelines: The Contribution of the Merger Guidelines to the Evolution of Antitrust Doctrine) (June 10, 2002), *available at* http://www.usdoj.gov/atr/hmerger/11256.pdf.

9 *See infra* Section VII.C. *See also FCC Orders* granting license transfers cited *infra* note 64 and *FCC Hearing Designation Orders* cited *infra* note 63.

where the stations' contours do not overlap or there are eight other broadcast "voices" in the market. Neither of the antitrust agencies has suggested that, as a rule, all transactions that eliminate an eighth competitor leaving the market with only seven competitors are likely to raise competitive concerns. Indeed, the trend in merger enforcement during the past decade or more has been to focus investigations on markets with far fewer competitors.[10]

2. Merger Law is Based on a Fact-Specific Inquiry.

The Merger Guidelines require the government first to define a relevant product and geographic market within which the parties to the merger compete. Then, the government must determine whether the elimination of a competitor in that market will give the merged entity, by itself or in combination with others, market power it did not previously possess. The lawfulness of an acquisition turns on the acquisition's potential for creating, enhancing or facilitating the exercise of market power -- the ability of one or more firms to raise prices above competitive levels for a significant period of time.

There are various factors that go into making this determination, including the number and size of independent competitors that remain in the market and the susceptibility of the market to the exercise of market power. This last factor includes, but is not limited to, whether entry by new firms or expansion by existing competitors would be timely, likely or sufficient to deter the exercise of market power. In short, the analysis evaluates the competitive alternatives that customers would have left after the merger.

Finally, the antitrust agencies evaluate whether a given transaction will generate merger-specific benefits, known as "efficiencies," which do not arise from anticompetitive reductions in

[10] *See* David Scheffman, Malcolm Coate, and Louis Silvia, *20 Years of Merger Guidelines Enforcement at the FTC: An Economic Perspective* (June 2002), *available at* http://www.usdoj.gov/atr/hmerger/11255.htm.

output or service. The antitrust agencies will not challenge a merger if these efficiencies are of such character and magnitude that the merger is not likely to be harmful to consumers in any relevant market.

3. Effective Merger Review Requires that Each Transaction be Evaluated on its Merits.

a. Competitive Dynamics May Vary Across Markets.

A central premise of the Local TV Ownership Rule is that each broadcast market is a local market. Both the Antitrust Division and the FCC recognize that the competitive dynamic in a single industry may vary across local markets. FCC decisions involving radio broadcast license transfers illustrate this critical precept. For example, in some local radio markets, the BIA "in market" stations may represent the vast majority of the listening audience upon which advertising purchasing decisions are based.[11] However, in the application of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. for consent to the assignment of the licensees of WCHR-AM and WNJO-FM in Trenton, the FCC recognized that the Trenton "in market" stations captured only 36.7% of the Trenton audience while the remaining 63.3% listened to "out of market" stations, therein suggesting that local advertisers have more options than the Trenton BIA listings would otherwise suggest.[12]

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11 BIA, or BIA Financial Network, Inc., is a service that reports which radio stations are located in various local markets around the country. Stations listed in a BIA locality are considered "in market" for that locality. However, sometimes radio stations not listed in a BIA locality may nevertheless enjoy significant listenership in that locality. For example, radio stations listed in the BIA for New York City may enjoy significant listenership on Long Island where they would be considered "out of market" stations. Depending on circumstances, "out of market" stations may or may not be considered advertising alternatives in that BIA locality.

12 *Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C.*, 17 FCC Rcd 5397, 5410 (2002). *See also Application of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc.*, 17 FCC Rcd 5423, 5440 (2002) (Separate Statement of Chairman Michael K. Powell) [hereinafter *Powell Statement*].

In some local markets, the Arbitron metro listings may define the geographic boundaries of the local market and indicate that two stations listed in the same Arbitron metro area are direct competitors.[13] Yet, in the application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc. for consent to the assignment of the license of KCGY-FM in Laramie, WY, et al., the FCC concluded that the relevant geographic market was not the Cheyenne Arbitron metro area.[14] This was because, among other things, a mountain within the Arbitron metro area significantly limited the reach of the radio station signals of the assignor and assignee into each other's service areas. The Commission concluded that this geographic anomaly prevented these stations from competing, now and in the future, for advertising revenues.

b. Competitive Dynamics Evolve as Industries Evolve.

Merger reviews conducted by the federal antitrust agencies conclude with a determination as to whether the subject transaction may substantially lessen competition. However, this determination may be revisited and altered as the relevant antitrust market defined to evaluate the effects of the transaction evolves. This is why the FTC has adopted a policy with respect to its consent orders creating a rebuttable presumption that the public interest warrants terminating orders that have been in force for more than 20 years.[15] The Antitrust Division almost always includes provisions limiting the duration of consent decrees, often to ten years.[16]

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[13] An Arbitron metro area is a metropolitan area defined by the Arbitron rating service, which may be used by radio stations and radio advertisers in negotiating and determining advertising rates.

[14] *Application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc.*, 17 FCC Rcd 5449, 5455-5456 (2002). *See also* Powell Statement, *supra* note 12, at 5442.

[15] Federal Trade Commission, Policy Statement with Request for Public Comment Regarding Duration of Competition Orders and Request for Public Comment Regarding Duration of Consumer Protection Orders, 59 Fed. Reg. 45286 (1994).

[16] *See* ANTITRUST LAW DEVELOPMENTS 758 (5th ed. 2002).

Yet, markets may evolve even more quickly than the government's "sunset" policy otherwise suggests. There are many industries, as one FTC Commissioner noted, which can be "turned upside-down overnight."[17]

c. **The Broadcasting Industry is Rapidly Evolving.**

The FCC recognizes that the "media market has undergone substantial changes since [the FCC's] ownership rules were adopted."[18] There has been an increase in the number and types of media outlets available to local communities. For example, three years ago the FCC noted that the clustering of cable systems in the major population centers enabled cable to compete more effectively for advertising dollars.[19] Today, the FCC is prepared to conclude that if local cable operators are now able to offer an advertising product comparable to that of local television stations, the rule "as currently structured may not be necessary to promote competition in local television advertising markets and that a more relaxed ownership limit may be appropriate."[20]

The FCC further acknowledges that today the pace of market evolution is increasing and that the industry stands on the verge of transformation. "Change permeates virtually every aspect of the organization of media markets and the operation of media companies."[21]

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17 *See* FTC Commissioner Thomas B. Leary, Antitrust Law as a Balancing Act, Remarks at the Tenth Annual Seattle Computer Law Conference, at 9, 11 (December 17, 1999) ("Market forces are immensely powerful, and the tidal waves of the future are likely to approach from unexpected directions . . . High-tech industries are not the only ones characterized by easy entry and rapid change. Publishing, entertainment and fashion are also examples of large industries that can be turned upside-down overnight."), *available at* http://www.ftc.gov/speeches/leary/leary991217.htm.

18 *Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review*, at ¶ 1.

19 *1999 Television Broadcasting and Television Satellite Stations Report and Order*, at ¶ 7.

20 *Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review*, at ¶ 87.

21 *Id.* at ¶ 65.

Broadcasters today operate in a market that is "increasingly . . . dynamic."[22] The most recent examples of such change are the shift in the broadcast and cable industries from analog transmission technologies to digital transmission technologies, and the increased consumer access to multi-channel video and audio programming from direct broadcast satellite, the Internet, and digital audio radio services.[23] These changes are likely to profoundly affect the marketplace by contributing to the creation of a "more dynamic and uncertain market" which brings both increased benefits to consumers, and destabilizes current business practices and customer relationships.[24] In few other U.S. industries will the need be as great as it is now in the broadcasting industry for a competition policy that is flexible enough to separate problematic concentration from pro-competitive consolidation.

C. The FCC May Still Prevent Anticompetitive License Transfers Absent This Rule.

Even if the Local TV Ownership Rule is eliminated, the FCC retains the authority to review assignments or transfers of broadcast station licenses under 47 U.S.C. § 310(d) of the Communications Act of 1934. This provision states:

> no construction permit or station license . . . shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the "public interest, convenience and necessity" will be served thereby.

The FCC interprets the public interest test to permit it to consider, as part of its public interest review, whether the license transfer promotes or restrains competition.

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22 *Id.* at ¶ 53.

23 *Id.* at ¶ 65.

24 *Id.* at ¶ 66.

III. The FCC Should Eliminate its Local TV Ownership Rule Because this Rule May Injure Present and Future Competition.

A. Good Public Policy Disfavors Special Rules to Protect Competition.

Special rules which deviate from the generally applied antitrust laws are disfavored. Current antitrust rules have been deemed sufficient to address issues regarding mergers and competition in a broad variety of industries including the agricultural,[25] computer or "high-tech,"[26] and defense industries.[27] All antitrust cases are "necessarily dependent on individual facts."[28] Although differences in fact need to be taken into account in conducting an antitrust analysis, the method of analysis of these facts should be consistent.[29] Therefore, Congress and the courts have been particularly reluctant to establish rules which prohibit conduct in one industry that would be lawful in another, thus favoring one class of business over another.[30]

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[25] ABA Section of Antitrust Law, *Comments Relating to Proposed Agribusiness Legislation, Pending before the 106th Congress*, at 17 (2000) (stating that "the [Antitrust] Section believes that the existing antitrust laws provide substantial and sufficient protection against the exercise of undue market power by those purchasing from agricultural producers, and that the addition of new [merger laws designed specifically for buyers of agricultural products], no matter how well intentioned, risks creating unintended harm to consumers and to competition in agriculture-related markets."), *available at* http://www.abanet.org/ftp/pub/antitrust/agreport.doc.

[26] *See Leary*, *supra* note 17, at 9, 11 (stating that "high-tech" industries do not require special antitrust rules).

[27] *See* Laura Wilkinson & Steven Bernstein, *Mergers in the Defense Industry: Application of the 1992 Horizontal Merger Guidelines*, 23 PUB. CONT. L.J. 1, 3, 5 (1993) ("[s]ome observers have suggested that either an exemption from the antitrust laws or a modification of the standard antitrust analysis used for other industries is necessary [in the defense industry]. . . . However, it is clear that current antitrust analysis is sufficiently flexible to consider and evaluate all of the specific characteristics of defense industry mergers").

[28] *See Leary, supra* note 17, at 10. *See also ABA Comments*, *supra* note 32, at 1 (stating that "weighing of the benefits and costs of the scrutinized conduct that considers the facts and circumstances of that conduct" is necessary to a determination of whether mergers or competitive practices are lawful).

[29] *See Leary, supra* note 17, at 10 (stating that "even if the facts are unique, the methods of analysis are not").

[30] *See ABA Comments*, *supra* note 25, at 1.

Such rules may lead to inconsistent conclusions, and may bring conduct within their scope that is otherwise permissible under the antitrust laws.[31]

B. Bright Line Standards Are a Poor Tool for Promoting Competition.

A fact-specific inquiry under Section 7 of the Clayton Act contrasts with a rule-oriented regulatory approach that employs bright lines, on one side of which all activity is allowed and on the other side of which all activity is condemned. One major disadvantage to bright line structural regulations as a method to implement competition policy is that they are over-inclusive in some cases, proscribing combinations that not only pose no competitive harm but may in fact promote competition by generating pro-competitive efficiencies. It is doubtful that there exists an optimal bright line in the broadcast industry reflecting the perfect equilibrium that accounts for the commercial realities of today's media marketplace -- i.e., where the prohibited activity corresponds exactly with, and strictly limits, only anticompetitive combinations.

C. The Current Local TV Ownership Rule Stifles Pro-competitive Efficiencies.

The merger law values competition "not as an end in itself, but because it promotes efficiency."[32] Production and transactional efficiencies benefit consumers by lowering the costs of goods and services or by increasing their value. Allocative efficiencies benefit consumers by moving the allocation of scarce resources to their highest valued use. Recognizing that

[31] *See* Prepared Statement of the Federal Trade Commission Before the Committee on the Judiciary Subcommittee on Antitrust, Competition, and Business and Consumer Rights, United States Senate, Concerning an Overview of Federal Trade Commission Antitrust Activities, at 9 (September 19, 2002) (stating that "antitrust immunities that are unnecessary, imprecise, or excessively broad may enable firms to engage in collusive arrangements detrimental to consumers"), *available at* http://www.ftc.gov/os/2002/09/020919overviewtestimony.htm.

[32] Deborah Platt Majoras, Deputy Assistant Attorney General, Antitrust Division, Merger Enforcement at the Antitrust Division, Address before KPMG/Chicago Graduate School of Business Mergers and Acquisitions Forum, at 10 (September 27, 2002), *available at* http://www.usdoj.gov/atr/public/speeches/200285.htm.

efficiency is the ultimate goal should make the FCC cautious about adopting a merger policy that sacrifices obvious efficiencies in the name of preserving less efficient competitors.[33]

Allowing greater consolidation among television broadcasters will permit them to achieve production, transactional and allocative efficiencies. It is not necessary to conclude that parties to any particular transaction in the future will demonstrate to the satisfaction of the government that such an acquisition will result in cognizable merger specific efficiencies. As discussed above, each merger review is fact specific and the government's decision whether or not to challenge a transaction will rise or fall on the competitive merits of that combination. It is enough, however, to recognize, as the FCC did in its 1999 decision to revisit the Local TV Ownership Rule, that

> [e]conomic theory suggests, and the record in this proceeding largely confirms, that there may be certain efficiencies inherent in joint ownership and operation of television stations in the same market . . . . These efficiencies can in turn lead to cost savings, which can lead to programming and other service benefits that enhance the public interest. Much of the evidence regarding the efficiencies of common ownership is anecdotal and is provided by broadcasters drawing upon their own experience in operating a same-market television LMA . . . . The efficiencies mentioned by these broadcasters include the ability to co-locate and share the studio and office facilities of same-market stations, sharing of administrative and technical staffs, efficiencies in advertising and promotion, and efficiencies involving news gathering and sales operations. [footnote omitted][34]

The current rule allows common ownership of two television stations in the same local market if the stations' contours do not overlap or if the "eight voices exception" applies after the merger. In 1992, the FCC observed that reducing the eight voices exception to six would provide outlet capacity for ABC, NBC, CBS, Fox, and two independents and permit mergers in

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33 *Id.* at 5 (discussing EU competition policy).

34 *1999 Television Broadcasting and Television Satellite Stations Report and Order,* at ¶ 34.

38 of the top 50 markets.[35] This suggests that there is a significant potential for broadcasters to capture substantial efficiencies such as those described above if the Local TV Ownership Rule is relaxed or eliminated. It further suggests that this rule, to the extent it has limited broadcasters from achieving the efficiencies described above, has impeded competition by prohibiting pro-competitive, efficiency-enhancing consolidation.

D. Recalibrated Bright Line Standards May Quickly Become Obsolete in the Broadcast Industry.

As the FCC recognizes, "[c]hange permeates virtually every aspect of the organization of media markets and the operation of media companies."[36] Therefore, even assuming it was possible to create an optimal bright line which applied to all television broadcast mergers across markets, the equilibrium represented by that line would likely shift as the broadcasting market, as expected, rapidly evolves. For this reason, relaxing the one-size-fits-all Local TV Ownership Rule by recalibrating it for the evolving marketplace is likely to prove an elusive task. The virtue of choosing instead to rely on merger law is the flexibility this law provides, saving the government from what would likely be a fruitless task.

IV. Dual Antitrust Review by Both the FCC and Antitrust Division Imposes Needless Costs, May Have a Chilling Effect on Legitimate Broadcast Mergers and is Not in the Public Interest.

Although the public interest test permits the FCC to consider whether a proposed license transfer promotes or restrains competition, it is more efficient to have one agency rather than two enforce the antitrust laws as applied to the same transaction. As one former FCC Commissioner has asked:

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35 *Review of the Commission's Regulations Governing Television Broadcasting, Notice of Proposed Rulemaking*, FCC 92-209 (rel. June 12, 1992), 57 Fed. Reg. 28,163 (June 24, 1992).

36 *Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review*, at ¶ 6. *See also id.* at ¶ 4 ("[t]he regulatory structure best suited to promote the public interest is not static").

> If the [FCC's antitrust merger] analysis is not materially different, then why is it not redundant for this agency to repeat an analysis that numerous experts at the Department of Justice already perform?[37]

This same point has been made specifically with reference to the FCC's public interest review of radio transactions. The FCC developed a competitive effects review of radio transactions which, insofar as it looks at competition concerns, parallels the Antitrust Division's merger review process. The FCC practice of "flagging" certain radio transactions which trigger the Commission's screen has been characterized as an ad hoc process that has "too often led to inconsistent decision-making and delays in processing applications."[38]

The burdens, costs, and delays associated with dealing with two reviewing agencies evaluating the same transaction under the same principles may well have a chilling effect on merger activity. They may add an additional layer of uncertainty and potential inconsistency making the application of well-established antitrust principles vague and ambiguous. The creation of this additional risk adds non-productive and wasteful expenditures to the total cost of a transaction, and may delay or preclude some transactions. Such redundancy and uncertainty -- to the extent they are created or exacerbated by dual review -- is not in the public interest.

V. **The FCC Should End Dual Antitrust Review and Rely on the Antitrust Division to Preserve Competition in the Media Industry Because the Antitrust Laws Enforced by the Antitrust Division Provide Sufficient Protection Against Undue Concentration.**

In conducting its "public interest" review of merger transactions, the FCC has articulated as its core concerns both the promotion of diversity and competition. The FCC generally follows an analytical framework "embodied in the antitrust laws, including the DOJ and Federal Trade

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[37] *Consent to Transfer Control of Teleport Communications Group Inc. to AT&T Corp.,* 13 FCC Rcd 15236 (1998) (Separate Statement of Commissioner Harold W. Furchtgott-Roth).

[38] *Powell Statement, supra* note 12 at 5440.

Commission 1992 Horizontal Merger Guidelines and the April 8, 1997 revisions of those guidelines" in conducting its independent competitive analysis of a given transaction.[39] In doing so, the FCC takes the position that "[a]lthough [] analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them."[40] This theoretically permits an assessment of likely competitive benefits or harms that could be different from an antitrust agency's assessment, which is based solely on antitrust laws.[41]

In evaluating this proposition, it is important to separate the FCC's goal of promoting diversity from its goal of preserving competition. The promotion of "diversity," depending upon how diversity is defined, goes beyond the purview of the antitrust laws.[42] Diversity should be defined by the FCC as a goal separate from, and independent of, the goal of preserving competition by prohibiting anticompetitive consolidation in the broadcast industry. The goal of preserving competition may be effectuated without resort to principles beyond conventional merger law – and is well within the aegis of the Antitrust Division's enforcement authority.

It is true that the FCC has previously expanded the conventional reach of merger law through its "public interest" authority in evaluating the competitive merits of several telecommunication industry mergers. In particular, the FCC has developed a comparative practices analysis which has no parallel under Section 7 of the Clayton Act. Similarly, it has promoted a potential competition analysis which it believes goes further than that permitted

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39 *Merger of MCI Telecommunications Corp. and British Telecommunications PLC*, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15368, at ¶ 34 (1997).

40 *Application of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc.*, 17 FCC Rcd 5423, 5439 n.16 (2002).

41 *Id.*

42 The FCC has made this, too, a subject for comment. *Notice of Proposed Rulemaking, 2002 Biennial Regulatory Review,* at ¶ 47.

under Clayton Act precedent. As explained below, such analyses are not implicated in any theoretical merger review involving consolidation among television station owners.

Therefore, because the FCC's public interest authority is superfluous for the purpose of preserving competition in the broadcast industry, the FCC can rely on the competition analysis conducted by the Antitrust Division rather than replicate that analysis itself to avoid needless duplication and redundancy. If necessary, the Antitrust Division can share its competitive analyses of proposed station sales with the FCC, as it has done in the past.[43] This practice would not only save the license transfer applicants from engaging in needless expense, it will also save the FCC substantial time and conserve its scarce resources.

A. Benchmarking is not an Issue in Reviewing the Competitive Effects of Broadcast Television Mergers.

In past local exchange carrier mergers, the FCC has recognized that the declining number of independently-owned major incumbent LECs limits the effectiveness of the FCC's use of comparative practices analyses, also known as "benchmarking."[44] The FCC has previously stated that, in the long run, benchmarking is essential to the agency's ability to implement pro-competitive policies and rules and evaluate incumbents' regulatory compliance requirements.[45] For example:

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43 *See, e.g., DOJ Comment in Response to Public Notice re: Application of Tallahassee Broadcasting Company and Cumulus Licensing Corp. for Consent to Assignment of License of Station WGLF-FM*, File No. BALH-980911GE (November 16, 1998).

44 *See In re Ameritech Corp. and SBC Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 14712, at ¶ 57 (1999); *In re NYNEX Corp. and Bell Atlantic Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19999, at ¶ 16 (1997).

45 *Bell Atlantic/NYNEX Order*, *supra* note 51, at 20058-58a, ¶ 148 (citing *United States v. Western Elec. Co., Inc.*, 47 Fed. Reg. 7170, 7174-75 (Feb. 17, 1982) (United States Department of Justice, Competitive Impact Statement); *United States v. Western Elec. Co.*, 993 F.2d 1572, 1580 (D.C. Cir.), *cert. denied*, 510 U.S. 984 (1993).

> One incumbent LEC may claim . . . that a particular form of interconnection is infeasible, while a second may resist the unbundling of a particular network element, and a third may oppose the collocation [sic] of specific types of equipment within its central offices. In such situations, the behavior of other major incumbent LECs can be used as benchmarks to evaluate the outlying incumbent's claims. Competitors, in negotiating and implementing access and interconnection arrangements, could point to the conduct of one incumbent to rebut another incumbent's assertion that a particular service is not feasible or must be structured or priced in a particular manner.[46]

The FCC regards mergers which rob it of this ability as anticompetitive. Yet, it should be recognized that the competitive dynamic and regulatory environment of the television broadcast industry are different from conditions in the telecommunications industry. None of the reasons the FCC relies on to justify benchmarking apply to the television broadcast industry.

The FCC uses benchmarking in evaluating telecommunication industry mergers as a way of measuring dimensions of competition potentially endangered by the proposed combination. The FCC also uses benchmarking in evaluating telecommunication industry regulatory requirements as a way of ascertaining what is and is not commercially and technically feasible. The FCC maintains that benchmarking is an essential tool because the telecommunication industry has been previously closed to competition and dominated by a few players.

The television broadcast industry is exactly the opposite. There are numerous competitors in a highly fragmented market. Further, unlike the telecommunication industry, there is a long history of competition among television broadcast providers which establishes reliable benchmarks of the competitive environment to use for present-day purposes. Nor will there be a need for benchmarking in the future because the antitrust laws provide the necessary check against unlawful consolidation. These factors, therefore, militate against maintaining an artificially low level of concentration strictly for the purpose of preserving the FCC's ability to benchmark in the television broadcast industry.

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[46] *In re Ameritech*, 14 FCC Rcd 14712, at ¶ 108.

B. Potential Competition is not an Issue in Reviewing the Competitive Effects of Broadcast Television Mergers.

The FCC interprets the 1996 Telecom Act as requiring it to evaluate, among other things, whether telecommunication industry mergers might "impede the development of future competition."[47] "Depending upon how one interprets the antitrust agencies' mandate," this is a reason why the FCC says its merger analysis should be distinct from and broader than the antitrust analysis conducted by the antitrust agencies.[48] There, however, should be no doubt of the applicability of Section 7 of the Clayton Act to any merger whose effect may be substantially to lessen present *or future* competition, the latter known as the "potential competition" doctrine.[49] The Antitrust Division remains active in applying this doctrine.[50]

Nevertheless, the FCC has previously stated that it prefers to rely upon its "public interest" authority, rather than Section 7, to evaluate mergers which may reduce potential competition because of the limits of that doctrine under existing antitrust law.[51] This preference should be irrelevant in reviewing future broadcast television mergers because the marketplace for

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47 *Application of WorldCom, Inc. and MCI Comminations Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18034-35, at ¶ 14 (1998).

48 *Id.*

49 *See, e.g., United States v. Marine Bancorporation*, 418 U.S. 602 (1974); *United States v. Falstaff Brewing Corp.*, 410 U.S. 526 (1973).

50 *See, e.g., U.S. v. Signature Flight Support Corp.*, No. Civ. A. 99CV-0537RCL, 1999 WL 816730, *14 (D.D.C. March 26, 1999) (alleging that Signature's acquisition of Combs in the market for fixed based operator services for general aviation eliminated potential competition at APA Airport); *United States v. Northwest Airlines Corporation and Continental Airlines, Inc.*, Civ. Action No. 98-74611 (M.D. Fl.) (Am. Compl. December 18, 1998) (alleging that Northwest's acquisition of voting control over Continental would have, *inter alia*, deterred Continental from offering new service in competition with Northwest in, among other places, Cleveland).

51 *In re Ameritech*, 14 FCC Rcd 14712, at ¶ 64 ("our framework for analyzing these transitional markets reflects the values of, and builds upon, but does not attempt to copy, the 'actual potential competition' doctrine established in antitrust case law."]; *WorldCom/MCI Order*, *supra* note 47, at 18038, ¶ 20.

television broadcasters is highly atomistic as a result of the current ownership rules. Even the FCC recognizes, independent of the antitrust case law, that any meaningful application of the potential competition doctrine requires, *inter alia*, that the target industry (here, television broadcasting) be substantially concentrated[52] -- which is not the case here.

C. The FCC's Competitive Effects Analysis in Broadcasting Mergers is Coextensive with Section 7 of the Clayton Act.

To transfer an existing license, a current licensee must first file a written application seeking the FCC's consent.[53] Once the filing has been accepted, the FCC staff will review it and, if necessary, make its recommendation to the Commission.[54] The staff or the Commission will examine, among other things, whether the transfer is permitted by the appropriate media ownership rule. Assuming it is, the FCC then reviews this filing pursuant to Section 310(d) of the Communications Act, which requires the FCC to find that the "public interest, convenience, and necessity" would be served by the assignment of that broadcast license.

As part of its public interest review, the FCC may, if the issue is raised, consider whether a license transfer will create competitive concerns. This part of the FCC's review employs the same analytical framework used by the Antitrust Division in its merger reviews. The FCC's Interim Policy for reviewing transfers of broadcast radio licenses illustrates this point.[55] The

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52 *In re Ameritech*, 14 FCC Rcd 14712, at ¶ 64.

53 *See* 47 U.S.C. § 308; 47 C.F.R. § 73.3540.

54 47 C.F.R. § 73.3561, § 73.3564(b).

55 *In the Matter of Rules and Policies Concerning Multiple Ownership of Radio Broadcasting Stations in Local Markets and Definition of Radio Markets*, MM Docket Nos. 01-317, 00-244, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 01-329, ¶ 84-89 (adopted November 8, 2001) [hereinafter *Rules and Policies Concerning Multiple Radio Ownership*]. The genesis of this Interim Policy began in 1998 when the FCC began "flagging" radio station transactions which it believed raised competitive concerns under the FCC's 50/70 screen. Under this policy, acquisitions resulting in a single station group controlling 50% or more, or two station groups controlling 70% or more, of the ad revenues in the local radio market

Interim Policy's "public interest" review consists of an "independent preliminary competitive analysis"[56] and a broader inquiry encompassing "the broad aims of the Communications Act" including whether the transaction ensures "the existence of an efficient, nationwide radio communications service available to everyone and promot[es] locally oriented service and diversity in media voices."[57]

The independent preliminary competitive analysis is more than "informed by traditional antitrust principles."[58] It fully tracks the Merger Guidelines approach and largely reflects the results of the Antitrust Division's application of this methodology to the facts of the broadcast radio industry. It provisionally defines radio advertising as the relevant product market and the local Arbitron metro area as the relevant geographic market.[59] It assigns market share based on sales revenue and applies the Herfindahl-Hirschman Index (HHI) to measure concentration.[60] It conducts an entry and competitive effects analysis.[61] Finally, it considers any evidence of

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were singled out for special review. In November 2001, the FCC launched a comprehensive review of its rules and policies concerning local radio ownership seeking to ascertain, *inter alia,* whether this practice should be modified. During the pendancy of this proceeding, now consolidated with the subject rulemaking, the FCC adopted its Interim Policy to remain in effect until it develops a permanent policy. The Interim Policy states that applications falling below the 50/70 screen are presumptively legal unless a petition to deny is filed that raises competitive concerns. For applications caught by the screen, the FCC staff conducts a public interest review.

56 *Rules and Policies Concerning Multiple Radio Ownership*, at ¶ 86. *See also FCC Hearing Designation Orders, infra* note 63.

57 *See FCC Hearing Designation Orders, infra* note 63.

58 *See Air Virginia, Inc.*, 17 FCC Rcd 5423, 5439 n.16.

59 *See Rules and Policies Concerning Multiple Radio Ownership*, at ¶ 86.

60 *Id.*

61 *Id.*

economic efficiencies.[62] The FCC has examined a number of license transfers since adopting its Interim Policy and has employed the same rubric in each.[63]

After completing the independent preliminary competitive analysis in each case, the FCC considers the other non-competition factors which are part of the "broader inquiry" described above. The FCC then determines whether it will grant the application, with or without conditions, or formally designate the application for a hearing at which the applicants may introduce evidence to challenge these provisional findings by the FCC. In the reviews conducted to date pursuant to the Interim Policy, after reaching an initial determination that the transaction is competitive or anti-competitive, the FCC has not yet reversed such a finding based on the application of other non-competition factors in the "public interest."[64]

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62 *Id.*

63 *Application of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc.*, 17 FCC Rcd 5423 (2002); *Applications of Mountain Wireless, Inc. and Clear Channel Broadcasting Licenses, Inc.*, 17 FCC Rcd 13914 (2002); *Application of Sheldon Broadcasting, Ltd. and Clear Channel Broadcasting Licenses, Inc.*, 17 FCC Rcd 13931 (2002); *Application of Youngstown Radio License, L.L.C. and Citicasters Licenses, Inc.*, 17 FCC Rcd 13896 (2002); *Application of Hilco Communications, Inc. and Cumulus Licensing Corp.*, 2002 WL 2030952 (2002); *Application of Voice in the Wilderness Broadcasting, Inc. and Clear Channel Broadcasting Licenses, Inc.*, 27 FCC Rcd 535 (2002); *Application of Whitehall Enterprises, Inc. and Clear Channel Broadcasting Licenses, Inc.*, 2002 WL 31084937 (2002) [cited as *FCC Hearing Designation Orders*]. *See also FCC Orders* cited *infra* note 64.

64 *Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C.*, 17 FCC Rcd 5397 (2002) (granting license application after determining that the proposed transaction was unlikely to produce anticompetitive effects, and that the public interest weighed in favor of the grant); *Applications of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc.*, 17 FCC Rcd 5449 (2002) (finding "little or no" anticompetitive effects would exist as a result of the transaction, and finding that the transaction was consistent with the public interest); *Applications of Shareholders of AMFM, Inc. and Clear Channel Communications, Inc.*, 15 FCC Rcd 16062 (2000) (granting the license application subject to divestitures, and finding that the transaction was not anticompetitive and served the public interest); *Applications of Great Empire Broadcasting, Inc. and Journal Broadcast Corporation*, 14 FCC Rcd 11145 (1999) (finding a lack of sufficient competitive concerns, and that the proposed transaction was consistent with the public interest) [cited as *FCC Orders*]. *See also FCC Hearing Designation Orders* cited *supra* note 63.

Even were it to do so, however, the indisputable point remains that the FCC's antitrust analysis of mergers in the broadcast industry relies upon the same principles employed by the Antitrust Division in its merger program. As Judge Sentelle noted, the FCC need look no further than the principles established in the Horizontal Merger Guidelines in order to preserve its goal of promoting competition. *Sinclair Broadcast Group, Inc.*, 284 F.3d at 170 (Concurring Statement of Sentelle, J).

VI. The FCC Should End Dual Antitrust Review and Rely on the Antitrust Division to Preserve Competition in the Media Industry Because the Antitrust Division Possesses Sufficient Law Enforcement Tools to Prosecute Anticompetitive Broadcast Mergers.

The Antitrust Division and the FTC are the primary agencies charged with the enforcement of Section 7 of the Clayton Act. The Antitrust Division employs attorneys and economists who are specifically dedicated to enforcing the antitrust laws, including Section 7 of the Clayton Act. During the last fiscal year, the Antitrust Division devoted a very significant portion of its total enforcement budget to merger enforcement. The career staff of attorneys and economists have many years of experience in applying merger law and conducting the most sophisticated kinds of merger investigations across virtually all industries.

A. Two Antitrust Laws Confer Substantial Investigative Powers on the Antitrust Division.

1. The Hart-Scott-Rodino Antitrust Improvements Act.

Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act, is the U.S. law which requires companies to notify the FTC and the Antitrust Division and to observe a waiting period before consummating a merger if the transaction and parties are over a certain size. Such transactions, if they involve sales of television stations, will also require notification to the FCC. The notification and waiting period requirements of the HSR Act are intended to give the federal antitrust agencies prior notice of, and information about, proposed transactions. The waiting period is also intended to provide the antitrust agencies an opportunity to investigate proposed transactions and determine whether to seek an injunction to prevent transactions that may violate the antitrust laws.

After filing, the parties must observe an initial waiting period, generally 30 days, prior to closing the transaction. During this time, the antitrust enforcement agencies review the information submitted and determine whether any further action is warranted. The waiting period may be extended by issuance of a request for additional information or documentary material, also known as a "second request," at the close of the initial waiting period. Parties must substantially comply with a second request, and then wait an additional period of time, generally 30 days, before closing. The second request may only be used to collect documents and information from parties to the transaction. Many significant media acquisitions involving television stations are likely to be captured by the HSR Act even though the reporting threshold has been raised. Even for those transactions which do not trigger the Act, license transfer filings must be made with the FCC and that agency can notify the Antitrust Division of these requests to ensure that no transaction escapes notice.

2. **The Antitrust Civil Process Act.**

The Antitrust Division is authorized to conduct formal discovery at the investigative stage pursuant to the Antitrust Civil Process Act, 15 U.S.C. § 1312 et seq. Under this law, the Antitrust Division may compel the production of documents, serve interrogatories and depose witnesses. This is the primary discovery tool used by the Division in conducting civil non-merger investigations. The Division also relies upon this law to investigate non-HSR merger investigations and to conduct third party discovery in connection with HSR investigations.

B. The Antitrust Division has Substantial Experience Enforcing the Clayton Act in the Broadcast Industry.

Congress "revamped the landscape" for radio ownership with the passage of the 1996 Telecom Act.[65] Prior to that Act, caps limiting the number of radio stations that a single entity could own within a single "radio market" were set so low that they generally precluded any combinations that triggered competitive concerns. Moreover, no single entity could own more than 20 FM and 20 AM radio stations nationally.[66] The 1996 Telecom Act raised the local ownership caps, permitting a single entity, in some cases, to own as many as eight commercial radio stations within a local market.[67] Further, the act repealed the national radio ownership limits.[68] As of March 1997, only one year following the passage of the Telecom Act, more than a thousand radio station acquisitions were announced.[69] These radio deals ranged in size and scope from single station sales to a market incumbent up to the $23 billion Clear Channel Communications, Inc./AMFM, Inc. transaction, combining two of the largest radio broadcast groups in the country.[70]

The 1996 Telecom Act also relaxed the television ownership rule, raising the number of households that a single company or network could reach through the TV stations it owned and

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65 *Sinclair Broadcast Group, Inc.*, 284 F.3d at 154.

66 Constance K. Robinson, Director of Operations, Antitrust Division, Trends In Antitrust Merger Enforcement in the Wake of Globalization and the Telecommunications Act of 1996, Remarks at the 2d Annual Seattle Telecommunications Seminar (March 20, 1997), 1997 WL 129300, *2 (D.O.J.); 47 C.F.R. § 73.3555(e)(1)(i) (1995).

67 Robinson, *supra* note 66, 1997 WL 129300, at *2; 47 C.F.R. § 73.3555(a).

68 Robinson, *supra* note 66, 1997 WL 129300, at *2.

69 *Id.* at *4.

70 *See* Elizabeth A. Rathburn, *Radio Sales Enter Mop-Mode*, Broadcasting & Cable, February 19, 2001.

operated from 25% to 35%.[71] The value of TV station acquisitions within a year following the passage of the Act totaled an estimated $7 billion in value.[72]

Since the passage of the 1996 Telecom Act, the Antitrust Division has reviewed numerous radio and television mergers. In the past six years, the Antitrust Division has conducted at least 78 substantial investigations in the radio and television station industry.[73] The Division has also brought 42 enforcement actions to remedy alleged anticompetitive mergers or combinations in the broadcast industry which either resulted in consent decrees, "fix it first" remedies, or transactions that were abandoned upon issuance of a second request.[74] Through these enforcement actions, the Antitrust Division evaluated the competitive dynamics of over 90 local radio and TV markets. In no other industry, other than perhaps banking, has the Antitrust Division invested more resources and developed more expertise than in local broadcast markets.[75]

C. The Burden of Proof is More Properly Allocated in a Law Enforcement Proceeding.

While the FCC applies the "public interest" test under the Communications Act, the Antitrust Division applies the "may substantially lessen competition" test under Section 7 of the

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71 Robinson, *supra* note 66, 1997 WL 129300, at *2; 47 C.F.R. § 73.3555(e)(i).

72 Robinson, *supra* note 66, 1997 WL 129300, at *4.

73 *See Number of Enforcement Actions and Substantial Investigations by DOJ and FTC in the Telecommunications and Media & Entertainment Industries*, Fiscal Year 1997 to January 2002, *available at* http://www.ftc.gov/opa/2002/03/clearance/tme.htm. As of March 1997, only one year after the passage of the 1996 Telecom Act, the Antitrust Division had conducted about 50 "intensive" investigations. Robinson, *supra* note 66, 1997 WL 129300, at *4.

74 *Id.*

75 This does not count the number of local media markets which, during the same time, were the subject of separate investigations involving combinations of outdoor advertising firms, local cable providers, and newspapers.

Clayton Act. Parties seeking FCC approval of a merger have the burden to prove that their merger is in the public interest, which the FCC has interpreted to require proof that the merger will enhance competition.[76] In contrast, the Antitrust Division, as the plaintiff in an antitrust enforcement action, has the burden of proving that the merger will substantially lessen competition.

Most commentators agree that requiring the plaintiff seeking to challenge a transaction as anticompetitive to prove its allegations, rather than forcing the defendant to prove that its merger promotes -- or is at least neutral towards -- competition, represents the ideal allocation of burden.[77] To do otherwise allows the regulator to substitute its vision of the marketplace for that of the market participant.[78]

This is a hard lesson now being learned by the European Commission's Merger Task Force. Unlike its U.S. counterparts, the European Commission can enjoin a merger transaction without obtaining court approval. Most companies do not have the resources or the time to appeal these decisions to the European courts. Yet, in three decisions within the past few months, European courts have reversed EU Commission decisions blocking merger

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[76] *See Bell Atlantic/NYNEX Order*, *supra* note 44, at 19985, ¶ 2 ("[i]n order to find that a merger is in the public interest we must, for example, be convinced that it will enhance competition"); *see also Merger of MCI Telecommunications Corp.*, *supra* note 39, at ¶ 3 (stating that the applicants must demonstrate that the merger actually "will enhance competition").

[77] *See, e.g.*, PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, ANTITRUST LAW, § 905g (1998).

[78] Michael K. Powell, FCC Commissioner, Letting Go of the Bike, Address before the Practicing Law Institute, Washington, D.C. (December 10, 1998), *available at* http://ftp.fcc.gov/Speeches/Powell/spmkp820.html.

transactions.[79] These decisions may well weaken the EU Commission's authority and credibility in the EU merger review process.

[79] *Tetra Laval BV v. Commission of the European Communities*, Judgment, T-5/02, T 80/02 (Ct. First Instance October 25, 2002), *available at* http://curia.eu.int; *Schneider Electric SA v. Commission of the European Communities,* Judgment, T-310/01, T-77/02 (Ct. First Instance October 22, 2002), *available at* http://curia.eu.int; *Airtours v. Commission of the European Communities*, Judgment, T-342/99 (Ct. First Instance June 6, 2002), *available at* http://curia.eu.int.

VII. **Conclusion.**

There is no reason for the FCC to retain the Local TV Ownership Rule for the purpose of preserving competition in the television station broadcast industry. The rule imposes arbitrary ownership limitations. Moreover, it is likely to stifle present and future competition rather than promote it because it prohibits otherwise lawful consolidation which may result in pro-competitive efficiencies. Rather than attempting to jury-rig an arbitrary bright line rule, the FCC should instead rely upon well-established principles of antitrust law embodied within the nation's primary merger law, Section 7 of the Clayton Act. Further, the FCC should define as a major part of its competition policy the goal of avoiding the imposition of redundant costs to itself and private parties, and chilling otherwise lawful mergers through excessive and duplicative government regulations, by abandoning its practice of dual antitrust review. Instead, the FCC should, as part of its "public interest" review, rely upon the accumulated experience, within and without the broadcast industry, of the government's federal antitrust agencies which possess the resources, legal authority and experience to prosecute any broadcast television merger which would offend the antitrust laws. For the foregoing reasons, we urge the FCC to end the Local TV Ownership Rule and its practice of dual antitrust review of mergers in the broadcast industry.

Submitted on behalf of
Nexstar Broadcast Group, L.L.C.

By: Paul H. Friedman
Reid B. Horwitz
DECHERT LLP
1775 Eye Street, NW
Washington, DC 20006
(202) 261-3300

February 3, 2003

EXHIBIT B

Younger ABC Family Takes Shape

Net picks The WB's *Gilmore Girls* for 2004

BY ALLISON ROMANO

Last fall, new ABC Family President Angela Shapiro pledged that, come January, the Disney-owned net would chart a younger, fresher course. With a new reality block on Monday nights and fresh off-net acquisition, the latest transformation of the former Fox Family is under way.

ABC Family last week acquired The WB drama *Gilmore Girls* from Warner Bros. Domestic Cable Distribution in a deal said to be worth $400,000-$500,000 per episode, or as much as $750,000 with bartered ad time. ABC Family gets exclusive off-net rights, which means that *Gilmore Girls* won't be repurposed on any other network and won't go into broadcast syndication. The only other contender for the show, sources said, was WE: Women's Entertainment. (WE already airs off-net runs of WB's *Felicity*)

cable


ABC Family has acquired exclusive off-net rights to The WB drama *Gilmore Girls*.

Shapiro's first major acquisition indicates that she is free to shop outside the Disney family for shows. *Gilmore Girls* joins the schedule in fall 2004, where it could be paired with WB's *7th Heaven*.

"*Gilmore Girls* won't do a huge household rating," said Horizon Media's head of research Brad Adgate of *Gilmore Girls*. "but it's a very targeted 18- to 34-year-old vehicle."

That is the audience that ABC Family is gunning for as it tries to broaden out to more-contemporary definitions of family, what Shapiro has called more *Will & Grace* and *Friends* than *Ozzie and Harriet*.

New breeds of family are on display in reality/scripted hybrid *My Life as a Sitcom*, where real families vie to star in a sitcom based on their lives. It debuted to Jan. 20 to a 0.8 rating, on par with ABC Family's prime time average last year. Original reality show *The Last Resort* debuted to a 0.6 that night.

"It's not what I would have hoped for, but it is still good," Shapiro said. "I have great hopes for both of the shows." ■

WB 100+ Attracts Rival

BY ALLISON ROMANO

TV station executives were left grumbling last week when Warner Bros. sold two syndicated talk shows to The WB's 100+. Soon, though, they may have a way to challenge the small-market giant.

When Warner Bros. Domestic Cable Distribution cleared its upcoming *The Sharon Osbourne Show* and *The Ellen DeGeneres Show* into the WB 100+—a collection of cable channels in 111 small markets—it blocked broadcast TV stations in those markets from bidding for either show. Now Raycom Media is spearheading an effort to band together small-market stations and compete with The WB's buying power.

syndication

Mary Carole McDonnell, the top programmer for the Raycom station group, has recruited about 40 Fox affiliate stations to a buying clearinghouse. Under her plan, when a syndicated show comes up, small-market stations would submit bids to her. She, in turn, would go to the studios with an aggregate bid.

"There are only five shows right now that are a firm go, and they've taken two out of the mix already [for small-market stations]," said McDonnell.

She envisions the group's bidding on shows within two months.

Some station executives are receptive to the idea but want to make sure it's practical.

"Each market is so uniquely different," said Granite Broadcasting COO John Dueshane. "What works for one market wouldn't be the same for a different station." Granite owns stations in Fort Wayne, Ind., Peoria-Bloomington, Ill., and Duluth, Minn./Superior, Wis.—markets 102, 110 and 134, respectively.

McDonnell intends to ensure flexibility, though. Under her plan, stations would have a choice whether to bid on a given show. That way, she said, "it doesn't take away the autonomy of a station."

Compatibility is not a problem for The WB 100+ group. On its stations, each syndicated show airs at the same time, receives the same marketing support and reaches a fairly consistent demographic. "I don't know another station group that can offer 111 clearances in 111 markets across the board," said Lynn Stepanian, senior vice president of programming and distribution for the group.

Some broadcasters gripe that Warner Bros.' latest arrangement with its corporate cousin is a sweetheart deal. But The WB group's blanket distribution clearly appeals to syndicators: Making sales calls to individual cities is a costly and time-intensive effort, particularly as consolidation squeezes sales forces.


Clearing *Ellen DeGeneres* on WB 100+ group kept smaller-market stations out of the bidding.

McDonnell added that the clearinghouse also could offer syndicators more-appealing barter deals. Its stations (Fox affiliates so far; CBS, NBC and ABC stations may come on board) would likely have higher ratings than the WB channels in most markets.

John Tupper, owner of a cluster of TV stations in Bismarck, N.D., says WB 100+ is only partly to blame. Small-market stations are experiencing difficulties because syndicators are introducing fewer original shows, he explained, and the flow of good off-network sitcoms is slowing because the networks are ordering more reality shows. Less content "puts more pressure on stations to fill up their time slots." ■

WEEK OF JAN 17-23

B&C INDICES

	WEEK	YTD
THE B&C 10	-2.1%	1.7%
BROADCAST TV GROUPS	-0.6%	4.5%
CABLE TV MSO'S	-5.3%	6.7%
RADIO	-2.6%	8.2%

	CLOSE	WEEK	YTD
Dow Jones	8369.47	-3.8%	0.3%
Nasdaq	1388.27	-2.5%	4.0%

The B&C 10

	CLOSE	WEEK	YTD
AOL Time Warner	$14.48	-5.4%	10.5%
Clear Channel	$41.57	-2.7%	11.5%
Comcast Corp.	$25.68	-4.2%	13.7%
Cox Comm.	$30.50	-5.4%	7.4%
Disney	$17.68	-2.0%	8.4%
EchoStar	$24.48	-7.7%	10.0%
Fox Ent.	$28.75	1.1%	10.9%
Hearst-Argyle	$24.48	-0.2%	1.5%
Tribune	$48.55	0.7%	6.8%
Viacom	$39.53	-4.5%	-10.7%

GOOD WEEK

XM Satellite	$4.50	**15.4%**	67.3%
Meredith Corp.	$42.95	**2.1%**	4.5%
Grey Global	$635.00	**1.7%**	3.9%
LIN TV	$25.83	**1.5%**	3.3%
New York Times	$46.90	**1.5%**	2.6%

BAD WEEK

Insight	$11.33	**-15.3%**	-8.5%
Interep	$1.81	**-12.1%**	-22.3%
Scientific-Atlanta	$12.05	**-11.4%**	1.6%
TiVo	$5.37	**-11.1%**	3.1%
Mediacom	$8.95	**-10.9%**	1.6%

JANUARY GAIN

2%

So much for the January Effect. After perking up at the beginning of the month, media stocks slumped back and, so far, show just 2% average gain for the month. One Wall Street theory states that stocks rise in January in the wake of year-end dumping by money managers.

Source: CNET Investor (investor.cnet.com). This information is based on sources believed to be reliable, and while extensive efforts are made to assure its accuracy, no guarantees can be made. CNET Investor assumes no liability for any inaccuracies. For information regarding CNET Investor's customized financial research services, please call 415-344-2836.

EXHIBIT C

KAMC - TV 10:00pm Newscast - 1/28/03

First Segment - "A" Block w/ Page Numbers
Page
A03-A06 - ABC reporter package on Bush State of the Union wrap from tonight.

A07 - Saddam Hussein has his own State of Iraq address.

A08 - Latest on US military in Afghanistan. Fighting in mountains with rebels.

A10-A12 - First look at Weather from Chief Meteorologist Ron Roberts

A13-A15 - Lubbock family who's power was cut off when city cut a line. City won't pay.

A16-A18 - State budget cutbacks could effect many programs at Texas Tech.

A19-A20 - DNA links a man from Brownfield to a year old murder in East Texas.

A21 - Woman shot and killed in Seminole and police officer wounded by suspect and brought to Lubbock.

A22-A24 - Story on fake guns in Lubbock. One week ago Lubbock police shot and killed a teenage boy carrying fake gun.

A25-A26 - A Clovis, NM man is suspected of killing & raping a 6-year old girl in Big Spring.

A27-A29 - Pig farmer charged today in starvation deaths of 100 pigs in Lubbock county.

A30-A35 - More local news digest - Car rollover this afternoon; Grass fire in Lubbock; Lubbock day in Austin at the Legislature.

A36-A38 - Reporter story on counting the number of homeless people in Lubbock.

A39-A40 - Woman in Alaska receives box of relative's bones from medical examiner.

A41-A48 - Digest of stories around country & world - Elections in Israel; Challenger explosion anniversary; Stock market up; Teen driver in Missouri grabs onto power lines after wreck; Missouri church receives letter postmarked 1949.

A49-A52 - Tease of upcoming stories including weather and sports.

Second Segment - "B" Block w/ Page Numbers
Page
B01-B03 - Full weather segment with Chief Meteorologist Ron Roberts.

B04-B05 - Tease for upcoming story

Third Segment - "C" Block w/ Page Numbers
Page
C01-C04 - Local story by anchor on Lubbock surgical clinics arthritis treatment.

C05-C06 - Tease for sports stories next.

Fourth Segment - "C" Block w/ Page Numbers
Page
D02-D13 - Sports segment - Stories include Lady Raiders highlights playing Missouri in basketball tonight; preview of Bob Knight going after 800th win; A&M & OU men's basketball highlights; four local high school basketball games (2-boy games - 2-girl games); Cotton Kings local hockey team score; Junior golf clinic coming up.

D15-D16 - Tease for next story.

Final Segment
Page
E-01-E05 - Final weather - Goodbye - and closing credits & copyright.

C01-C04 - Main weather segment from Chief Meteorologist David Young.

C04-C05 - Tease for upcoming stories.

Fourth Segment - "D" Block w/ Page Numbers
Page
D01-D03 - Homeless in Lubbock being counted.

D06-D07 - Sports tease and sports tease play of the day.

Fifth Segment - "E" Block w/ Page Numbers
Page
E02-E08 - Sports segment - Stories include - Highlights from Lady Raider basketball game; Men's Big 12 Basketball game; Boy's and girl's high school basketball highlights; Hockey score.

Sixth Segment - "F" Block w/ Page Numbers
Page
F09-F12 - Final weather forecast - Goodbye and closing credits and copyrights

KLBK - TV 10:00pm Newscast - 1/28/03

First Segment - "A" Block w/ Page Numbers
Page
A04-A08 - Reporter story on family without electricity because city accidentally cut a line. City won't pay. After story aired city decides to pay.

A09-A10 - Lubbock day in Austin at Legislature.

A11-A13 - CBS reporter package on State of the Union address by President Bush tonight.

A14 - Results of our web poll on war with Iraq.

A15-A17 - Comments from local viewers on possibility of war with Iraq.

A18-A20 - First weather from CBS 13 Chief Meteorologist David Young.

A21-A22 - Brownfield man a DNA match to murder scene from East Texas.

A23-A24 - Pig farmer arrested today charged with animal cruelty of 100 dead pigs in Lubbock County.

A25-A28 - Tease of stories coming up.

Second Segment - "B" Block w/ Page Numbers
Page
B01-B03 - Anchor story on local daycare facilities. Who passed inspection and who did not.

B04-B06 - Anchors story on local moms in baby stroller fitness class.

B07-B08 - Graphic of our phone number to check out certain daycare facilities.

B09-B10 - Weather tease.

Third Segment - "C" Block w/ Page Numbers
Page

KAMC - TV 10:00pm Newscast 01/30/03

First Segment - "A" Block w/ Page Numbers
Page
A3-A7 - Evolution - Reporter story on Texas Tech Professor who refuses to write recommendations to students who don't believe in evolution.

A8 - Poll questions from our website on evolution story.

A9 - A10 - President Bush on evolution.

A11 - A13 - First check on weather with Meteorologist Ron Roberts

A14 - Latest on situation in Iraq

A 15 - Marines arrested for destroying parachutes.

A16 - A18 - New F-16's arrive at Cannon Air Force Base in Clovis, New Mexico

A19-A20 - Follow up on missionary from our area who was shot by a terrorist gunman last month.

A21-A23 - Former Lubbock mayor announces his run for a vacant Congressional seat.

A24-A26 - Reporter profiles and interviews the new President of Texas Tech Health Science Center.

A27-A28 - Two companies adding businesses in underdeveloped area of Lubbock.

A29-A31 - Great weather an low interest rates means housing construction boom in Lubbock

A32-A33 - Follow up story on large chemical spill in Slaton, TX

A34-A39 - More local news digest - Record enrollment at LCU; Pilot school programs in area; United Way Volunteer awards.

A41-A44 - Teases for upcoming stories and weather

Second Segment - "B" Block w/ Page Numbers
Page
B01-B05 Weather segment with Chief Meteorologist Ron Roberts

Third Segement - "C" Block w/ Page Numbers
Page
C2-C10 - National News Digest - Shoe bomber sentenced; doctor dilutes cancer drugs; police called to O.J. Simpson residence again; Title Nine decision on men's and women's athletic programs; MTV show causes fasting in India; Tatoo boom for Super Bowl champion Tampa Bay Bucs.

C11-C12 - Tease for Sportscast

Fourth Segment or "D" Block Sports
Page
D02-D10 - Update on fight at Texas Tech/Colorado basketball game; Lubbock Christian University men's and women's basketball highlights; Waylond University basketball highlights; Texas Tech baseball player ineligible; Texas Tech baseball preview.

Final Segment
Page
E01 - E03 Weather Update

E04 - Kicker story - cat can tell north, south, east and west

E05 - Goodnight, credits and copyright

KLBK - TV 10:00pm Newscast 01/30/03

First Segment - "A" Block w/ Page Numbers
Page
A03-A05- Welcome and video and sound on latest on possible war with Iraq.

A06-A09- Reporter story on local F-16 pilots from Cannon Air Force Base in Clovis, NM talking about possibility of going to war. And training in their new F-16's over West Texas.

A10-A11 - Story on Airmen hurt during plane crash at Cannon AFB

A12-A14 - First look at Weather from Chief Meteorologist David Young.

A15-A17 - Former Lubbock mayor announces for congressional race.

A18-A20 - New businesses moving into east Lubbock.

A21-A23 - We hear from a construction company on the housing boom in Lubbock.

A23-A24 - Evolution controversy with Texas Tech professor.

A25-A26 - Introduction of new President of Texas Tech Health Sciences Center

A27-A28 Follow up on large chemical spill in Slaton TX, the previous day.

A29-A30 Lubbock Police chase stolen car suspects for about an hour before newscast

A31-A34 - Teases for stories later in newscast.

Second Segment - "B" Block w/ Page Numbers
Page
B01-B04 - Story from Dallas on mentally challenged student being beaten up on a school bus. Caught on Video

B05-B06 - Tease for Weather

Third Segment - "C" Block w/ Page Numbers
Page
C01-C03 Weather with Chief Meteorologist David Young

C04-C05 - Tease for next segment

Fourth Segment - "D" Block w/ Page Numbers
Page
D01-D04 - Reporter series done on rash of fights breaking out at Lubbock Nightclubs.

D05-D06 - Sports tease and play of the day.

Fifth Segment - "E" Block w/ Page Numbers
Page
E01-E09 Sports segment - Lubbock Christian basketball highlights; Waylond Baptist Highlights; Tech basketball fight; Ineligible baseball player for Texas Tech; Baseball coach Larry Hayes previews season.

Final Segment
Page
E10-E11 – Final Weather
E12 – Goodbye
E13 – Credits and Copyright

EXHIBIT D

KODE-TV Newscast 10:00 p.m. December 9, 2002
(Stories Covered)

Death of Joplin baby Jessica Hardee.

City Council moving forward with changes to downtown enforcement regarding cruising.

Tracker Marine Group has announced plans to by Oklahoma plant.

Car catches fire in Ottawa County.

Local church offering helping hand during holidays.

Today in History.

Students at Emerson Elementary held a read aloud day.

Carthage Public Library meeting with City Council to discuss financing to expand.

How to avoid credit card debt.

Joplin Humane Society – best not to surprise with animal.

Sports.

Senator-Elect Gary Nodler will serve as Commencement Speaker for December graduation.

KSNF Newscast 10:00 p.m. December 9, 2002
(Stories Covered)

City Council go-ahead for adoption of zero-tolerance policy with increased enforcement against cruising.

City Council approved more than $1-million for purchase of land in Jasper County to add on to the Crossroads business district.

City of Miami economy boost with plans by Tracker Marine Group to open plant.

Dick Combs, former city manager of Parsons, Kansas died overnight.

Weather – First Forecast

Joplin police investigating death of 15-month old Jessica Hardee.

Four State Woman charged with embezzlement back in court.

Ottawa County car fire.

Emerson Elementary "Read Aloud" Day.

National News – United Airlines bankruptcy; construction project at Naval Observatory; new research on connection between Body Mass Index and stroke; remembrance of Roone Arledge;

Financial News.

New Contract Lenses could restore sight to blind.

Local business paying employees in pennies.

KODE-TV Newscast 10:00 p.m. December 13, 2002
(Stories Covered)

Cardinal Law's resignation.

Chuck Finley resigns with St. Louis Cardinals.

Kansas man asking for release from state treatment facility.

Joplin Red Cross swings into action to help with home fire survivors.

Small pox vaccine – President directed military personnel to be vaccinated.

Friday the 13^{th} superstitions.

Local students joined Santa in his rounds.

Dangerous drivers – DWIs during the holidays.

America's favorite bachelor returns home to help with KODE Christmas toy drive.

Missouri Southern professor Barbara Box leading by example.

Local investment executive retiring.

Two County Community Health Report completed.

University of Iowa student gives out hugs on Thursdays.

KSNF Newscast 10:00 p.m. December 13, 2002
(Stories Covered)

Missouri officials take steps to protect residents from smallpox.

Court date set for Michael Dean who is charged with child abuse.

Joplin High School renovation is nearing completion.

Local health organization conducted study of area health, report released.

Local students gave Santa hand making gifts for seniors and join Santa in his rounds.

Weather – First Forecast.

National News – Cardinal Law resigns; Coast Guard rescue off coast of California; Florida storm; Florida kindergarten teacher tells students Santa is not real, but Santa visits.

Financial News

New Drug hitting market that gives hope to heroin addicts.

Area's most eligible bachelor makes appearances.