

To the contrary, there is ample evidence that, in many cases, bigger is better. Below, Paxson will describe the significant public interests served by allowing broadcasters to take advantage of the economies of scale and efficiencies offered by the UHF discount.⁹ Many commenters have shown persuasively the value of broadcast/newspaper combinations.” The Commission has recognized the benefits of consolidated ownership in other contexts as well.” As Paxson pointed out in its Comments, viewers reap many benefits from large media companies, such as better and more diverse programming choices.¹² More importantly, there is no evidence or indication that the existence of large media corporations is undermining the Commission’s traditional policies of preserving localism and diversity. The record simply presents no evidence that the big media corporations feared by commenters in favor of the ownership restrictions are making it any more difficult for small and locally oriented broadcasters to survive. The market will always demand diversity and localism. There is no evidence that the current ownership restrictions are necessary to achieve these goals

The burden is not, however, on television broadcasters to show the benefits of lifting the ownership restrictions. As the Commission well knows, without evidence of

⁹ See Section II, *infra*.

¹⁰ See, *e.g.*, Comments of Gannett Co., Inc. at 4-7; Comments of the National Association of Broadcasters at 60-67.

¹¹ Amendment of Section 73.658(g) of the Commission’s Rules - The Dual Network Rule, *Report and Order*, 16 FCC Rcd 11114, 11122-23, 11123-24 (2001); Review of the Commission’s Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12930 (1999) (“*Duopoly Order*”).

¹² See Paxson Comments at 13-14.

any concrete harm that will flow from relaxation of the ownership rules (and no such evidence exists), the rules cannot be sustained in their present form. Nonetheless, Paxson has not argued that all the ownership rules must be swept away wholesale.

Instead, Paxson has proposed a measured approach that would allow the Commission to carry out Congress's deregulatory purpose without foreclosing future regulatory remedies to correct any imbalances that deregulation might cause. For example, with respect to the 35% national television ownership cap, Paxson has proposed an incremental relaxation first to 50%, with a presumption that the limit would increase by 2.5% with each biennial review until the cap is at 60%. This course would allow the Commission to both give the regulatory relief demanded by the record while retaining enough control to reverse course if public harms materialized. Similarly, in the duopoly context, Paxson has proposed a reasonable set of reforms, even though the record fails to show the need for any local television ownership restrictions. This reasonable approach compares favorably to the often fevered arguments made in favor of retaining the restrictions in their current form. Given the strict statutory standard the Commission must meet in justifying its ownership restrictions going forward, a measured, deregulatory approach is the only defensible position.

The FCC simply does not have a record to support retention of the existing rules. Faced with the evidence before it, the Commission should not need the threat of legal action to choose the Congressionally-mandated course of deregulation. Nonetheless, that threat looms if the FCC retreats from deregulation. The broadcast industry surely will take the FCC to court. Given the state of the record and the previous chances the D.C. Circuit has given the Commission to adhere to Congress's deregulatory directives,

if the Commission retains the current rules, they most likely will be thrown out in their entirety. Consequently, if the Commission believes that relaxation of the rules eventually may cause public harm, the worst thing it could do would be to try to retain the rules in their current form. If the Commission wants to remain in the business of regulating broadcast ownership, its only choice is to begin reforming them as Paxson has suggested.

II. PAXSON HAS DEMONSTRATED THAT THE UHF DISCOUNT IS NECESSARY IN THE PUBLIC INTEREST.

As Paxson explained in its initial Comments, the UHF discount continues to advance several vitally important public interest goals.¹³ Less than three years ago, in the 1998 Biennial Review, the FCC agreed, affirming that the UHF discount remained necessary to allow UHF station owners to effectively compete with their VHF counterparts.¹⁴ The same remains true today.

For example, the Commission recognized that as long as UHF stations broadcast NTSC signals, their inferior signal coverage area undermines their ability to reach both over-the-air viewers and cable head-ends, severely restricting their ability to reach the majority of viewers in their markets.¹⁵ As Paxson demonstrated in its Comments, these handicaps remain.¹⁶ UCC disputes that UHF broadcasters' signal inferiority remains significant, but its argument relies solely on Commission statements in the Prime Time

¹³ See Comments of Paxson Communications Corporation, filed January 2, 2003, at 15-20.

¹⁴ See 1998 Biennial Review at 11078.

¹⁵ See *id.*

¹⁶ Paxson Comments at 15-18

Access Rule and Duopoly proceedings.” Each of these proceedings were resolved before the Commission preserved the UHF discount” and cannot now form the basis for elimination of the discount.

Further, the Commission must continue to recognize that the added expense of constructing and operating UHF stations undermines UHF broadcasters’ competitive position.¹⁹ This gap has not closed in the past three years, and there is nothing on the horizon to indicate that analog UHF stations ever will be operated as cheaply or as effectively as VHF stations. As described in greater detail below, the burden of operating both an analog and digital station during the transition falls especially hard on UHF broadcasters that already pay increased operating costs.

Accordingly, UHF broadcasters must be permitted to take advantage of the economies of scale that the discount makes possible. Allowing large group ownership of UHF stations, and the efficiencies thereby realized, encourages diversity in mass-market programming by promoting the growth of competitive networks. Networks like the WB and UPN rely almost entirely upon UHF stations to distribute their programming, so the health and stability of UHF broadcasters is keenly important to their continued growth.” The growth of the PAXTV network also demonstrates the utility of the rule in

¹⁷ UCC Comments at 58 (citing Review of the Prime Time Access Rule, § 73.658(k) of the Commission’s Rules, Report and Order, 11 FCC Rcd 546, 583-84 (1995) (“PTAR Order”); Review of the Commission’s Regulations Governing Television Broadcasting, Report and Order, 10 FCC Rcd 4538,4542 (1995)).

¹⁸ Indeed, the Commission even cited one of these Orders in upholding the UHF discount. See 1998 Biennial Review at n.105 (citing PTAR Order, 11 FCC Rcd 546, 583-86).

¹⁹ See 1998 Biennial Review at 11078.

²⁰ See Paxson Comments at 20.

this regard. The PAXTV network now covers over 87% of the country, enabling Paxson to provide family-oriented mass-market programming that would not be available if Paxson were at the mercy of the established broadcast networks or cable operators who seem chiefly interested in outdoing each other with the level of sex and violence they are willing to inject into their programming.” These examples show that UCC’s myopic argument that the discount undermines diversity cannot be sustained. It is equally important that the Commission preserve a diversity of station owners capable of reaching the mass market as it is that other diverse programming sources be preserved.

In addition to failing to recognize the considerable public benefits produced by the UHF discount, UCC offered no justification for the disruption that would ensue if the Commission eliminated the UHF discount without grandfathering the interests of owners like Paxson, who have pursued innovative and valuable business plans based on the UHF discount.” The entire basis and purpose of the biennial review process is to ensure that the Commission’s ownership rules continue to preserve and promote competition, yet UCC makes no effort to address the essentially anti-competitive effects that would be brought about by elimination of the UHF discount without grandfathering. Thus, even if the Commission were to eliminate the UHF discount on a going-forward basis, current ownership interests must be grandfathered with free assignability going forward.

²¹ See Opening Remarks of Commissioner Kevin J. Martin, Family Programming Forum, Annual Conference of National *Association of Television Program Executives*, January 22, 2003, available at [http://www.fcc.gov/Speeches/Martin/2003/spkjm301 .pdf](http://www.fcc.gov/Speeches/Martin/2003/spkjm301.pdf), at 1, 2.

² UCC’s comments further identify several other station owners that would be required to divest their interests if the UHF discount were eliminated. UCC Comments at 49.

A. NO DEVELOPMENTS SINCE THE 1998 BIENNIAL REVIEW SUPPORT ELIMINATION OF THE UHF DISCOUNT.

The only relevant change that has occurred since the Commission last upheld the UHF discount is that a greater number of homes now are receiving cable and DBS service. This fact fails to provide any justification for eliminating the discount. Because at least fifteen percent of viewers and thirty percent of televisions still receive television signals over-the-air, this remains an important part of UHF broadcasters' revenue stream, directly and significantly impacting their competitive position. Fifteen percent of viewers and thirty percent of television sets may be a smaller audience than ten or even three years ago, but the dollars those viewers add to stations' advertising revenues represent the difference between profit and **loss** for many stations. Although UHF stations need to be able to reach these viewers, VHF stations, with their stronger signals, still are able to reach more of them. Consequently, UHF stations' inability to reach an over-the-air audience commensurate with their VHF counterparts still impacts their competitive position

UCC relies on the flip side of this equation – the increase in cable and DBS penetration – to justify elimination of the UHF discount.²³ This development has not significantly improved UHF stations' competitive position. Because stations are required to place a good quality signal over cable headends, the must-carry rules do little more than perpetuate the disparity in signal reach that already exists between UHF and VHF stations. Because UHF stations cannot reach as many cable headends in their DMAs with a quality signal, they are forced to either forgo carriage or enter into

²³ See UCC Comments at 57-58

expensive arrangements for signal delivery. Moreover, as Paxson has detailed in the past, some cable operators actively resist carrying UHF stations in their market, often with the effect of preserving channel capacity for their own affiliated programming.²⁴ Eliminating the UHF discount and the efficiencies that it provides will only result in fewer station owners capable of resisting these efforts and fewer choices for over-the-air and cable television viewers alike. Reliance on DBS penetration is even more misguided. DBS does not offer local-into-local service in most communities, and such service is all but non-existent in the mid-sized and smaller markets where UHF broadcasters are most handicapped.

B. THE DTV TRANSITION HAS NOT PROGRESSED SUFFICIENTLY TO JUSTIFY ELIMINATION OF THE UHF DISCOUNT

The Commission should adhere to the course it charted in the 1998 Biennial Review, when it stated that it would consider the need for the UHF discount again near the close of the DTV transition.²⁵ The Commission reasoned that reconsidering the UHF discount at the close of the transition would be in the public interest because it believed that the transition would eliminate the UHF-VHF disparity.²⁶ Although Paxson disagrees with this conclusion,²⁷ there will be ample time to debate that question when the Commission squarely presents it near the transition's close. At this point, despite the remarkable progress that the transition has made in the last year, even the most optimistic observers recognize that the end of the DTV transition still is years away

²⁴ See Reply Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed August 21, 1998, at 5-9 ("Paxson 1998 Biennial Reply Comments").

²⁵ See 1998 Biennial Review at 11079-80.

²⁶ See *id.*

Consequently, any reasoning that relies on post-transition conditions to justify elimination of the discount cannot be sustained.

Indeed, for UHF broadcasters, the transition itself is the worst of both worlds, because they are handicapped not only by traditional signal inferiority and the higher costs of station operation, but also by the costs of the transition – including construction costs and the added power expense of operating two stations.²⁸ Eliminating the discount now based on predictions about post-transition conditions would therefore be not only premature, but in many ways, perverse. The added burdens of the transition require that UHF broadcasters be permitted to continue to realize the efficiencies that the discount permits.

Thus, the FCC must reject UCC's invitation to re-regulate UHF broadcasters at this sensitive point in the DTV transition. The Commission should not even consider *undermining UHF broadcasters' competitive position on the heels of their larger-scale investment in DTV facilities*. To devalue these stations by eliminating the discount at this point in the transition could have calamitous results. The reality is that the UHF-VHF disparity will persist at least so long as broadcasters continue to operate their NTSC stations, and the Commission's rules must take proper account of this fact.

Another important prudential reason for retaining the discount until the close of the transition is the administrative headaches that removal would create. Because the Commission has repeatedly acknowledged the inferiority of UHF stations' reach, it cannot now simply find that UHF and VHF stations have reached technical parity.

²⁷ See Paxson Comments at 18-19; Paxson 1998 Biennial Reply Comments at 9-10.

²⁸ See *id.* at 11078.

Instead, the Commission would have to replace the discount with some system that would calculate the actual coverage of each station.²⁹ The time and resources this endeavor would require, however, cannot be justified when the end result would be a system that would only be employed for a limited number of years before the close of the transition. Indeed, by the time stations and the Commission could agree about each stations' "actual" coverage, the transition would be near completion, and the same process would need to be undertaken for the DTV universe.

C. ELIMINATING THE UHF DISCOUNT IS OUTSIDE THE PROPER PURVIEW OF THE BIENNIAL, REVIEW PROCESS.

Finally, as Paxson pointed out in its Comments, Congress did not create the biennial review process as a vehicle for increasing ownership restrictions on the most vulnerable broadcasters.³⁰ UCC's proposed elimination of the UHF discount would do precisely that by imposing significant new ownership restrictions on the station owners that can least afford them.

UCC's drive to re-regulate UHF broadcasters flies in the face of what the D.C. Circuit has recognized to be the fundamentally deregulatory intent of the biennial review process.³¹ To enact such a new restriction, the Commission would be under the doubly heavy burden of justifying a complete policy about-face without any new underlying rationale, and describing the public interest harms that have flown from maintenance of

²⁹ See 1998 Biennial Review at 11079.

³⁰ See Paxson Comments at 21.

³¹ See *Fox Television Stations v. FCC*, 280 F.3d 1027, 1033 (2000).

the UHF discount.³² As Paxson has demonstrated, no such harms exist, and in any case, none have been entered into the record of this proceeding.

III. CONCLUSION

For these reasons, as well as those laid out in Paxson's initial Comments, the Commission should relax its television broadcast ownership restrictions and maintain the UHF discount. No evidence supports continuation of the current national or local ownership restrictions or the newspaper/broadcast or radio/television restrictions. Accordingly, the Commission cannot satisfy the rigorous legal standard imposed by Congress and the D.C. Circuit for justifying these restrictions. Congress and the Courts have commanded deregulation, and now is the time to carry out that order.

Regardless of the Commission's decision with respect to its ownership restrictions, however, the Commission must reject UCC's call for repeal of the UHF discount and consequent re-regulation of UHF broadcasters. The discount has and continues to partially balance the competitive playing field between UHF and VHF broadcasters. By creating economies of scale that permit UHF station owners to surmount the inherent competitive handicaps of UHF broadcasting, the discount continues to play an important role in making the broadcast industry more competitive. This guarantees better and more diverse services to television viewers, without harm to the public, making the UHF discount the very essence of "necessary in the public

³² *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41-42 (1983) (reasoned opinion beyond that necessary to refrain from adopting a rule is required to discard a rule); *Office of Communication of United Church of Christ v. FCC*, 560 F.2d 529, 532 (2d Cir. 1977); *National Wildlife Foundation v. Mosbacher*, 1989 U.S. Dist. Lexis 9748 (D.D.C. 1989) (overturning agency order amending 2-year old rule without reasoned explanation).

interest." In the face of these significant public interest benefits, it would be grossly inappropriate for the Commission to use the deregulatory biennial review process to re-regulate UHF broadcasters.

PAXSON COMMUNICATIONS CORPORATION

By: 

William I. Watson, Vice President
Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, FL 33401

Dated. February 3, 2003

**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)	MB Docket No. 02-277
Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications)	
Act of 1996)	
)	
Cross-Ownership of Broadcast Stations)	MM Docket No. 01-235
and Newspapers)	
)	
Rules and Policies)	
Concerning Multiple Ownership of)	MM Docket No. 01-317
Radio Broadcast Stations in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

**COMMENTS OF
PAXSON COMMUNICATIONS CORPORATION**

Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, FL 33401

Dated: January 2, 2003

SUMMARY

The Commission must address the new competitive landscape in the video delivery and broadcast industries in a firmly deregulatory, but thoughtful way. Both Congress and the courts have instructed the Commission to remove ownership regulations that are not strictly necessary to the public interest in light of competitive conditions. This mandate must lead the Commission to remove many of its outmoded restrictions, but it must also temper its deregulation with a measure of wisdom.

So, for example, the Commission must increase the national ownership cap. Current competitive forces have rendered the current ownership cap an anti-competitive drag on broadcasters' competitive energies. At the same time, however, the Commission must maintain the UHF discount, because it still provides a realistic measure of the technical and financial obstacles to successful UHF broadcasting. There has been no development in the past two years that could possibly support the abandonment of this important competitive safeguard. The UHF discount remains an important tool in building emerging broadcast networks, as the success of PAXTV has shown. Moreover, the DTV transition has done nothing to alleviate the need for the discount thus far, and it remains too early in the transition to conclude that it ultimately will render the UHF discount unnecessary.

There are areas where the Commission is compelled to move ahead more forcefully. The Commission must immediately remove all restrictions on duopoly ownership in local markets and newspaper/broadcast cross-ownership. Moreover, the Commission must liberalize its radio/television cross-ownership rule, which has no place in a competitive local media environment. None of these rules were well-conceived in

the first place and each has long outlived whatever usefulness it may have had. Like the national ownership cap, these rules merely restrain broadcasters from fairly competing with other media giants, such as vertically integrated cable companies, that face no ownership restrictions of comparable magnitude.

TABLE OF CONTENTS

	Page
SUMMARY.....	2
I. INTRODUCTION.....	2
II. The Commission Must Liberalize its Ownership Rules, but It Should Retain Its Current Service-Specific Approach and Its Traditional Focus on Diversity, Competition, and Localism.....	6
III. The FCC Should Liberalize All of Its Media Ownership Standards But Do So By Retaining a Service-Specific Approach.....	7
A. The Commission Should Immediately Increase the National Television Ownership Cap and Set a Schedule for Phasing Out the Rule Over Time.....	8
1. The National Ownership Is No Longer Necessary in the Public Interest.....	9
2. The Commission Should Immediately Raise the Ownership Cap to 50%, Then Increase the Cap by 2.5% Biennially.....	13
B. Both Law and Logic Dictate that the Commission Retain the UHF Discount.....	15
1. The Commission's Reasons For Maintaining the UHF Discount Remain Apt.....	15
2. UHF Technical Inferiority Will Not Be Solved By the Transition to DTV.....	18
3. The UHF Discount Remains Critical to the Development of New Broadcast Networks.....	19
4. Maintenance of the UHF Discount Satisfies Section 202(h) Because It Is Necessary in the Public Interest.....	20
5. If the Commission Decides to Eliminate the UHF Discount, Basic Principles of Fairness Require Grandfathering of Existing UHF Station Groups.....	21
C. Local Television Ownership Rule.....	27
1. The Commission Should Eliminate All Restrictions on Duopoly Ownership.....	27
2. Alternatively, NAB's "10/10 Rule" Would Provide Needed Relief to Small and Mid-Size Market Broadcasters.....	30
D. The Newspaper Broadcast Cross-Ownership Rule Should Be Completely Repealed.....	31
E. Radio-Television Cross-Ownership Rule.....	33

TABLE OF CONTENTS
(continued)

Page

CONCLUSION..... 36

**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)	MB Docket No. 02-277
Other Rules Adopted Pursuant to)	
Section 202 of the Telecommunications)	
Act of 1996)	
)	
Cross-Ownership of Broadcast Stations)	MM Docket No. 01-235
and Newspapers)	
)	
Rules and Policies)	
Concerning Multiple Ownership of)	MM Docket No. 01-317
Radio Broadcast Stations in Local Markets)	
)	
Definition of Radio Markets)	MM Docket No. 00-244

COMMENTS OF PAXSON COMMUNICATIONS CORPORATION

Paxson Communications Corporation (“Paxson”) hereby submits these Comments in response to the Commission’s *Notice of Proposed Rulemaking* in the above-captioned proceeding.¹ Paxson urges the Commission to (1) relax significantly the current 35% national broadcast ownership cap and to phase out the cap over the

¹ 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, MB Docket No. 02-277; Cross-Ownership of Broadcast Stations and Newspapers, MM Docket No. 01-235; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, MM Docket No. 01-317; Definition of Radio Markets, MM Docket No. 00-244, *Notice of Proposed Rule Making*, FCC 02-249 (rel. September 23, 2002) (the “*Ownership NPRM*”). See also FCC Seeks Comment on Ownership Studies Released by Media Ownership Working Group and Establishes Comment Deadlines for 2002 Biennial Regulatory Review of Commission’s Ownership Rules, *Public Notice*, DA 02-2476 (rel. October 1, 2002).

next several years; (2) to retain for UHF broadcasters the full benefit of the current UHF discount; (3) to ease the most restrictive elements of its current duopoly policies; (4) to repeal the newspaper/broadcast cross-ownership rule; and (5) to refine the radio/television cross ownership rule. These changes are necessary to modernize the Commission's broadcast ownership rules in light of the current robust competitive media landscape and to bring to consumers the full promise of competition made by Congress through the Telecommunications Act of 1996.

I. INTRODUCTION

As the largest television broadcast station group-owner in America, Paxson is intimately concerned with the important ownership issues raised in this proceeding. Paxson and its subsidiaries own and operate 61 full power analog television stations and 17 low-power and translator stations. Paxson stations have been transitioning to digital aggressively, and 26 Paxson stations are on the air with full-power digital facilities. Paxson has used its many stations to launch the nation's seventh competitive broadcast network, offering family-oriented programming free of the excessive violence, sex, and foul-language common to much of today's broadcast and cable network fare. Paxson is proud to have "proven that money can be made with family friendly programming,"² and believes that, if given the chance, the market will demand that large media owners live up to the same standard.

Paxson long has been a supporter of relaxation of the Commission's ownership rules in the face of the ever-growing competition in the television broadcasting and

video delivery industries. As Congress recognized in passing the 1996 Telecommunications Act, relaxation of outmoded regulations will stimulate competition and produce media that are responsive to local markets.³ Paxson participated in the 1998 Biennial Review proceeding, arguing that the Commission should retain the UHF discount, relax its restrictions on duopolies involving stations in separate DMAs, and increase the national ownership cap to 40%.⁴ The Commission accepted the former arguments and rejected the latter.⁵ Paxson now comes before the Commission to argue in favor of a much more ambitious deregulatory program.

Paxson commends the Commission on its decision to address necessary changes to its broadcast ownership rules in an omnibus proceeding. Logic dictates that

² Remarks Of Commissioner Michael J. Copps To United States Conference Of Catholic Bishops, Dallas, Texas, April 26, 2002, available at <http://www.fcc.gov/speeches/copps/2002/spmjc204.html>.

³ Section 202(h) of the Telecommunications Act of 1996, requires the Commission to: "review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and . . . determine whether any of such rules are necessary in the public interest as the result of competition . . ." and to " . . . repeal or modify any regulation it determines to be no longer in the public interest." Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996).

⁴ See Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed July 21, 1998 ("*Paxson Biennial Comments*"); Reply Comments of Paxson Communications Corporation, MM Docket No. 98-35, filed August 21, 1998.

⁵ 1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, *Biennial Review Report*, 15 FCC Rcd 11058, 11078-80 (retaining UHF discount), 11072-75 (retaining 35% national ownership cap) ("*1998 Biennial Review*"), *reversed and remanded, Fox Television Stations v. FCC*, 280 F.3d 1027 (2000) ("*FOX TV Stations*"), *rehearing granted in part*, 293 F.3d 537 ("*FOX TV Stations Rehearing*"); see also Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policy and Rules, *Report and Order*, 14 FCC Rcd 12903, 12924-29 (1999) (relaxing duopoly rule to allow ownership of stations with overlapping Grade B contours in separate DMAs).

the rules be considered together because each rule impacts the others, and the Commission's goal should be to achieve a logically consistent system of broadcast ownership rules that can stand for years to come.⁶ The first step to accomplishing this goal is recognizing the proper frame through which Section 202(h) of the Communications Act requires the Commission to view its ownership regulations. Both the language of 202(h) and its legislative history plainly indicate that Congress expected the Commission to presume that competition and the free market are adequate to ensure that the public interest is served and to retain only those ownership restrictions that can be affirmatively justified as necessary in the public interest either despite existing competition or due to a lack of it.⁷

As the D.C. Circuit has recognized, the Telecommunications Act of 1996 is fundamentally a deregulatory statute.⁸ The courts and at least one Commissioner have recognized that the 1996 Act instituted a presumption in favor of relaxation and repeal of media ownership restriction.⁹ Indeed, the very language "necessary in the public interest" should be held to require the Commission to discard any rule that cannot be shown to be strictly necessary to the public interest.¹⁰ At the very least, the Commission should be required to announce a plan for easing these rules over time.

⁶ *Ownership NPRM*, ¶ 8.

⁷ *See Fox TV Stations*, 280 F.3d at 1048.

⁸ *See Id.* at 1033 (" . . . Congress instructed the Commission, **in order to continue the process of deregulation**, to review each of the Commission's ownership rules every two years . . .").

⁹ *See Id.* at 1033, 1048; *Ownership NPRM* at 66 (Separate Statement of Commissioner Martin).

¹⁰ *See GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000) (interpreting "necessary in § 251(c)(6) "collocation of equipment necessary for interconnection" to

Although the Commission has at times appeared to resist this interpretation of the 1996 Act,¹¹ it is unlikely that any rules founded on a weaker standard will pass muster with the Courts. The Commission has argued, for example, that it is irrational for Congress to require a higher standard for retaining its rules than is required for enacting them.¹² This argument fails, however, because it is perfectly consistent with Congress's deregulatory purpose to isolate a group of regulations (*i.e.* the Commission's ownership rules) and single them out for higher scrutiny. The Commission also has argued that the "necessary in the public interest" language in the 1996 Act is similar to language in the Communications Act of 1934 which has been held to require only the basic public interest rationale.¹³ This argument also fails because the 1996 is fundamentally *deregulatory* in nature, whereas the 1934 Act was intended to set the basic framework of communications *regulation*.¹⁴ It is decisive that Congress in Section 202(h) did not require the Commission to review all its rules on a biennial basis and discard those that do not meet the "necessary" standard, but only the ownership regulations. Congress plainly meant for the Commission to undertake a searching review of its ownership regulations and retain only those that are strictly necessary to its mission of protecting the public interest. Because the law is clear and to avoid being right back where it

mean "indispensable"); *See also Fox TV Rehearing*, 293 F.3d at 540 (declining to determine standard created by Section 202(h)); *Ownership NPRM*, ¶ 18 (requesting comment on court decisions and proper standard to be applied under Section 202(h)).

¹¹ *See FOX TV Rehearing*, 293 F.3d at 539 (describing Commission argument against strict necessity standard); *see also Ownership NPRM*, ¶ 18 (same).

¹² *See Id.*

¹³ *See Id.*

¹⁴ *See Id.* at 539 (describing arguments in favor of strict necessity standard).

started from after another round of rulemaking, appeal, and remand, the Commission should recognize in this proceeding that Section 202(h) requires it to affirmatively justify the public necessity of each of its ownership rules. This stringent standard cannot be satisfied with respect to the ownership rules under review in this proceeding.

II. THE COMMISSION MUST LIBERALIZE ITS OWNERSHIP RULES, BUT IT SHOULD RETAIN ITS CURRENT SERVICE-SPECIFIC APPROACH AND ITS TRADITIONAL FOCUS ON DIVERSITY, COMPETITION, AND LOCALISM.

As both Chairman Powell and Commissioner Martin have observed, the broadcast ownership restrictions at issue in this proceeding are old.¹⁵ They are old in the sense that they were enacted a long time ago, and they are old in the sense that they have become antiquated in the face of the tremendous competition existing in local and national media markets today. In their current configuration, the Commission's broadcast ownership rules bear no relation to what is needed to maintain a diverse and competitive media environment. In fact, the rules in their current form work to stifle competition and hinder the full development of the broadcast medium. The Commission must relax these restrictions to allow the full promise of broadcast competition to be realized.

Nonetheless, the Commission's ownership rules have been the fundamental reality of the broadcast industry and the rules have shaped the businesses and plans of every industry participant. It would be unwise to rashly discard any of the existing ownership rules or to attempt to replace them with an as yet undetermined single

¹⁵ See 1998 Biennial Review, 15 FCC Rcd 11058, 11140 (separate statement of (then) Commissioner Michael K. Powell); *Ownership NPRM* at 66 (separate statement of Commissioner Kevin J. Martin).

ownership rule based on an as yet unexplained market/voice standard.¹⁶ Similarly, it would be an unnecessary strain on the Commission's future resources to commit to case-by-case determinations of multiple ownership questions.¹⁷ The strain on the Commission resources and the delay that such processes would create would all but negate the intended effect of deregulating the broadcast industry.

Instead, the Commission should maintain its basic ownership rule framework, although the rules themselves require significant revision. Specifically, the Commission should continue to observe and study broadcast ownership on both the local and national level to ensure that the policy goals of encouraging diversity, competition, and innovation continue to be satisfied.¹⁸ More importantly, the Commission should continue its practice of maintaining straightforward rules that let industry participants know exactly what the Commission expects.¹⁹ As the Commission moves forward into this deregulatory period, clear rules will be essential to maintaining order in what likely will be a quickly evolving marketplace.

III. THE FCC SHOULD LIBERALIZE ALL OF ITS MEDIA OWNERSHIP STANDARDS BUT DO SO BY RETAINING A SERVICE-SPECIFIC APPROACH.

The Commission requested comment chiefly on the impact that liberalizing its ownership rules will have on its traditional goals of fostering diversity, competition,

¹⁶ See *Ownership NPRM*, ¶ 73.

¹⁷ See *Id.*

¹⁸ See *Id.*, ¶¶ 29, 65 (describing traditional goals).

¹⁹ See e.g. Review of the Commission's Rules Regarding the Main Studio and Local Public Inspection Files of Broadcast Television and Radio Stations; 47 C.F.R. §§ 73.1125, 73.3526 and 73.3527, *Memorandum Opinion and Order*, 14 FCC Rcd

localism, and innovation. In Paxson's view, market forces are sufficient to promote these goals and, in any case, are more likely than regulation to achieve them. There has been much debate over the potential negative effects of media consolidation, but the reality of the post-1996 Act has seen a full flowering of competition and media choice.²⁰ Moreover, the addition of the Internet has added an important competitor for viewers leisure time that is so vast that it could never be monopolized entirely by one or a few firms. Consequently, today the Commission has less reason than ever before to believe that its traditional goals are in danger from consolidated ownership. The Commission therefore has the leisure to consider the most prudent ways to draw down its ownership limitations over the next several years. This Biennial Review should be the first step in that process.

A. The Commission Should Immediately Increase the National Television Ownership Cap and Set a Schedule for Phasing Out the Rule Over Time.

The current rule limiting station ownership to reaching 35% of American television homes is the current incarnation of a rule originally enacted in 1941.²¹ For the last 61 years, first the rule of five, then of seven, then of twelve, and finally the 35% cap have controlled the growth of national television station group ownership. The question now before the Commission, however, is whether any reason remains to continue to

11113, 11113, 11117 (1999) (describing Commission goal of promulgating clear rules that are easy to understand and administer).

²⁰ See, e.g., Jim Rutenberg, *Fewer Media Owners, More Media Choices*, NEW YORK TIMES, December 2, 2002, available at <http://www.nytimes.com/2002/12/02/business/media/02MEDI.html>.

²¹ See *Broadcast Services Other than Standard Broadcast*, 6 Fed. Reg. 2282, 2284-85 (May 6, 1941).

exercise that control. More specifically, Section 202(h) requires the Commission to decide whether a numerical ownership cap on national broadcast ownership is necessary to promote the Commission's policy goals of competition, diversity, and localism or whether it now is appropriate to allow market forces to achieve these goals free from regulation. Paxson submits that local and national media markets have matured such that continuing the national ownership rules will no longer promote the Commission's goals, but instead will act as an artificial constraint of broadcasters' ability to compete with other media owners that do not face these types of restrictions.

1. The National Ownership Is No Longer Necessary in the Public Interest.

Regardless of how the Commission analyzes the national and local media markets, it must find that diversity and competition have triumphed and a healthy dose of localism continues to be served. A narrow focus on the broadcast television market reveals that consumers have far more choice in terms of both local and national program providers than at any time in the past. There now are 1,714 local broadcast television stations, 568 Class A television stations and 2,127 low power television stations. Each of these stations operates pursuant to a license that requires them to satisfy the Commission's public-interest oriented and local service requirements.²² The

²² See, e.g., 47 C.F.R. §§ 73.670 (children's programming commercial limits), 73.671 (children's educational and informational programming requirements); 73.3526(a)(11) (FCC issues oriented programming requirements). The Commission has requested comment on whether it should replace its ownership rules with additional behavioral regulation governing local broadcasters' operations. *Ownership NPRM*, ¶ 49. Paxson opposes such additional regulation and believes that current regulations are sufficient to guarantee that the needs of local communities are met. Paxson does, however, support the Commission's recent, more aggressive stance toward enforcement of the indecency regulations. Again, however, Paxson believes that the market eventually will eliminate the gratuitous sex, violence, and foul language that characterizes much network