media consolidation, including concerns that such consolidation would result in a significant loss of viewpoint diversity, and affect competition from all entities, including small entities. The Commission shares these concerns and believes that the rules adopted in the Order serve our public interest goals, take account of and protect the vibrant media marketplace, including the continued viability of small entities, and comply with our statutory responsibilities and limits.

23. The decisions made in the Order reduce or remove regulatory restrictions for all entities, including small entities. The Commission also adopts waiver processes that will enable licensees to seek relief from the impact of the rules in appropriate circumstances. Additionally, we are grandfathering existing combinations, both intra- and inter-media, that would not comply with the new regulations. This will prevent the harmful economic impact of forced divesture at fire-sale prices that would have been burdensome to all affected licensees, including small entities. Also, the Commission generally elects to establish bright-line ownership rules rather than case-by-case determinations. This will reduce the delay, cost, and uncertainty that sometimes accompanies case-by-case reviews. This is of special interest to small entities as such costs could weigh disproportionately on small businesses if the subject matter of the proposed transaction is a substantial portion of the small business's total assets. Generally speaking, by adopting bright-line rules rather than a case-by-case approach, the Commission takes action that will benefit small businesses by lowering transaction costs and increasing regulatory certainty

24. **Local TV Multiple Ownership Rule (Paragraphs 132-234).** The Order modifies the current local TV multiple ownership rule to permit an entity to have an attributable interest in two television stations in markets with 17 or fewer stations; and up to three stations in markets with 18 or more stations, provided that no more than one of the stations in the combination is ranked among the top four in terms of audience share. As a result of the top four-ranked standard, combinations in markets with fewer than five stations are not permitted. The Order eliminates the provision of the current rule that permits combinations of two television stations that do not have overlapping signal contours. Because of mandatory carriage of television broadcast stations by multichannel video programming distributors, the geographic market in which a station competes is generally its Nielsen Designated Market Area (DMA), rather than its over-the-air service area. Therefore all proposed stations combinations will be subject to the restrictions described above, without regard to contour overlap.

25. Commenters proposing elimination or relaxation of the local TV multiple ownership rule argue that the rule is no longer "necessary in the public interest" because it prevents broadcasters from achieving efficiencies that will allow them to compete more effectively with other media outlets and to provide improved services to the public. Several commenters contend that this is especially true for broadcasters in small and mid-sized markets. The Commission agrees that, by limiting common ownership of television stations in local markets where at least eight independently owned TV stations would remain post merger, the current rule prohibits mergers that would result in efficiencies that will benefit the public interest, especially mergers in small and mid-sized markets. The modifications to the rule adopted in the Order will permit broadcasters in more small and mid-sized markets, including small entities, to combine and thereby achieve such efficiencies. The modified rule accounts for the competitive realities faced by broadcasters in small and medium markets. Although the modified rule ensures that there will be at least six competitors in markets with 12 or more television stations, in markets with 11 or fewer television stations the Order permits higher levels of concentration in light of the differences in the economics of broadcasting in smaller markets The top four – ranked restriction of the modified local TV ownership rule also protects small entities by preventing the largest firms in a given local market from combining to achieve excessive market power. By prohibiting combinations involving stations with the largest audience shares, the restriction protects against potential harm to broadcasters with smaller market shares, including small entities.

26. The Order also addresses competitive challenges faced by broadcasters in small markets through modified waiver standards. The Order modifies the standards for rule waiver requests involving failed, failing, and unbuilt local television stations by removing the requirement to demonstrate that there is no reasonably available out-of-market buyer. The Order further adopts two additional waiver standards. First, it provides for consideration of requests for waiver of the top four-ranked prohibition of the local TV ownership rule in markets with 11 or fewer TV stations where an applicant can show that the public interest benefits of a proposed combination outweigh potential harms to competition, diversity, and localism. In evaluating such waiver requests, the Commission also will account for the diminished reach of UHF stations by considering whether the proposed combination involves a UHF station. Reduced audience reach diminishes UHF stations' impact on diversity and competition in local markets. Because this standard applies only in smaller markets, it may benefit smaller entities that would otherwise be unable to combine under the current rule. In addition, because it will account for competitive disparities faced by UHF stations, it will benefit small entities that may own such stations. The Order also provides guidelines for waivers for combinations involving stations that do not have overlapping signal contours and are not carried in the same geographic area by MVPDs.

27 The Commission received a proposal that, if the local TV multiple ownership rule is relaxed, the Commission require periodic certification by owners of same-market combinations that they are not engaged in certain types of anticompetitive conduct that would adversely affect smaller broadcasters in their markets. The Commission denies this proposal, on grounds that the modified local television ownership rule does not increase the likelihood that broadcasters will engage in anticompetitive conduct. The Order notes that, if broadcasters engage in anticompetitive conduct that is illegal under antitrust statutes, remedies are available pursuant to those statutes. In addition, an antitrust law violation would be considered as part of the Commission's character qualifications review in connection with any renewal, assignment, or transfer of a license.

28. The Commission, as discussed in paragraphs 209-220 of the Order, received several suggestions for modifying the local TV multiple ownership rule, but concludes that, as compared to the modified rule, the proposals advanced by commenters are more likely to result in anomalies and inconsistencies or will otherwise fail to serve our policy goals. Examining each proposal in turn, the Order concludes that these proposals would permit unacceptable levels of concentration in local markets or would permit combinations among top four-ranked stations, which are likely to result in competitive harm, with no offsetting public interest benefits. One commenter, the National Association of Broadcasters (NAB) proposes a "10/10" alternative that would permit combinations where at least one of the stations has had, on average over the course of the year, an all-day audience share of 10 or less. NAB maintains that its proposal would provided needed financial relief for struggling stations in small and medium markets and those that are lower rated, and, by prohibiting combinations of leading stations, would effectuate the Commission's diversity and competition goals The Commission dismisses this proposal, finding that the proposal would permit mergers between financially strong stations, including top four-ranked stations, in a significant number of markets, and offers no justification for using 10 as a threshold. The Order finds that, rather than allowing combinations involving top four-ranked stations as a general rule, consideration of waivers of the top four-ranked restriction in smaller markets on a case-by-case basis, as described above, will better effectuate its policy goals, and will address the concerns of broadcasters in smaller markets, including small entities operating in such markets.

29. **Local Radio Ownership Rule (Paragraphs 235- 326).** The local radio ownership rule limits the number of commercial radio stations overall and the number of commercial radio stations in a service (AM or FM) that a party may own in a local market. The Commission finds that the numerical limits in the current rule are "necessary in the public interest," but finds that the rule must be modified to

change the method for defining radio markets and to count noncommercial stations in the market. The Order thus modifies the rule by adopting a market definition that reflects more accurately the competitive impact of proposed radio station combinations, and by providing that the Commission will count non-commercial radio stations in calculating market size. The Order also makes joint sales agreements (JSAs) attributable for purposes of determining compliance with the local radio ownership rule and adopts "grandfathering" rules and procedures to address any existing station ownership patterns or JSAs that may cause a party to be out of compliance with the modified rule. The Commission dismisses requests to repeal the local radio ownership rule. Commenters favoring repeal argue that, for example, the rule is unjustified because consolidation has resulted in efficiencies and has produced significant public interest benefits. While the Commission does not dispute that a certain level of consolidation of radio stations can improve the ability of a group owner to make investments that benefit the public, we seek to ensure that radio stations outside of the dominant groups, including small entities can remain viable and, beyond that, can prosper. Other commenters dispute these contentions, expressing concern that, in a concentrated market, dominant radio station groups can exercise market power to attract revenue at the expense of the small owner. As a result, they argue, the small owner has greater difficulty obtaining the revenue it needs to develop and broadcast attractive programming and to compete generally against the dominant station groups. Although the Commission declines to pass on the competitive situation in any particular radio market in the context of this proceeding, the concerns raised by the latter commenters comport with the competition analysis that underlies this Order and supports our decision not to repeal the local radio ownership rule.

30 The Commission decides not to require divestiture of existing combinations of broadcast stations that violate the modified multiple ownership rules adopted in the Order. The Commission determined that the alternative, requiring divestiture, would be too disruptive on the broadcast industry, which includes small broadcast owners. However, the Commission will require that combinations comply with the modified multiple ownership rules upon the assignment or transfer of control of the station group. The Commission rejected the alternative, allowing grandfathered combinations to be sold in perpetuity, because such a decision would disserve our competition goals discussed in the Order. Any spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. It could also give small station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined ownership.

31. The Commission adopts an exception to the prohibition on the transfer of grandfathered combinations that violate the new rules. The Commission will allow transfers to "eligible entities." The Commission defines an eligible entity as a small business consistent with SBA standards for industry groupings. This exception was adopted to facilitate new entry by, and growth of, small businesses in the broadcast industry, and thereby further our goals of diversity of ownership, competition, and localism. The Commission will allow eligible entities to sell grandfathered combinations generally without restriction. The Commission believes that small businesses require greater flexibility than do larger entities for the disposition of assets Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms, compared to that of larger firms that have other revenue streams. To prevent abuse of the policy, the Commission prohibits eligible entities from selling grandfathered combinations acquired after adoption date of the Order unless it has held the combination for a minimum of three years.

32. Paragraphs 316-325 of the Order discuss attribution of JSAs. In this regard, the Commission has the option, supported by some commenters, of maintaining its current policy of that JSAs are not attributable under the Commission's rules. Commenters supporting retention of this exemption argue

that JSAs produce a public interest benefit. Although the Commission continues to believe that JSAs may have some positive effects on the local radio industry, the threat to competition and the potential impact on the influence over the brokered stations and requires attribution. As indicated in paragraph 319 of the Order, the Commission recognizes that JSAs raise concerns regarding the ability of smaller broadcasters to compete, and may negatively affect the health of the local radio industry generally. Therefore, the Order states that the Commission will now count such brokered stations toward the brokering licensee's attributable interest in one or more stations in a local radio market.

33. **Newspaper/broadcast and radio/television cross ownership rules. (Paragraphs 327-481).** Based on the extensive record in this proceeding, the Commission finds that neither the current nationwide prohibition on common ownership of daily newspapers and broadcast outlets in the same market, nor our cross-service restriction on commonly owned radio and television outlets in the same market, is "necessary in the public interest." With respect to both rules, the Commission concludes that the ends sought can be achieved with more precision and with greater deference to First Amendment interests by modifying the rules into a single set of cross media limits. The modified rules adopted in the Order are, in sum, designed to protect against markets becoming highly concentrated, in a qualitative sense, for diversity purposes.

34. Although our conclusions pertain to markets of all sizes, newspaper-broadcaster combinations may produce tangible public benefits in smaller markets in particular. In this regard, West Virginia Media contends that the cross-ownership restriction impairs coverage of local news and public affairs in small markets by prohibiting combinations that would produce efficiencies and synergies particularly necessary in smaller markets. It argues that the rule may have the unintended effect of stifling local news by prohibiting efficient combinations that would produce better output. We assume that the efficiencies cited by West Virginia Media can benefit small businesses with respect to the production of news and public affairs programming.

35. National Ownership Rules (Paragraphs 499-621). The Order modifies the national TV ownership rule by raising the audience cap from 35% of the country's television households to 45%. The Commission received a significant amount of public comment in this regard and, based on the record, finds that, although retention of a national cap is necessary to limit the percentage of television households that an entity may reach through the station it owns, a cap of 35% is not necessary to preserve the balance of bargaining power between networks and affiliates and may have other drawbacks. The Commission believes that the current affiliate/network dynamic is beneficial to viewers and should be preserved and that eliminating the cap altogether would shift the balance of power with respect to programming decisions toward the national broadcast networks in a way that would disserve the Commission's localism policy But the evidence suggests that 35% is overly restrictive and that the cap may safely be raised and the benefits of wider network station ownership achieved without disturbing either this balance or affiliates' ability to preempt network programming.

36. The Order cites three primary reasons for settling on the 45% cap: (1) given that the Commission is interested in finding a point at which the balance of bargaining power between networks and affiliates is roughly equal, a national audience reach cap of approximately half of all homes is appropriate; (2) because the Commission has some concern about allowing significant new aggregation of network power absent more compelling evidence regarding the possible effects of that aggregation above current limits and in light of the fact that Congress raised the ownership cap by ten percentage points in 1996, the Commission is inclined to take a similarly incremental approach; and (3) a 45% cap will allow some, but not unconstrained, growth for each of the top largest network owners. Permitting the networks a modest amount of growth will enable them to compete more effectively with cable and DBS operators and may help preserve free, over-the-air television by reducing the likelihood that

networks will migrate expensive programming to their cable networks. The Order retains the 50% UHF discount when calculating a television station owner's national reach, which could benefit small businesses by encouraging the emergence of new broadcast networks. The Order sunsets the application of the UHF discount for the stations owned by the top four broadcast networks when the digital transition is completed on a market by market basis.

37. The Commission retains the dual network rule, which permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top-four" networks, finding that the rule is "necessary in the public interest" to promote competition and localism. The Order concludes that a top-four network merger would give rise to competitive concerns that the merged firm would be able to reduce its program purchases and/or the price it pays for programming, and that this would in turn harm viewers through reduction in program output, program choices, program quality, and innovation. Further, a top-four network merger would harm localism by providing the networks with undue economic leverage over their affiliates.

38. **Minority and Women Proposals (Paragraphs 46-52).** MMTC proposes a dozen business and regulatory initiatives that "would go a long way toward increasing entry into the communications industry by minorities."[28] MMTC's initiatives include: (1) equity for specific and contemplated future acquisitions; (2) enhanced outreach and access to debt financing by major financial institutions; (3) investments in institutions specializing in minority and small business financing; (4) cash and in-kind assistance to programs that train future minority media owners; (5) creation of a business planning center that would work one-on-one with minority entrepreneurs as they develop business plans and strategies, seek financing, and pursue acquisitions; (6) executive loans, and engineers on loan, to minority owned companies and applicants, (7) enhanced access to broadcast transactions through sellers undertaking early solicitations of qualified minority new entrants and affording them the same opportunities to perform early due diligence as the sellers afford to established non-minority owned companies; (8) nondiscrimination provisions in advertising sales contracts; (9) incubation and mentoring of future minority owners; (10) enactment of tax deferral legislation designed to foster minority ownership; (11) examination of how to promote minority ownership as an integral part of all FCC general media rulemaking proceedings; and (12) ongoing longitudinal research on minority ownership trends, conducted by the FCC, NTIA, or both[29]; (13) sales to certain minority or small businesses as alternatives to divestitures.

39 These comments contain many creative proposals to advance minority and female ownership. Clearly, a more thorough exploration of these issues, which will allow us to craft specifically tailored rules that will withstand judicial scrutiny, is warranted.[30] Therefore, we will issue a Notice of Proposed Rulemaking to address these issues and incorporate comments on these issues received in this proceeding into that proceeding

40. We do, however, see significant immediate merit in MMTC's proposal regarding the transfer of media properties that collectively exceed our radio ownership cap. MMTC recommends that the

[28] MMTC Nov. 5, 2002 Comments at Tab 10, "Twelve Minority Ownership Solutions."

[29] *Id*

[30] *See Adarand Constructors Inc v Pena*, 515 U S. 200, 227 (1995) (holding that all racial classifications imposed by a governmental agency must be analyzed by reviewing courts under strict scrutiny, and are constitutional "only if they are narrowly tailored measures that further compelling governmental interests").

Commission generally forbid the wholesale transfer of media outlets that exceed our ownership rules except where the purchaser qualifies as a "socially and economically disadvantaged business (SDB)."[31] MMTC defines SDBs as the definition contained in legislation recently introduced by U.S. Senator John McCain.[32] As discussed in the Grandfathering and Transition Procedures, Local Ownership Rules Section VI(D) V infra, we agree with MMTC that the limited exception to a "no transfer" policy for above-cap combinations would serve the public interest. We agree with MMTC that the benefits to competition and diversity of a limited exception allowing entities to sell above-cap combinations to eligible small entities outweigh the potential harms of allowing the above-cap combination to remain intact Greater participation in communications markets by small businesses, including those owned by minorities and women, has the potential to strengthen competition and diversity in those markets. It will expand the pool of potential competitors in media markets and should bring new competitive strategies and approaches by broadcast station owners in ways that benefit consumers in those markets.

41 In addition, MMTC proposes that we adopt an "equal transactional opportunity" rule similar in some respects to our EEO requirements.[33] While such a rule is worthy of further exploration, we decline to adopt a rule without further consideration of its efficacy as well as any direct or inadvertent effects on the value and alienability of broadcast licenses. We see merit in encouraging transparency in dealmaking and transaction brokerage, consistent with business realities. We also reiterate that discriminatory actions in this, and any other context, is contrary to the public interest. For these reasons, we intend to refer the question of how best to ensure that interested buyers are aware of broadcast properties for sale to the Advisory Committee on Diversity for further inquiry and will carefully review any recommendations this Committee may proffer. As soon as the Commission receives authorization to form this committee we will ask it to make consideration of this issue among its top priorities.[34]

42. Report to Congress. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress pursuant to the SBREFA.[35] In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.[36]

[31] MMTC Comments at 107. *See also* NAB Reply Comments at 44 ("Although NAB would go further, so that station owners would be allowed to transfer properly formed station combinations freely to any purchaser, whether an SDB or not, NAB does not oppose MMTC's proposal.").

[32] "Telecommunications Ownership Diversification Act of 2003," S.267, 108th Congress, 1st Sess.

[33] MMTC Comments at 115-120

[34] We anticipate that the Committee will make recommendations on ways to improve our regulatory programs designed to enhance new entry into broadcasting

[35] *See* 5 U.S C. § 801(a)(1)(A).

[36] *See* 5 U.S C § 604(b)

APPENDIX H
RULE CHANGES

47 CFR Part 73 is amended to read as follows:

PART 73 – RADIO BROADCAST SERVICES

The authority citations for part 73 continue to read as follows:

Authority· 47 U.S C. §§ 154, 303, 334, and 336.

Section 73.3555 is amended by revising paragraphs (a) and (b), removing paragraphs (c) and (d), and adding a new paragraph (c); by redesignating paragraphs (e) and (f) as (d) and (e) and revising paragraph (d); by retaining all notes in force, revising Notes (1), 2(i)(2)(ii), 2(j), 4, 5, 6 and 7, and by adding new Notes 2(k), 11 and 12 to read as follows:

§ 73.3555 Multiple ownership.

(a) (1) Local radio ownership rule. A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and noncommercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and noncommercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM), provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless the combination of stations comprises not more than one AM and one FM station.

(b) Local television multiple ownership rule

(1) For purposes of this section, a television station's market shall be defined as the Designated Market Area (DMA) to which it is assigned by Nielsen Media Research or any successor entity at the time the application to acquire or construct the station(s) is filed. Puerto Rico, Guam, and the U.S. Virgin Islands each will be considered a single market.

(2) An entity may have a cognizable interest in more than one full-power commercial television broadcast station in the same DMA in accordance with the following conditions and limits:

(i) at the time the application to acquire or construct the station(s) is filed, no more than one of the stations that will be attributed to such entity is ranked among the top four stations in the DMA, based on the most recent all-day (9:00 a m.-midnight) audience share, as measured by Nielsen Media Research or by any comparable professional, accepted audience ratings service; and

(ii) (A) Subject to (2)(i) above, in a DMA with 17 or fewer full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 2 commercial television broadcast stations; or

(B) Subject to (2)(i) above, in a DMA with 18 or more full-power commercial and noncommercial television broadcast stations, an entity may have a cognizable interest in no more than 3 commercial television broadcast stations.

(c) Cross-Media Limits. Cross-ownership of a daily newspaper and commercial broadcast stations, or of commercial broadcast radio and television stations, is permitted without limitation except as follows:

(1) In Nielsen Designated Market Areas (DMAs) to which three or fewer full-power commercial and noncommercial educational television stations are assigned, no newspaper/broadcast or radio/television cross-ownership is permitted.

(2) In DMAs to which at least four but not more than eight full-power commercial and noncommercial educational television stations are assigned, an entity that directly or indirectly owns, operates or controls a daily newspaper may have a cognizable interest in either: (i) one, but not more than one, commercial television station in combination with radio stations up to 50% of the applicable local radio limit for the market, or (ii) radio stations up to 100% of the applicable local radio limit if it does not have a cognizable interest in a television station in the market

(3) The foregoing limits on newspaper/broadcast cross-ownership do not apply to any new daily newspaper inaugurated by a broadcaster.

(d) National television multiple ownership rule. (1) No license for a commercial television broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors having a cognizable interest in television stations which have an aggregate national audience reach exceeding forty-five (45) percent.

(2) For purposes of this paragraph (d):

(i) National audience reach means the total number of television households in the Nielsen Designated Market Areas (DMAs) in which the relevant stations are located divided by the total national television households as measured by DMA data at the time of a grant, transfer, or assignment of a license. For purposes of making this calculation, UHF television stations shall be attributed with 50 percent of the television households in their DMA market.

(ii) No market shall be counted more than once in making this calculation

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Note 1 to § 73.3555: The words "cognizable interest" as used herein include any interest, direct or indirect, that allows a person or entity to own, operate or control, or that otherwise provides an attributable interest in, a broadcast station.

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Note 2(i)(2)(ii) to § 73.3555: The interest holder supplies over fifteen percent of the total weekly broadcast programming hours of the station in which the interest is held. For purposes of applying this paragraph, the term, "market," will be defined as it is defined under the specific multiple ownership rule or cross-media limit that is being applied, except that for television stations, the term "market," will be defined by reference to the definition contained in the local television multiple ownership rule contained in paragraph (b) of this section.

Note 2(j) to § 73.3555: "Time brokerage" (also known as "local marketing") is the sale by a licensee of discrete blocks of time to a "broker" that supplies the programming to fill that time and sells the commercial spot announcements in it.

(1) Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(2) Where two television stations are both located in the same market, as defined in the local television ownership rule contained in paragraph (b) of this section, and a party (including all parties under common control) with a cognizable interest in one such station brokers more than 15 percent of the broadcast time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (b) and (c) of this section. This limitation shall apply regardless of the source of the brokered programming supplied by the party to the brokered station.

(3) Every time brokerage agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the provisions of paragraphs (b) and (c) of this section if the brokering station is a television station or with paragraphs (a) and (c) if the brokering station is a radio station.

Note 2(k) to § 73.3555: "Joint Sales Agreement" is an agreement with a licensee of a "brokered station" that authorizes a "broker" to sell advertising time for the "brokered station."

(1) Where two radio stations are both located in the same market, as defined for purposes of the local radio ownership rule contained in paragraph (a) of this section, and a party (including all parties under common control) with a cognizable interest in one such station sells more than 15 percent of the advertising time per week of the other such station, that party shall be treated as if it has an interest in the brokered station subject to the limitations set forth in paragraphs (a) and (c) of this section.

(2) Every joint sales agreement of the type described in this Note shall be undertaken only pursuant to a signed written agreement that shall contain a certification by the licensee or permittee of the brokered station verifying that it maintains ultimate control over the station's facilities, including, specifically, control over station finances, personnel and programming, and by the brokering station that the agreement complies with the limitations set forth in paragraphs (a) and (c) of this section.

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Note 4 to § 73.3555: Paragraphs (a) through (c) of this section will not be applied so as to require divestiture, by any licensee, of existing facilities, and will not apply to applications for assignment of license or transfer of control filed in accordance with § 73.3540(f) or § 73.3541(b), or to applications for assignment of license or transfer of control to heirs or legatees by will or intestacy, if no new or increased concentration of ownership would be created among commonly owned, operated or controlled media properties. Paragraphs (a) through (c) will apply to all applications for new stations, to all other applications for assignment or transfer, to all applications for major changes to existing stations, and to applications for minor changes to existing stations that implement an approved change in an FM radio station's community of license or create new or increased concentration of ownership among commonly owned, operated or controlled media properties. Commonly owned, operated or controlled media properties that do not comply with paragraphs (a) through (c) of this section may not be assigned or transferred to a single person, group or entity, except as provided above in this Note or in the Report and Order in Docket No 02-277, released July 2, 2003 (FCC 03-127).

Note 5 to §73.3555: Paragraphs (b) and (c) of this section will not be applied to cases involving television stations that are "satellite" operations. Such cases will be considered in accordance with the analysis set forth in the Report and Order in MM Docket No. 87- 8, FCC 91-182 (released July 8, 1991), in order to determine whether common ownership, operation, or control of the stations in question would be in the public interest. An authorized and operating "satellite" television station may subsequently become a "non-satellite" station under the circumstances described in the aforementioned Report and Order in MM Docket No. 87-8. A cognizable interest in such "non-satellite" television stations may be retained by the existing interest-holder even if that interest would be impermissible under § 73.3555(b) or (c). However, such "non-satellite" station may not be transferred or assigned to a single person, group, or entity except as provided for by § 73.3555(b) and (c).

Note 6 to § 73.3555: For purposes of paragraph (c) of this section a daily newspaper is one that is published four or more days per week, is in the dominant language of the market in which it is published, and is circulated generally in the community of publication. A college newspaper is not considered as being circulated generally.

Note 7 to § 73.3555: The Commission will entertain applications to waive the restrictions in paragraph (b) of this section (the local television multiple ownership rule) on a case-by-case basis. We will entertain waiver requests as follows:

(1) If one of the broadcast stations involved is a "failed" station that has not been in operation due to financial distress for at least four consecutive months immediately prior to the application, or is a debtor in an involuntary bankruptcy or insolvency proceeding at the time of the application.

(2) If one of the television stations involved is a "failing" station that has an all-day audience share of no more than four per cent; the station has had negative cash flow for three consecutive years immediately

prior to the application; and consolidation of the two stations would result in tangible and verifiable public interest benefits that outweigh any harm to competition and diversity.

(3) If the combination will result in the construction of an unbuilt station. The permittee of the unbuilt station must demonstrate that it has made reasonable efforts to construct but has been unable to do so.

(4) If the signals of the stations in a proposed combination: (a) do not have overlapping Grade B contours, and (b) have not been carried, via DBS or cable, to any of the same geographic areas within the past year.

(5) For paragraph (b)(2)(i) of this section only (the top four-ranked restriction), if the stations in a proposed combination are in a market with 11 or fewer full-power television stations, we will consider waivers pursuant to criteria described in the Report and Order in MB Docket No. 02-277, released July 2, 2003 (FCC 03-127).

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Note 11 to § 73.3555: For purposes of paragraph (c) of this section: (1) for radio/newspaper combinations, the Cross-Media Limit is triggered when the newspaper's community of publication is completely encompassed by: (A) for AM radio stations, the predicted or measured 2mV/m contour computed in accordance with § 73 183 or § 73 186 of the Commission's Rules; (B) for FM stations, the predicted 1 mV/m contour computed in accordance with § 73.313 of the Commission's Rules; and (2) for television/newspaper combinations, the Cross-Media Limit is triggered when the newspaper's community of publication is located within the same Nielsen Designated Market Area to which the television station is assigned.

Note 12 to § 73.3555: For purposes of paragraph (c) of this section, for television/radio combinations, the rule is triggered when the radio station's community of license is located within the Nielsen Designated Market Area to which the television station is assigned.

43. Section 73.3613 is amended by revising paragraph (d) and redesignating it paragraph (d)(1), adding a new paragraph (d)(2), and revising paragraph (e) to read as follows:

§ 73.3613 Filing of contracts.

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(d)(1) Time brokerage agreements (also known as local marketing agreements): Time brokerage agreements involving radio stations where the licensee (including all parties under common ownership) is the brokering entity, the brokering and brokered stations are both in the same market as defined in the local radio multiple ownership rule contained in § 73.3555(a), and more than 15 percent of the time of the brokered station, on a weekly basis is brokered by that licensee; time brokerage agreements involving television stations where the licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both licensed to the same market as defined in the local television multiple ownership rule contained in § 73.3555(b), and more than 15 percent of the time of the brokered station, on a weekly basis, is brokered by that licensee; time brokerage agreements involving radio or television stations that would be attributable to the licensee under § 73.3555 Note 2(i). Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(d)(2) Joint sales agreements: Joint sales agreements involving radio stations where the licensee (including all parties under common control) is the brokering entity, the brokering and brokered stations are both in the same market as defined in the local radio multiple ownership rule contained in § 73.3555(a), and more than 15 percent of the advertising time of the brokered station on a weekly basis is brokered by that licensee. Confidential or proprietary information may be redacted where appropriate but such information shall be made available for inspection upon request by the FCC.

(e) The following contracts, agreements or understandings need not be filed but shall be kept at the station and made available for inspection upon request by the FCC; subchannel leasing agreements for Subsidiary Communications Authorization operation, franchise/leasing agreements for operation of telecommunications services on the television vertical blanking interval and in the visual signal; time sales contracts with the same sponsor for 4 or more hours per day, except where the length of the events (such as athletic contests, musical programs and special events) broadcast pursuant to the contract is not under control of the station; and contracts with chief operators.

44. Section 73.5007 is amended by revising paragraphs (b)(2)(i), (b)(2)(ii), (b)(2)(iii), and (b)(3)(i), (b)(3)(ii), and (b)(3)(iv to read as follows:

§ 73.5007 Designated entity provisions.

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(b)***

(2)***

(i) AM broadcast station – principal community contour (see § 73.24(i));
(ii) FM Broadcast station – principal community contour (see § 73.315(a));
(iii) Television broadcast station – television Grade B or equivalent contour (see § 73.683(a) for analog TV and § 73.622(e) for DTV);

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(3)***

(i) AM broadcast station – principal community contour (see § 73.24(i));
(ii) FM broadcast station – principal community contour (see § 73.315(a));
(iii) ***
(iv) Television broadcast station – television Grade B or equivalent contour (see § 73.683(a) for analog TV and § 73.622(e) for DTV).

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APPENDIX I
INITIAL REGULATORY FLEXIBILITY ANALYSIS

1. As required by the Regulatory Flexibility Act (RFA),[43] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rulemaking ("Notice"). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the Notice. The Commission will send a copy of the Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[44] In addition, the Notice and the IRFA (or summaries thereof) will be published in the Federal Register.[45]

2. The Commission will send a copy of the Notice, including this IRFA to the Chief Counsel for Advocacy of the SBA. A copy of the Notice and the IRFA (or summaries thereof) will also be published in the Federal Register.[46]

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

3. Section 202(h) of the Telecommunications Act of 1996 (1996 Act) requires the Commission to review all of its broadcast ownership rules every two years commencing in 1998 ("Biennial Review"), and to determine whether any of these rules are necessary in the public interest as the result of competition. The 1996 Act also requires the Commission to repeal or modify any regulation it determines to be no longer in the public interest. In the 2002 Biennial Report and Order, the Commission concluded that the numerical limits in the local radio ownership rule are necessary in the public interest to protect competition in local radio markets. We also concluded that the rule in its current form did not promote the public interest as it relates to competition, in part, because the current methodology for defining radio markets is conceptually flawed as a means to protect competition in local radio markets. Thus, the Commission revised the present method of determining the dimensions of radio markets and/or of counting the stations available in those markets. The new geographic based approach better serves the public interest, reflects true markets in which radio stations compete, and better effectuates Congressional intent when it adopted the radio ownership limits in 1996. In the 2002 Biennial Report and Order, the Commission adopted a geography-based approach using Arbitron-defined markets. However, the Commission found that the current record provides insufficient information about appropriate boundaries for areas located outside of Arbitron defined areas. This Notice is designed to solicit comment on proposals to define radio markets outside of Arbitron defined areas.

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

[44] *See* 5 U.S.C § 603(a)

[45] *See id*

[46] *See* 5 U.S C. § 604(b)

B. Legal Basis

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

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

5 The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[47] The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental entity under Section 3 of the Small Business Act.[48] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[49] A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[50]

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

7. The SBA defines a radio broadcast entity that has $6 million or less in annual receipts as a small business.[51] Business concerns included in this industry are those "primarily engaged in broadcasting aural programs by radio to the public.[52] According to Commission staff review of the BIA Publications, Inc., Master Access Radio Analyzer Database, as of May 16, 2003, about 10,427 of the 10,945 commercial radio stations in the United States have revenue of $6 million or less. We

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[47] 5 U.S.C § 603(b)(3)

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

[49] *Id*

[50] 15 U.S.C § 632.

[51] *See* OMB, North American Industry Classification System· United States, 1997, at 509 (1997) (Radio Stations) (NAICS code 513111, which was changed to code 515112 in October 2002).

[52] *Id*

note, however, that many radio stations are affiliated with much larger corporations with much higher revenue, and that in assessing whether a business concern qualifies as small under the above definition, such business (control) affiliations[53] are included.[54] Our estimate, therefore likely overstates the number of small businesses that might be affected by any changes to the ownership rules.

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

8 The Notice proposes to modify the definition of radio markets outside of Arbitron defined areas The action, depending on the definition ultimately adopted, would modify the instructions and the multiple ownership showing currently required for the following forms: (1) FCC Form 315, Application for Consent to Transfer Control of Entity Holding Broadcast Station Construction Permit or License; (2) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License; and (3) FCC Form 301, Application for Construction Permit For Commercial Broadcast Stations. The impact of these changes will be the same on all entities. Whether compliance will take more, less, or the same amount of time and money, will depend on the definition adopted

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

9. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[55]

10 We are directed under law to consider alternative means to achieve our stated objectives.[56] In the 2002 Biennial Report and Order, the Commission considered and rejected alternatives to defining radio markets through the rulemaking process. Specifically, the Commission found that determining radio markets on a case-by-case basis would create significant regulatory uncertainty and impose substantial burdens on small-market radio broadcasters, many of which are small businesses The Commission concluded that the better course is to develop radio market definitions for non-Metro areas through the rulemaking process. The Commission found that this would be the most expeditious way to define local radio market boundaries for the entire country.

[53] "Concerns are affiliates of each other when one concern controls or has the power to control the other, or a third party or parties controls or has the power to control both" 13 C F.R. § 121.103(a)(1).

[54] "SBA counts the receipts or employees of the concern whose size is at issue and those of all its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit, in determining the concern's size." 13 C.F R § 121(a)(4)

[55] 5 U.S C. § 603(c).

[56] 5 U.S.C. § 603(b)

Defining radio markets also would give all interested parties, including small businesses, clear guidance about how the Commission will analyze a proposed radio station combination in non-Arbitron areas.

11. The Notice invites comment on how to modify the current methodology for determining radio markets for areas of the country outside of Arbitron defined areas. The Commission has a number of alternatives on which it invites comment. We particularly invite comment on how the various alternatives might impact on small businesses and on alternatives outside the Notice which might minimize any burden on small businesses.

12. The Commission seeks comments on how to draw specific market boundaries in areas of the country not located in the Arbitron Metros and on what factors should we consider in grouping radio stations into markets. The Commission proposes that radio markets be county–based. One alternative, if that proposal is adopted, would be to use a different standard in the western United States where counties are significantly larger. The Commission could also divide counties into separate radio markets in certain circumstances. Small businesses should benefit from a county-based system because county boundaries are clear, stable, and well-known, and are commonly used for market definition purposes (see next paragraph).

13. The Commission also seeks comment on whether to rely on any pre-existing market definitions in delineating radio markets for non-Metro areas. For example, the Commission could base its Metro definitions on the Metropolitan Area (MA) definitions developed by OMB. The Commission asks how the radio market should be define in areas that MAs do not cover, and notes one possible alternative would be to establish geographic markets based on the location, distribution, and density of populated area. The Commission could also treat Cellular Market Areas as the relevant geographic market for radio. Both of these potential market definitions are county-based. We do not believe that the selection of one pre-defined market definition over another generally will have an impact on small business. We invite comment on this question.

14. The market definition we establish would result in small business owners being subject to a market definition that is different than the one to which they currently are subject. As a result, the number of radio stations that they may own, and the number of radio stations that their competitors may own, under the local radio ownership rule may change. We encourage parties to use this opportunity submit specific information that would the Commission in properly delineating the boundaries of the local radio markets in which they are interested.

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

15. None

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re. *2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*

I. INTRODUCTION

The *Order* we adopt today represents the culmination of a twenty month process that was required by the framework Congress crafted in the 1996 Telecommunications Act.[1] In the now infamous section 202(h), Congress ordered the Commission to review its broadcast ownership regulations every two years to "determine whether any of such rules are necessary in the public interest *as a result of competition*." Further, we must "repeal or modify any regulation" we determine no longer serves the public interest in its current form.[2]

Against this statutory mandate, the Commission has been working tirelessly towards achieving three critically important goals: (1) Reinstating legally enforceable broadcast ownership limits that promote diversity, localism and competition (replacing those that have been struck down by the courts); (2) Building modern rules that take proper account of the explosion of new media outlets for news, information and entertainment, rather than perpetuate the graying rules of a bygone black and white era; and (3) Striking a careful balance that does not unduly limit transactions that promote the public interest, while ensuring that no company can monopolize the medium. I am confident we achieved these goals in the *Order* we adopt today.

I must punctuate one irreducible point: Keeping the rules exactly as they are, as some so stridently suggest, was not a viable option. Without today's surgery, the rules would assuredly have met a swift death. As the only member of the Commission here during the last biennial review, I watched first hand as the Commission bent to political pressure and left many rules unchanged. Nearly all were rejected by the court because of our failure to apply the statute faithfully. I have been committed to not repeating that error, for I believe the stakes are perilously high. Leaving things unaltered, regardless of changes in the competitive landscape, is a course that only Congress can legitimately chart.

II. STATUTORY MANDATE AND COURT DECISIONS

Critical to understanding our actions, is an understanding of the court's view of Congress' charge to the Commission in the 1996 Telecommunications Act. In *Fox*, the D.C.

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996).
[2] *Id* at Section 202(h).

Circuit held that *"Congress set in motion a process to deregulate the structure of the broadcast and cable television industries."*[3]

It noted in support that in the 1996 Act, Congress:

- Repealed the statutory telephone/cable cross-ownership ban;
- Repealed the statutory cable/broadcast cross-ownership ban;
- Repealed the limits on cable/network cross-ownership;
- Eliminated the national ownership restrictions in radio;
- Relaxed the local ownership restrictions in radio;
- Eased the "Dual Network" rule;
- Directed the Commission to eliminate the national cap upon the number of television stations any one entity may own; and
- Directed the Commission to increase the national television ownership cap from 25 percent to 35 percent.[4]

As to the biennial review provision, the court stated clearly that the Commission was required by Congress *"to continue the process of deregulation"* by reviewing each of the Commission's ownership rules every two years.[5] It is this Congressional framework that guides the Commission's work, and it was the prior Commission's attempt to maintain rules in their current form and not heed the Congressional direction that led to so many of our broadcast rules being struck down, or remanded. As an administrative agency, the Commission is constitutionally bound to comply with Congress' direction, as expressed by the text of the statute.[6]

Recent court decisions have established a high hurdle for the Commission to maintain a given broadcast ownership regulation. As interpreted by the D. C. Circuit in the 2002 *Fox* and *Sinclair* cases, Section 202(h) requires the Commission to study and report on the *current* status of competition.[7] Indeed, the court's guidance suggests that the survival of any prospective broadcast ownership rule depends on this Commission's ability to justify those rules adequately with record evidence in light of the current competitive landscape, and to ensure that the rules are analytically consistent with each other. The implications of the court decisions were clear—failure to justify the necessity of any broadcast ownership rule will result in the rule being struck down.

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[3] *Fox Television Stations, Inc v FCC*, 280 F 3d 1027, 1033 (D.C. Cir 2002)
[4] *Id*
[5] *Id* (emphasis added)
[6] *See Bowen v Georgetown University Hospital*, 488 U.S. 204, 208 (1988).
[7] See *Fox Television Stations, Inc* , 280 F.3d 1027 (D.C Cir. 2002), *See also Sinclair Broadcast Group, Inc v FCC*, 284 F 3d 148 (D C Cir 2002)

Given the court's requirement that we consider the current competitive market, keeping all of the rules in their current form simply could not be justified as "*necessary in the public interest.*" Those rules failed to account for the dramatic changes in the media landscape over the last several decades, and suffered from inconsistency and incoherency that could not be squared with the statute or the court decisions without modification.

III. FCC PROCEDURAL ACTION

The court admonitions demonstrated the need to rebuild our decaying broadcast ownership regulations from the ground up. Like any reconstruction project, our task began with the need to lay a solid foundation to support our structural regulations. Our cement was not the blind intuitions of generations past—but facts that would lay the foundation for a sustainable set of broadcast ownership regulations built around, and for, today's media marketplace.

Because of the critically important nature of this proceeding, we set out to lay this foundation by embarking on an exhaustive review, indeed the most comprehensive in the agency's history. It began in earnest 20 months ago when I created the Media Ownership Working Group, which commissioned twelve studies, examining how Americans use the media for different purposes and how media markets function. This was the first time the agency actually sought out the American people to see how they access news. The group's work formed the initial foundation of our review. More importantly, those studies signaled that this review, unlike prior ones, would be rigorous, analytically consistent and based on record evidence.

For the first time, we took on the challenge of updating and reconciling years of piecemeal, decades old, ownership regulations in a rigorous and comprehensive way. We put out five *Notices of Proposed Rulemakings* and *Public Notices*[8] during that time and gave the public over fifteen months of open comment time to assist the Commission in its fact-gathering efforts. Approximately ten public fora were held on the subject, thanks in large measure to the efforts of Commissioners Copps and Adelstein, who could then bring those perspectives to the Commission's internal deliberations.

I am enormously pleased the public accepted our challenge. The record in this proceeding is deeper and more insightful than any I have seen in my six years of service at the

[8] *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001). 47 C F.R § 73.3555(a); *Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001) 47 C F R. § 73.3555(d), *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*, 17 FCC Rcd 26294 (2002); *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,* 17 FCC Rcd 19140 (2002); *FCC Media Bureau Adopts Procedures for Public Access to Data Underlying Media Ownership Studies and Extends Comment Deadlines for 2002 Biennial Regulatory Review of Commission's Media Ownership Rules*, 17 FCC Rcd 22172 (2002)

Commission. I take pride in the fact that our decisions rest on an extraordinarily strong empirical record. For the agency charged with preserving the free flow of information in our democracy, the public should expect no less from us.

IV. THE MODERN MEDIA MARKETPLACE

Our fact-gathering effort demonstrated that today's media marketplace is marked by abundance. Since 1960 there has been an explosion of media outlets throughout the country. Even in small towns like Burlington, Vermont, the number of voices—including cable, satellite radio, TV stations and newspapers has increased over 250 percent during the last 40 years. Independent ownership of those outlets is also far more diverse, with 140 percent more owners today than in 1960.[9]

In 1960—the "Golden Age of Television"—if you missed the ½ hour evening newscast, you were out of luck. In 1980, it was no different. But today, news and public affairs programming—the fuel of our democratic society—is overflowing. There used to be three broadcast networks, each with 30 minutes of news daily. Today, there are *three 24 hour all-news networks*, seven broadcast networks, and over 300 cable networks. And local broadcasters are bringing the American public more local news than at any point in history.

What does this abundance mean for the American people? It means more programming, more choice and more control in the hands of citizens. At any given moment our citizens have access to scores of TV networks devoted to movies, dramatic series, sports, news and educational programming, both for adults and children. In short, niche programming to satisfy almost any of our citizens' diverse tastes. Americans are clearly responding to this plethora of choice, as over 85 percent of television households now pay for either cable or direct broadcast satellite service providers.[10] This dramatic shift is evidenced by the fact that in 2000, for the first time in history, cable TV programming exceeded the prime time viewing of broadcast television, and in 2002 -- another first -- cable viewing exceeded 50 percent of the prime time audience.[11]

The Internet is also having a profound impact on the ever-increasing desire of our citizenry to inform themselves and to do so using a wide variety of sources. Google news service (http://news.google.com) brings information from 4,500 news sources to one's finger tips from around the world, all with the click of a mouse. As demonstrated by this proceeding, diverse and antagonistic voices use the Internet daily to reach the American people. Whether it is the *New York Times* editorial page, Slate Magazine (http://slate.msn.com), or Joe Citizen using email to let his views be known to the Commission, or the use by organizations such as

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[9] See Scott Roberts, Jane Frenette and Dione Sterns, Federal Communications Commission (Media Ownership Working Group Study # 1), *A Comparison of Media Outlets and Owners for Ten Selected Markets: 1960, 1980, 2000*, Sept. 2002.

[10] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd. 26,901 (2002) at 3.

[11] *Id* at 5

MoveOn.org[12] to perform outreach to citizens, the Internet is putting the tools of democracy in the hands of speakers and listeners more and more each day.

I have not cited cable television and the Internet by accident. Their contribution to the marketplace of ideas is not linear, it is exponential. Cable and the Internet explode the model for viewpoint diversity in the media. Diversity-by-appointment has vanished. Now, the media makes itself available on *our* schedule, as much or as little as we want, when we want. In sum, citizens have more choice and more control over what they see, hear or read, than at any other time in history. Indeed, the greatest challenge for speakers is getting the attention of an increasingly fragmented audience of viewers and listeners. This is a powerful paradigm shift in the American media system, and it is having a tremendous impact on our democracy.

V. THE PUBLIC INTEREST REMAINS PROTECTED

The marketplace changes mentioned above were only the beginning, not the end of our inquiry. In this *Order,* the Commission has, for the first time, more precisely defined our policy goals and developed metrics to actually measure market responsiveness to those goals. We adopted a more sophisticated way to measure the competitiveness of media markets; the robustness of the marketplace of ideas; and the responsiveness of broadcasters to local needs. The new broadcast ownership limits adopted today, are carefully balanced to foster a vibrant marketplace of ideas, promote vigorous competition and ensure that broadcasters continue to serve the interests of their local communities.

The most important public interest benefit, however, is that we have reinstated meaningful limits that are once again enforceable - the existing rules largely having been taken out of action, suffering from their judicially-delivered wounds. And, I believe we faithfully implemented the Congressional scheme.

A. Protecting Viewpoint Diversity

Today, we strongly reaffirm our core value of limiting broadcast ownership to promote viewpoint diversity. The Commission, recognizing that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public," continues to rely on the preservation of multiple independent owners as the best way to ensure a robust exchange of news, information and ideas among Americans.[13]

As discussed in detail below, we developed a "Diversity Index" to more precisely define

[12] "MoveOn is a catalyst for a new kind of grassroots involvement, supporting busy but concerned citizens in finding their political voice. Our international network of more than 2,000,000 online activists is one of the most effective and responsive outlets for democratic participation available today." (visited June 18, 2003) <http://www.moveon.org/about/#s1>.

[13] *Turner Broadcasting System, Inc v FCC*, 512 U S. 622, 663-64 (1994).

viewpoint diversity. The Index is "consumer centric," in that it is built on data about how Americans use different media to obtain news and information. Thus, while recognizing that viewpoint diversity is as elusive as it is cherished, we have developed this methodological tool to more coherently and systematically analyze the marketplace of ideas.

B. Enhancing Competition

Our new broadcast ownership regulations reaffirm our long standing commitment to promoting competition by ensuring pro-competitive market structures. Although the primary concern of antitrust analysis is ensuring economic efficiency through the operation of a competitive market structure, we found the Commission's public interest standard brings a closer focus to the American public. Thus, we have a public interest responsibility to ensure that broadcasting markets remain competitive so that the benefits of competition, including lower prices, innovation and improved service are made available to Americans.

To measure the competitiveness of the media market, we recognize that cable and satellite TV compete with traditional over-the-air broadcasting. We also found that pro-competitive ownership limits must account for the fact that broadcast TV revenue relies exclusively on advertising; whereas cable and satellite TV services have both advertising and subscription revenue streams.

C. Localism Affirmed as Important Policy Goal

We again affirm the goal of promoting localism through limits on ownership of broadcast outlets. We sought to promote localism to the greatest extent possible through broadcast ownership limits that are aligned with stations' incentives to serve the needs and interests of their local communities.

To analyze localism in broadcasting markets, we relied on two measures; local stations' selection of programming that is responsive to local needs and interests, and local news quantity and quality. Program selection is an important function of broadcast television licensees and the record contains data on how different types of station owners perform. A second measure of localism is the quantity and quality of local news and public affairs programming by different types of television station owners.

D. Importance of Promoting Minority and Female Ownership

We embrace our longstanding objective of encouraging greater ownership of broadcast stations by women and minorities. We further this objective by creating greater opportunities for new entrants in the broadcasting industry by carving out special transactional opportunities for small businesses, many of which are owned by minorities and women.

In addition, Minority Media Telecommunications Council made a number of creative and thoughtful proposals to advance minority and female ownership. These recommendations warrant a more thorough exploration; thus, I am pleased we have referred them for a Further Notice of Proposed Rule Making and to the Advisory Committee on Diversity to recommend policies that will withstand judicial scrutiny.

VI. LOCAL AND NATIONAL REGULATORY FRAMEWORK WILL PROMOTE DIVERSITY, COMPETITION, AND LOCALISM

The modified ownership rules we adopt today provide a new comprehensive national and local regulatory framework that will serve the public interest by promoting diversity, localism and competition. The local character of broadcast stations is a hallmark of the American media system. The *Order* modifies the local television ownership rule; strengthens the local radio ownership rule by modifying the local radio market definition; adopts a set of cross-media limits to replace the newspaper/broadcast and radio/television cross ownership rules; modifies the national television ownership rule; and retains the dual network rule.

A. Local TV and Radio Limits Enhance Competition and Preserve Viewpoint Diversity

Our new local television and local radio limits, for example, are both premised on well-established competition theory and are intended to preserve healthy and robust competition among broadcasters in each service. The rules rest on the antitrust principle that six independent, equally-sized firms in a market generally will protect competition. In smaller markets, we recognize the need to strike a different balance that permits somewhat greater consolidation among radio and television stations.

We determined that our prior local television multiple ownership rule could not be justified as necessary to promote competition because it failed to reflect the significant competition now faced by local broadcasters from cable and satellite TV services. Our revised local television limit is the *first* TV ownership rule to acknowledge that competition. This new rule will enhance competition in local markets by allowing broadcast television stations to compete more effectively not only against other broadcast stations, but also against cable and/or satellite channels in that local market. In addition, the record demonstrates that these same market combinations will serve the public interest through improved or expanded services such as local news and public affairs programming and facilitating the transition to digital television.

Because of the enduring competitive strength of the top four stations in virtually all markets, we prohibited mergers among stations ranked in the top four. Importantly, this ban will also promote viewpoint diversity by preventing mergers among those local stations that typically produce news in local markets.

We also found that our current limits on local radio ownership continue to be necessary to promote competition among local radio stations and we reaffirm the caps set forth by

Congress in the 1996 Telecommunications Act. The *Order* tightens the radio rules in one important respect—we concluded that the current method for defining radio markets was not in the public interest and thus needed to be modified. We found the current definition for radio markets which relies on the signal contour of the commonly owned stations, is unsound and produces anomalous and irrational results, undermining the purpose of the rule. We therefore adopted a geographic based market definition, which is a more rational means for protecting competition in local markets. For example, we fixed the vaunted case of Minot, North Dakota. The number of stations in Minot will be reduced by 65% under our reformed market definition, thereby limiting the number any single entity can own.

By promoting competition through the local television and radio rules, the Commission recognized that the rules may result in a number of situations where current ownership arrangements exceed ownership limits. In such cases we made a limited exception to permit sales of grandfathered station combinations to small businesses, many of which are minority or female owned.

Finally, by ensuring that numerous competitors remain within each of the radio and television services, we also ensure that multiple independently owned outlets for viewpoint diversity will remain in every local market. Because local TV and radio ownership limits cannot protect against losses in diversity that might result from combinations of different media, we adopt the cross-media limits discussed below.

B. Cross Media Limits Promote Diversity and Localism

The agency's most challenging consistency issue in this proceeding was viewpoint diversity. The *Sinclair* court criticized as facially inconsistent the Commission's two separate "voice" tests for two different broadcast ownership rules.[14] Under the Local Television Rule, the Commission considered only other television stations to be "voices," whereas the TV-Radio Cross-Ownership Rule considered television stations, radio stations, the local cable system, and each daily newspaper to be a "voice."[15] The court directed the Commission to reconcile the inconsistency between the two "voice" tests.[16]

The Commission has sought to do this by developing and applying a Diversity Index (DI) to its broadcast ownership rules. The DI is modeled on the Herfindahl-Hirschman Index (HHI) used by antitrust authorities to measure the degree of concentration in a given economic market. The DI seeks to measure concentration in local media markets using many of the same principles as the HHI – identifying market participants, assigning market shares, and squaring those market shares to arrive at a measure of concentration.

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[14] *See Sinclair Broadcast Group, Inc*, 284 F.3d at 164.
[15] *See 1998 Biennial Regulatory Review*, Biennial Review Report, 15 FCC Rcd 11058 (2000)
[16] *See Sinclair Broadcast Group, Inc*, 284 F.3d at 164

The principal shortcoming of our prior diversity analysis was the failure to capture in a reasonable way the relative importance of different outlets for purposes of viewpoint diversity. For example, the television-radio cross ownership rule considered each outlet in a city to be exactly equal, while the local TV ownership rule looked only to the number of television stations in the local market. Both formulations are clearly flawed - one equates the viewpoint impact of a small AM station in Washington, DC with the viewpoint impact of the *Washington Post*. The other blinds itself to all sources of diversity other than local broadcast television stations.

Our Diversity Index dramatically improves upon those frameworks by assigning weights to different outlet types. The weights are based on the results of an agency-commissioned survey of 3,000 Americans regarding the relative importance of different outlets for news.[17] Beyond that, the Index counts the number of each type of outlet in the market in calculating the extent of viewpoint "concentration" in a market. It does not attempt to capture the specific viewpoint impact of different outlet types by looking to the outlet's content, which can fluctuate in type and popularity from year to year. Instead it seeks only to distinguish between the relative speech power of different classes of media – radio, newspapers, broadcast television stations, the Internet, etc. In weighting different outlets according to their relative value to citizens, the DI provides the Commission with a far more consistent and rational metric for evaluating each ownership limit and, where necessary, establishing new limits.

Using the DI, we concluded that neither the blanket ban on newspaper-broadcast combinations nor the radio-television cross-ownership prohibition could be justified as necessary in the public interest in light of the abundance of diverse sources available to citizens for their news consumption. Furthermore, the clear public interest benefits of these combinations were revealed by evidence in the record. We found that greater participation by newspaper publishers in the television and radio business would actually enhance, not harm, diversity and localism. The record demonstrated that where newspaper-broadcast television combinations were allowed, those televisions stations have produced dramatically better news coverage in terms of quantity (over 50 percent more news) and quality (outpacing non-newspaper owned television stations in news awards).[18]

Therefore, we replaced the television-radio and newspaper-broadcast rules with a set of Cross-Media Limits. These limits are designed to protect viewpoint diversity by ensuring that no company, or group of companies, can control an inordinate share of media outlets in a local market. We established these limits by using the DI to measure the availability of key media outlets in markets of various sizes. We concluded that there were three tiers of markets in terms of "viewpoint diversity" concentration, each warranting different regulatory treatment.

[17] *See* Federal Communications Commission (Media Ownership Working Group Study # 8), *Consumer Survey on Media Usage*, Sept 2002.

[18] See Thomas C Spavins, Loretta Dennison, Jane Frenette and Scott Roberts, Federal Communications Commission (Media Ownership Working Group Study # 7), *The Measurement of Local Television News* and *Public Affairs Programs*, Sept 2002.

C. *The Modified National Cap Protects Localism and the Dual Network Prohibition Protects Localism and Competition*

We found that a national TV ownership limit on the percentage of potential TV households the networks may reach continues to be necessary to promote localism. We determined that a national ownership cap serves localism by preserving a balance of bargaining power between the networks and their affiliates; ensuring the affiliates play a meaningful role in the selection of programming that serves the interests of their local audiences. Although the record supports retention of a national ownership limit, it does not support a cap of 35 percent.

Record data showed the 35 percent limit did not have any meaningful effect on the negotiating power between individual networks and their affiliates with respect to program-by-program preemption levels. The record revealed that affiliates of the largest network-owners (CBS and Fox, at 39 percent and 38 percent national reach respectively) preempt to an equal or greater extent than do affiliates of ABC, with a national reach of only 23 percent.[19] Thus, networks with the greatest station reach possess no greater bargaining power with regard to preemption than the network with the smallest station reach.

The record also indicates that the national cap at its current level has other drawbacks as well. We found the national cap restrains the networks from serving additional communities with more local news and public affairs programming. Network owned-and-operated stations served their local communities better with respect to news production, as those stations aired more local news programming than the affiliates.[20] Furthermore, we concluded that permitting the networks a modest amount of growth will enable them to compete more effectively with cable and satellite TV operators and may reduce the migration of expensive programming to their cable networks.

In balancing these competing interests, we concluded that the national ownership limit should be raised from 35 percent to a 45 percent limit. In reaching this decision, we attempted to balance the record evidence which demonstrates the affiliates apply positive pressure to the networks, making them more responsive on a local level, against the network owned stations' documented contribution to local news, as well as the public interest benefit of keeping high quality programming on free over the air TV. The court has recognized that setting caps is inherently a line drawing exercise and held that "the Commission 'has wide discretion to determine where to draw administrative lines,' and, therefore, the court will reverse that choice only for abuse of discretion."[21] We draw the line at 45 percent, as it approximates an equal measure of potential audience reach between networks and affiliates.

[19] *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, National Ownership Rules*, adopted June 2, 2003 at ¶ 583.
[20] *Id* at ¶ ¶ 565-566.
[21] *Sinclair Broadcasting Group, Inc*, 284 F.3d at 162 (citing *AT& T Corp v FCC*, 220 F 3d 607, 627 (D C. Cir. 2000))

We also decided to maintain the "UHF Discount" when calculating a company's national reach because it currently serves the public interest. First, more than 40 million Americans still access only free, over-the-air television. Second, evidence in the record demonstrates that UHF stations have a smaller signal reach of approximately 44 miles; whereas VHF stations have a reach between 72 and 76 miles.[22] This has a very real impact on UHF stations' ability to compete. The VHF stations' competitive advantage is also evidenced by the fact that VHF affiliates of the top four broadcast networks have approximately 50 percent higher ratings than UHF affiliates of the top four networks.[23] Third, the UHF Discount has promoted the entry of new broadcast networks into the market. These new networks have improved consumer choice and program diversity for all Americans, including those with and without cable and satellite TV service. We concluded though, that when the transition to digital television is complete, the UHF discount will be eliminated for the stations owned by the four largest broadcast networks. We will determine, in a future biennial review, whether to include any other networks and station group owners in the UHF discount sunset. We drew this distinction to ensure that the resolution of the UHF discount issue will properly account for the goal of encouraging the formation of new, over-the-air broadcast networks.

We also found the existing dual network prohibition continues to be necessary to promote competition in the national television advertising and program acquisition markets. The rule also promotes localism by preserving the balance of negotiating power between networks and affiliates. In addition, an aspect of bargaining power is the ability of an affiliate to switch affiliation if its needs are not being met by the network. A merger of two or more networks would reduce the opportunity for affiliates to go elsewhere.

VII. CONCLUSION

This critical review has been an exhaustive one. The Commission has struggled with a difficult conundrum; building an adequate record, satisfying the administrative burden of the Section 202(h) mandate, and ultimately justifying its rules before the courts that have expressed growing impatience with irrational and indefensible ownership rules. Five years ago, at the outset of the last completed biennial review, I stated "[i]t is indeed time to take a sober and realistic look at our broadcast ownership rules in light of the current competitive communications environment."[24] This was an exceedingly difficult charge and I am proud that we have finally met this challenge head on.

[22] *2002 Biennial Regulatory Review*, *supra* note 19, ¶ 586

[23] Letter from John Feore, Counsel for Paxson Communications Corporation, to Marlene Dortch, Secretary, FCC (May 7, 2003), Att at 9 (stating that VHF-based affiliates received a 9 6 prime time rating compared to UHF affiliates' 6 4 rating).

[24] Separate statement from Michael Powell, *Federal Communications Commission*, regarding the *1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules and other Rules Adopted Pursuant to*

I recognize, too, that by doing so we have forced an important debate about media regulation and the role of media in our society, a debate I welcome and encourage. I note, however, that much of the discussion (and hyperbole) has focused almost exclusively on content, not the structural broadcast ownership rules that are the subject of this proceeding. Much has been made about violent television, sexually explicit content, and "bland" or "coarse" programming. All of this anxiety about TV fare has been rolled into this proceeding as an indictment against media companies. Apparently, the notion seems to be that if we don't like the programming being aired, we can cure the problem by regulating the size and structure of broadcast television and radio. This, in my view, is not only a mistaken assumption, but is dangerously offensive to the principles of the First Amendment. As public officials we are not, nor should we be, empowered to adopt "must watch regulation."

It is easy to ridicule what we see on television and hear on the radio (or pine for what is absent) as the drivel dished out by corporate titans. It is less palatable to do so when one peers through this portrait and sees instead an indictment of the freely made program selections of our citizens. Put simply, a television company makes money by putting on programming that attracts the largest audience share possible. This is the inherent nature of the "mass media." We have heard much about five media companies controlling virtually everything we watch, hear and read. If this were true, I too would be alarmed. This statistic, however, has been purposely misstated to create hysteria around this proceeding. The truth is the "Big Five" control only 25 percent of the *channel capacity*, or an average of five percent each. These companies' alleged assault against the public interest is that they happen to produce the majority of programming that people like to watch. Apparently though, this is the same programming that some find objectionable and prefer we not see. In my view, popular freely chosen programming is not a policy question and the American public would undoubtedly find it deeply troubling that unelected government officials would want to make these decisions on their behalf.

The government has a legitimate interest in promoting a wide range of viewpoints from which to choose, but it strays illegitimately if it endeavors to regulate out of distaste for the viewpoints, or programs around which the populace has chosen to congregate. To urge the Commission to do so, as many at bottom have, would re-awaken King George. This would surely disturb the slumber of our forefathers.

Section 202 of the Telecommunications Act of 1996 (Mar 12, 1998) <http://www fcc gov/commissioners/powell/mkp_statements_1998.html>.

SEPARATE STATEMENT OF COMMISSONER KATHLEEN Q. ABERNATHY

Re: 2002 Biennial Regulatory Review, Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act or 1996, Cross-ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, Order and Further Notice of Proposed Rulemaking (adopted June 2, 2003).

Today the Commission faces another historic decision affecting free speech where it must decide whether to be guided by facts or by fears. For literally years, this Commission has struggled in a highly politicized environment through Democratic and Republican administrations to strike an appropriate balance in its media ownership rules. Many have argued that this proceeding is about the core of our democracy — and I agree. And nothing is more fundamental to democracy than following the rule of law as given to us by Congress and as interpreted by the courts. Our success will ultimately be judged not by a public relations assessment, but by the rigorous demands of judicial review. It is a heavy responsibility and I believe we have exercised it well.

I. Legal Framework of Today's Decision

I began my review of the FCC's media ownership rules with three inescapable realities: the Telecommunications Act of 1996, the judicial decisions interpreting it, and the U.S. Constitution.

First, the Act requires the Commission to conduct a review every two years to determine which of our broadcast ownership rules can be justified in the modern world of media. For those who want us to delay this proceeding, I cannot do it. In fact, we are already five months behind schedule and therefore unfaithful to congressional intent.

Second, judicial decisions in this area have struck down every broadcast ownership rule the courts have reviewed since the 1996 Act. Each time the courts found the FCC had failed to justify the limits it continued to place on broadcast ownership. For those who want the Commission to maintain all the rules in their current form, you are asking me to defy the federal courts. This I will not do.

Third, the First Amendment to the Constitution protects the rights of free speech and free press and tells me that, in my capacity as an FCC Commissioner, I cannot tell the American people what they should believe, what they should read, or what they should watch or listen to for their own good. Any restraint placed on broadcasters' free speech rights must be a reasonable means to further our public interest goals. The federal court opinions specifically tell me that any restrictions we place on ownership must be based on concrete evidence — not on fear and speculation about hypothetical media monopolies intent on exercising some type of Vulcan mind control over the American people.

Within these parameters, I want to emphasize that we have undertaken an enormous study of the reality of the modern broadcasting marketplace. We have accumulated a record of unprecedented breadth and depth, including hundreds of thousands of public comments, 12 independent studies, and testimony from a number of broadcast ownership hearings. Ken Ferree and the Media Bureau staff have invested countless hours in research and analysis.

II. Ownership Restrictions

Based on my review of the record, I am persuaded that several ownership limitations — in their current form or with some modifications — remain "necessary in the public interest"[1] to preserve competition, localism, and diversity.[2] These rules thus meet the legal standard demanded by Congress and the courts. Rules that do not meet this standard may not be retained.

First, in the process of retaining our current limits on ownership of radio stations, we have tightened our definition of radio markets to ensure that it more accurately reflects the level of competition in these markets. Second, our television ownership rules continue to maintain the prohibition of mergers among any of the top four networks. Third, for other matters such as restrictions on local television ownership, the national television cap, and our cross-ownership rules, we have preserved structural limitations in revised forms.[3] We have modified these restrictions because, not only do the former rules fail to promote competition, localism, and diversity, but they may actually be *harming* these goals. For example, the record has demonstrated that combinations of two television stations actually produce more local news. The record also demonstrates that newspaper-owned television stations provide more news and public affairs programming and receive more industry awards for such programming than unaffiliated stations. If we kept our existing rules unchanged, we would artificially restrict such benefits to local communities with no countervailing advantages. I emphasize that our

[1] Pub L. No. 104-104, § 202(h), 110 Stat. 56 (1996), *see also* 47 U.S.C § 161; Joint Statement of Chairman Michael K Powell and Commissioner Kathleen Q Abernathy in *2002 Biennial Regulatory Review,* FCC 02-342, GC Docket No. 02-390, (rel. March 14, 2003) (explaining that biennial review standard in section 11 and section 202(h) is best interpreted as requiring an affirmative justification of covered rules based on the same substantive standard that applies upon adoption of the rules in the first instance).

[2] I find it curious that Commissioner Martin in his Separate Statement sought fit to detail a series of post-adoption edits; to my mind, these are clarifications, rather than vote-affecting "bottom line" changes.

[3] While I would have preferred to address cross-media mergers in small to middle markets on a case-by-case basis, I support the decisions we reached in this Order. Indeed, bright-line rules have the benefit of providing more certainty to the marketplace and increase the transparency of our process

restrictions are grounded in actual evidence of harm, as required by the courts, not in merely hypothetical fears.[4]

III. Facts and Fears

Those who oppose our decision will continue to fear a mythical media monopoly that will descend upon our media landscape without any regulatory review of its power. But the reality is that under today's order there will continue to be hundreds of pathways into the American home in the average American city or town. The reality is that we are continuing to impose a national television ownership cap in recognition of the important role affiliates play in promoting localism, competition, and diversity. The reality is that today's order will prevent media companies from owning more than one of the top four stations in a market and will similarly forbid consolidation to fewer than six voices in the markets serving the vast majority of Americans. Democracy and civic discourse were not dead in America when there were only three to four stations in most markets in the 1960s and 1970s, and they will surely not be dead in this century when there are, at a minimum, four to six independent broadcasters in most markets, plus hundreds of cable channels and unlimited Internet voices.

Those opposing today's order have also emphasized that four companies air the programming that is chosen by approximately 75 percent of viewers during prime time. To me, the critical fact is that these providers control no more than 25 percent of the broadcast and cable channels in the average home, even apart from the Internet and other pipelines. Given these other viewing options, I can only presume that this means that Americans are watching these providers because they prefer their content, not because they lack alternatives. It would be anathema to the First Amendment to regulate media ownership in an effort to steer consumers toward other programming. By the same token, concerns about the degradation of broadcast content do not justify government manipulation of consumer choice. "Degradation" is just an elitist way of saying programming that one does not like. While I support adopting prophylactic regulations in the interest of ensuring that consumers have ample choice — as we have done today — I refuse to pour one ounce of cement to support a structure that dictates to the American people what they should watch, listen to, or think.

IV. New Initiatives

The defining characteristic of today's decision is balance. As I have said, we have undertaken affirmative steps to retain limits on ownership where they can be shown by actual evidence to promote competition, localism, and diversity. We have resisted merely hypothetical fears. In the process of reaching this balance, we have also taken some additional steps.

[4] Moreover, the modification of these prophylactic rules does not strip us of our continuing obligation to review transfers of media licenses to ensure they are consistent with the public interest.

First, I was concerned that allowing an entity to own more than one television station in a market could decrease the amount of children's educational and informational programming available to families in those communities. I did not want to see the amount and diversity of such programming diminished if stations that are commonly owned in the same market simply re-run the same shows on each station. Accordingly, I am pleased that we have clarified in this Order that commonly owned stations in a market must air distinct children's programming to comply with our rules.

Second, this Order also leads the Commission down a path of providing more opportunities for small businesses, many of which are minority- and woman-owned. The Order restricts transfers of most existing combinations that fall out of compliance with our new rules unless the purchaser is a small broadcaster. In doing so, we are creating new opportunities for participation in broadcasting without threatening diversity or competition in these markets.

Third, I also am pleased that, as part of this decision, we decided to issue a Further Notice of Proposed Rulemaking to explore opportunities to advance ownership by minorities and women in broadcasting. Furthermore, I commend the Chairman on his formation of a Federal Advisory Committee to assist the agency in creating new opportunities for minorities and women in the communications sector.

V. Conclusion

It goes without saying that *none* of us wants to see media ownership concentrated in the hands of a few. While reasonable minds can differ about which particular restrictions might best promote this goal — national ownership caps that vary by only five percentage points, a minimum of six versus eight owners of local television stations in a market, and so forth — we should recognize that these are in fact issues on which reasonable people may disagree. For me, given the rules we adopt today, the breakneck pace of technological development, and the ever-increasing number of pipelines into consumers' homes, it is simply not possible to monopolize the flow of information in today's world. Indeed, the fall of Communism in the 1980's and of military dictatorships in the 1990's shows that diverse viewpoints cannot be suppressed even by authoritarian governments, much less by private media companies.

The net result of our Order is *balance*: We have preserved core values by maintaining safeguards to protect against undue concentration, we have altered rules as necessary to respond to the dramatic changes that have occurred in the marketplace since the adoption of our media ownership rules many years ago, and we have provided a rigorous justification with an exhaustive study of the record. Sometimes the facts have led us to strengthen former restrictions; sometimes they have led us to relax them in part. But in all cases our decisions were based on facts rather than fears. That is what Congress' statute requires, that is what the courts require, and that is what the First Amendment requires.