

**WHEN LAW AND SOCIAL SCIENCE
GO HAND IN GLOVE**

**USAGE AND IMPORTANCE OF LOCAL AND NATIONAL NEWS SOURCES:
CRITICAL QUESTIONS AND ANSWERS FOR MEDIA MARKET ANALYSIS**

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I. INTRODUCTION AND OUTLINE

Social scientists in the media and communications fields should view the recent Appeals Court¹ ruling that overturned the Federal Communications Commission's proposed media ownership rules² as a huge victory and a golden opportunity. Following up on the ruling by the D.C. Circuit Court of Appeals in *Sinclair v. FCC* (2002)³ that demanded the FCC close an empirical gap in its analysis of media markets, the Third Circuit Court of Appeals embraced social science analysis wholeheartedly.

Opponents of the FCC rules, who had used traditional analytic tools and data from the fields of communications and media analysis to show that "the agency spent two years misreading the record, misinterpreting the law and mangling the analysis,"⁴ predicted the outcome. What was less predictable was the depth and clarity of the analysis provided by the Court. Perhaps because this was the second rejection of FCC efforts to rewrite several of the rules on the grounds that the FCC had failed to provide a reasoned, empirical basis for key decisions, the Court felt compelled to lay out a detailed framework for rigorous market structure analysis. It instructed the FCC to carefully measure media audiences, assess media usage, and apply a rigorous understanding of the functions of media in democracy.

This paper shows that, contrary to Chairman Powell's claim that the Court decision "sets near impossible standards for justifying bright-line ownership limits,"⁵ the Court has presented a highly refined road map for charting the media landscape. This presents the results of a survey conducted about six months prior to the Court ruling that was intended to highlight the methodological and conceptual flaws in the FCC analysis, the very flaws that the Court ultimately noted.

With the Court decision, however, the focus should shift from what the FCC did wrong to what the Court recommends is the right way to conduct the analysis. Therefore, this paper proposes a framework for identifying and integrating the necessary data to build an analysis that will pass court scrutiny and applies it to the ten cities for which the FCC did detailed analysis.

Five methodological/substantive issues are highlighted in the paper –

- distinguishing news and public affairs programming from entertainment or distribution of personal opinions,
- focusing on local rather than national news sources,
- assessing the importance of various media,
- consistent identification of media sources, and
- estimation of the audience of various media.

The paper is divided in two parts. Part I describes how the FCC went astray. Section II presents the legal context for the critique of the FCC analysis. It examines both the

substantive goals of media ownership policy and the standard of evidence that an FCC rule must meet. Section III discusses the methodological flaws in the FCC analysis as described by the Court.

Part II presents the approach to solving the problem. Section IV describes how the survey and market data were designed to address the critical mistakes made by the FCC in evaluating the importance of media as sources of news and information. It identifies the data sources and methods used to estimate the size of local media markets, a critical step in market structure analysis completely ignored by the FCC. Section V demonstrates why the FCC approach went astray and proposes a direction for future analysis. It shows that the use of improper media weights and the failure to estimate audience size led the FCC to underestimate the concentration of local news markets and therefore accept many more mergers in many more markets than was justified. The paper concludes with survey evidence that shows that the public perceives local markets very differently than the FCC does.

PART I: DISMANTLING THE DIVERSITY INDEX

II. THE LEGAL CONTEXT

Although the paper focuses on methodological and substantive issues, a quick review of the law is critical for two reasons. Substantively, the law establishes the public policy objectives that set the context for analysis. Procedurally, the law establishes the nature of the evidentiary and analytic support rules require to pass judicial scrutiny.

FIRST AMENDMENT PRINCIPLES

For over sixty years, since the landmark ruling in *Associated Press* (1945),⁶ the Supreme Court has expressed a bold aspiration for the First Amendment in the electronic age. The Court declared that “the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.”⁷ While *Associated Press* was an antitrust, newspaper case, the Court has applied this concept to every form of electronic media involving regulatory law.

In its ruling, the Third Circuit Court chose the most aggressive starting point for evaluating media ownership from a 1978 case in which ownership limits were upheld (*FCC v. Nat’l Citizens Committee For Broadcasting*, 1978). “In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power.”⁸ This picked up the line of reasoning that the D.C. Circuit had adopted in *Sinclair*, where it declared “the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have

an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.”⁹

That this line of cases remains the font of First Amendment jurisprudence was affirmed recently when the Supreme Court cited *Red Lion* (1968) favorably in upholding campaign finance reform.¹⁰ *Red Lion* is cited as the seminal case for broadcast television doctrine. It asserts that “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the government itself or a private licensee.”¹¹ In *Red Lion*, the court elaborated that “the ‘public interest’ in broadcasting clearly encompasses the presentation of vigorous debate of controversial issues of importance and concern to the public”¹² and “the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences.”¹³ A similar sentiment was expressed for cable in *Turner v. FCC* (1994) where the court declared that “[a] diverse and robust marketplace of ideas is the foundation of our democracy.”¹⁴

Moreover, while the FCC Media Ownership Order repeatedly applauded the abundance of choices consumers have as listeners, the Third Circuit Court emphasized that the primary concern of the First Amendment is the ability of citizens to speak. “In *NCCB*, the Court referred to the ‘physical scarcity’ of the spectrum – the fact that many more people would like access to it than can be accommodated. The abundance of non-broadcast media does not render the broadcast spectrum any less scarce.”¹⁵

WRITING REASONABLE RULES

The legal standard for reviewing rules is important because it establishes the quality of the analysis that must be conducted in support of a rule. At the most basic level Congressional intent is important and a Court “may find an agency rule is arbitrary and capricious where the agency has relied on factors which Congress has not intended it to consider...[or] an abuse of discretion, or otherwise not in accordance with the law.”¹⁶ The Court asks whether “the agency examined the relevant data and articulated a satisfactory explanation for its action, including a “rational” connection between the facts found and the choice made or the agency made a clear error in judgment.”¹⁷

At a more complex level, although an expert agency like the FCC is given discretion in writing rules, the Courts will overturn rules if the agency “entirely failed to consider an important aspect of the problem, offered an explanation for its decisions that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”¹⁸ In the case of an exercise such as identifying thresholds for merger review,

the traditional APA standard of review is even more deferential “where the issues involve ‘elusive’ and ‘not easily defined,’ areas such as program diversity in broadcasting.” Yet... a “rationality” standard is appropriate... when an agency has engaged in line-drawing determinations... its decisions

may not be “patently unreasonable” or run counter to the evidence before the agency.¹⁹

Thus, legal practice does not demand (and social science cannot produce) perfection or even great precision in the analysis, but evidence must be substantial, reasoning consistent, choices reasonable and results rational.

THE FCC’S NARROW VIEW OF THE FIRST AMENDMENT LED TO ABSURD ANALYSIS

Unfortunately, the FCC turned its back on this First Amendment jurisprudence. Instead of accepting the challenge of the Supreme Court’s bold aspiration for the First Amendment, the FCC has adopted the narrowest vision imaginable.²⁰ The Commission adopted the broadcasters’ “leak out” view of the public interest under the First Amendment even though the Supreme Court has consistently rejected it. “What really matters,” said the Broadcaster’s leading expert, “with ideas from a political point of view is whether they can be suppressed. But given the importance of interpersonal communications, it is extremely difficult to suppress ideas – they can “leak out” even through small or economically minor media outlets.”²¹

For the broadcasters, the First Amendment is reduced to simple economics. They reject the notion that Congress can pursue public policies that the courts have upheld. Their expert proffered by the broadcasters asks, “Why should the government seek to promote local content as opposed to, and especially at the expense of, any other category of idea?”²² Citizens engaging in political debate disappear, having been replaced by consumers enjoying entertainment. [“T]he commission’s sometime preoccupation with news and public affairs, as distinct from entertainment programming... makes even less sense than localism. First, broadcast news is entertainment – it has to be, at least in part, in order to attract audiences that can be sold to advertisers.²³ The Communications Act disappears and the Commission becomes superfluous, having been devoured by economics interests.²⁴

The FCC’s embrace of the narrow view is explicit and fundamental in the media ownership order. It has declared that it is concerned only with ensuring that ideas can leak out. “In the context of evaluating viewpoint diversity, this approach reflects a measure of the likelihood that some particular viewpoint might be censored or foreclosed, i.e. blocked from transmission to the public.”²⁵ The leak out view of the First Amendment leads to a discourse that looks nothing like the bold aspiration expressed by the Supreme Court. The ideas of the networks owners are likely to be broadcast much more widely than those that leak out. The FCC shrugs this off. If the distribution of media ownership undermines a robust exchange of views, the FCC is unconcerned, declaring:

Nor is it particularly troubling that media properties do not always, or even frequently, avail themselves to others who may hold contrary opinions. Nothing requires them to do so, nor is it necessarily healthy for public debate to pretend as though all ideas are of equal value entitled to equal airing.²⁶

The “leak out” view of the First Amendment led the FCC to assume that all outlets of a particular medium should be given an equal weight. If all that matters is whether an idea can leak out, the size of the audience does not matter. Whispers and shouts are equal in the leak out view. As the Court noted, the impact on empirical analysis is disastrous.

The assumption of equal market shares is inconsistent with the Commission’s overall approach to its Diversity Index and also makes unrealistic assumptions about media outlets’ relative contributions to viewpoint diversity in local markets.

The Commission’s decision to assign equal market shares to outlets within a media type does not jibe with the Commission’s decision to assign relative weights to the different media types themselves, about which it said “we have no reason to believe that all media are of equal importance...” It also negates the Commission’s proffered rationale... to allow it to measure the actual loss of diversity from consolidation by taking into account the actual “diversity importance” of merging parties, something it could not do with a simple “voices” test...

Additionally, there is no dispute that the assignment of equal market shares generates absurd results... A Diversity Index that requires us to accept that a community college television station makes a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America also requires us to abandon both logic and reality.²⁷

Even if the Court had found that the Diversity Index was reasonable, it would still have overturned the rule. The Court found that “the commission did not rationally derive its Cross-Media Limits from the Diversity Index results.”²⁸ It found that “the Cross-Media Limits allow some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed.”²⁹

As blunt as the Court was in its criticism of the Diversity Index, the Court pointed out that “the Commission’s decision not to retain a ban on newspaper/broadcast cross-ownership is justified... and is supported by record evidence.”³⁰ The Court found evidence in the record that “Newspaper/broadcast combinations can promote localism”³¹ and “a blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity.” The Court felt that “[g]iven the Commission’s goal of balancing the public’s interest in competition, localism, and diversity, it reasonably concluded that repealing the cross-ownership ban was necessary to promote competition and localism, while retaining some limits was necessary to ensure diversity.”³² It brushed aside complaints that continuing to regulate cross-media ownership violated the First and Fifth Amendment rights of the media owners.³³

In other words, limits on media ownership are permissible but they must reflect empirical facts and sound analysis.

III. ANALYTIC AND METHODOLOGICAL FLAWS IN THE FCC ORDER

In *Sinclair*, the D.C. Circuit Court had criticized the FCC's rule limiting the ownership of multiple TV stations within a single market because it had counted media "voices" in the same market differently for each of its rules. In reviewing the rule that prevented the holder of a television station license from owning a newspaper in the same market, the FCC had to confront the challenge of combining media in one framework. The FCC responded by adopting a modification of a standard antitrust approach to create a consistent empirical framework for evaluating media outlets in a local area. Where different types of media had to be considered together – e.g. in the question of mergers between newspapers and television stations – the FCC attempted to create a single Diversity Index.

The Court accepted the general antitrust framework and even the idea that a single index could be created, but found the FCC's implementation faulty. "But for all of its efforts, the Commission's Cross-Media Limits employ several irrational assumptions and inconsistencies."³⁴ The Court identified three primary problems in the implementation of the Diversity Index.

- The FCC refused to analyze the actual audience of a media outlet, assuming instead that all outlets within a media type are equal.
- Its weights for each type of media were inconsistent and not based on sound empirical measures.
- The link between the index and the merger approval was tenuous at best.

THE ANTITRUST APPROACH TO MARKET STRUCTURE ANALYSIS

For the purpose of merger analysis, antitrust officials define markets by the substitutability of products.³⁵ Products have to be good substitutes and readily available in a given geographic area to be included in the market.

After the market is defined, the analyst looks at the size of the firms in the market as a first screen in assessing the likely impact of a merger. When the number of firms in a market is small, or a single firm is very large, there is a concern that market power can be exercised. Prices can be raised or quality reduced to increase profits by coordinated or parallel actions among a small number of firms, or the unilateral acts of a single dominant firm.

The level of concentration is calculated by taking the market share of each firm, squaring it and then summing the result for all firms.³⁶ Known as the HHI, this index has an easy interpretation.³⁷ A market that is made up of 10 equal-sized firms will have an HHI of 1000. Each firm has a 10 percent market share. Squaring the share yields 100 points for each firm, times 10 firms (10x10 x 10). A market with 5 equal-sized firms will have an HHI of 2000 (20x20=400 x 5).

Exhibit 1: Describing Market Structures

DEPARTMENT OF JUSTICE MERGER GUIDELINES	TYPE OF MARKET	EQUIVALENTS IN TERMS OF EQUAL SIZED FIRMS	TYPICAL HHI IN MEDIA MARKETS	4-FIRM SHARE
↑	MONOPOLY	1 ^a	5300+	~100
	DUOPOLY	2 ^b	3000 - 5000	~100
HIGHLY CONCENTRATED	TIGHT OLIGOPOLY	5	2000	80
			1800 OR MORE	
MODERATELY CONCENTRATED		6	1667	67
UNCONCENTRATED	LOOSE OLIGOPOLY	10	1000	40 ^c
↓	ATOMISTIC COMPETITION	50	200	8 ^c

a = Antitrust practice finds monopoly firms with market share in the 65% to 75% range. Thus, HHIs in “monopoly markets can be as low as 4200.

b = Duopolies need not be a perfect 50/50 split. Duopolies with a 60/40 split would have a higher HHI.

c = Value falls as the number of firms increases.

Sources: U.S. Department of Justice, *Horizontal Merger Guidelines*, revised April 8, 1997, for a discussion of the HHI thresholds; William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), for a discussion of four firm concentration ratios.

The Department of Justice considers a market with fewer than 10 equal-sized firms to be concentrated (see Exhibit 1). It considers a market with fewer than the equivalent of approximately 5.5-equal sized firms (HHI = 1800) to be highly concentrated. Markets with an HHI between 1000 and 1800 are considered moderately concentrated. A highly concentrated market is called a tight oligopoly.³⁸ A moderately concentrated market is called a loose oligopoly.

It should be noted that the HHI is just one statistical measure of dispersion and there are many others. The HHI has become infused with significance in antitrust because a direct conceptual link between this measure of market structure and the performance of the market can be defined.³⁹ The theoretical link is supported by empirical evidence.⁴⁰

The judicial language on the relationship between ownership and viewpoint diversity and the desire to prevent excessive economic concentration and undue influence is certainly broadly consistent with the rhetoric of antitrust. However, the precise analytic link between the diversity outcomes and the statistical index that have developed in the economics literature does not exist for media. Sufficient qualitative evidence was entered into the record to support the link that the Court accepted the applications of the antitrust approach to media markets for purposes of diversity analysis, but this is an area in need of further study and reinforcement.

THE COURT’S CRITIQUE OF FCC IMPLEMENTATION

The FCC must define a market, measure concentration and establish a principle for rejecting or accepting mergers. To define the market for the purposes of cross media mergers, the FCC endeavored to combine different media (TV, newspapers). It had to decide which media to include and how much weight they should be given.

The Court found that the FCC had not properly weighted the various media. “In converting the HHI to a measure for diversity in local markets, however, the Commission gave too much weight to the Internet as a media outlet.”⁴¹ The Court focused on the handling of the Internet, in part, because of the extensive arguments presented by media owners to the Commission that the Internet had dramatically changed the media landscape. In fact, the mishandling of radio actually has a larger impact. However, viewing the issue through the portal of the Internet provided the Court with the opportunity to present a richly nuanced discussion of the media’s output and function.

The Court drove home the critical factor that diversity comes from independent sources of information and there is very little independent news on the Internet.

There is a critical distinction between websites that are independent sources of local news and websites of local newspapers and broadcast stations that merely republish the information already being reported by the newspaper or broadcast station counterpart. The latter do not present an “independent” viewpoint and thus should not be considered as contributing diversity to local markets.⁴²

The distinction between local and national sources was also emphasized in the Internet discussion.

The Commission does not cite, nor does the record contain, persuasive evidence that there is a significant presence of independent local news sites on the Internet... And the examples the Commission does cite – the Drudge Report and Salon.com – have a national, not local, news focus.^{a/}

^{a/} Moreover, the Drudge Report is an “aggregator” of news stories from other news outlets’ websites and, as such, is not itself normally a “source” of news, national or local.⁴³

The unique characteristics of the “information” that is the object of First Amendment policy and the role of the media also come out here.

Search-engine sponsored web pages such as Yahoo! Local and about.com, which were suggested by commenters as sources of local news and information, may be useful for finding restaurant reviews and concert schedules, but that is not the type of “news and public affairs programming” that the Commission said “was the clearest example of programming that can provide viewpoint diversity.” ...

In terms of content, “the media” provides (to different degrees, depending on the outlet) accuracy and depth in local news in a way that an individual posting in a chat room on a particular issue of local concern does not. But more importantly, media outlets have an entirely different character from individual or organizations’ websites and thus contribute to diversity in an entirely different way. They provide an aggregator function (bringing news/information to one place) as well as a distillation function (making a judgment as to what is interesting, important, entertaining, *etc.*) Individuals... and entities... may use the Internet to disseminate information and opinions about matters of local concern... but ... are not, themselves... “media outlets” for viewpoint-diversity purposes. Like many entities, they just happen to use a particular media outlet – the Internet – to disseminate information. Similarly, advertiser-driven websites such as hvnet.com... hardly contribute to viewpoint diversity.⁴⁴

The reach of the outlet is also important. The Court made this clear in the discussion of the way the FCC treated cable and the Internet. The Court said it chose to “affirm the Commission’s reasoned decision to discount cable. But we think that the same rationale also applies to the Internet.”⁴⁵ The FCC had excluded cable from the local news and information market, since it found that there was little local news available and few such channels reach the public. For example, the FCC found that for many who said they watched cable for news, “cable news channels were probably confused with broadcast network news.”⁴⁶ Moreover, only 10 to 15% of cable systems include channels that provide local and public affairs programming.⁴⁷

A close look at the data showed that the Internet exhibits characteristics that are similar to cable. For example, “62 percent of Internet users get local news from newspaper websites, 39% visit television web sites.”⁴⁸ The FCC’s claim that “the Internet is available everywhere,” was challenged by the fact that “almost 30% of Americans do not have Internet access.”⁴⁹ The Court concluded that “on remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable.”⁵⁰

The question here is one of degree.

METHODOLOGICAL PROBLEMS

Part of the FCC’s problem was caused by weak methodology. The FCC recognized the importance of evaluating the use of the media.⁵¹ In order to address the issue, it commissioned a survey. Yet, the FCC failed to ask the right questions and proceeded to make rules with admittedly faulty data. “Unfortunately, we do not have data on this question specifically with regard to local news and current affairs. The available “primary source” data address local and national news together and do not show that different media have different importance, in the sense that primary usage differs across media.”⁵²

In its effort to identify the most important sources of news, the FCC asked a question that combined national and local news. “What single source do you use most often for local or national news and current affairs?”⁵³ This, of course, destroys the possibility of using this question to specifically assess the importance of local media. Therefore, the FCC fell back on a much weaker question about local sources of news. “What source, if any, have you used in the past 7 days for local news and current affairs?”⁵⁴ Obviously, this question doesn’t necessarily tell anything about what people use or rely upon the most for local news and information. Note, however, that this approach is consistent with the “leak out” view; there is no difference between “any” and “the single most” in that view.

The FCC compounded the problem by mishandling the responses to its weak question. This was an open-ended question in which respondents were allowed multiple responses. Sources they mention first clearly came to their minds. One might infer that what they recall reflects the importance of the sources to them. Unfortunately, the FCC did not simply accept these responses. It followed up with a prompted question directed only at those who did not mention a source.⁴⁰ The FCC asked those people who failed to mention a source whether they had used it. The FCC then combined the answers to the two questions, giving them equal weight. This approach was certain to overweight the less prevalent sources by asking many more people about those sources a second time with a prompted question. This methodology, which treats first and second responses equally, would, of course, be consistent with the leak out theory, since whispers and shouts are equal in importance in that view.

PART II: A RIGOROUS APPROACH TO MEDIA MARKET STRUCTURE ANALYSIS

IV. DATA AND METHOD

SURVEY RESEARCH

The survey we conducted was designed to correct the analytic problems of media weights. We used identical wording to the FCC, but we asked separate questions about national and local sources of news. To distinguish the national from local object of the question, we gave referents in the question. Furthermore, because the criticism of the FCC approach stems in part from reliance on a “weak” question about the frequency of use, which failed to directly address the importance of sources, we asked a second question about each

source that was intended to get at the importance of the sources in determining public opinion. In order to accommodate multiple sources of information, we adopted the approach used by the Pew Research Center for People and the Press⁵⁵ so that primary and secondary sources can be distinguished.

The Interviewer reads the same list of potential sources twice:

Now thinking about national issues, like the Presidential election or the war in Iraq, what single source do you use most often for news and information?

And what do you use second most often?

Which single source is most important in determining your opinion about national issues?

And what source is second most important?

Now thinking about local issues, like the a city council election or school, police and fire department services, what single source do you use most often for news and information?

And what do you use second most often?

Which single source is most important in determining your opinion about local issues?

And what source is second most important?

These survey questions address the problems of weights by distinguishing between national and local sources of news and information. We use the survey responses to define the media weights. The “value” to a viewer, listener or reader is defined as its influence in forming opinions.

While the main focus of the survey was on media sources of news and information, we also asked questions to ascertain how the public views mergers, which were the focal point of the rules. Accordingly, in our survey we asked three questions about the impact of cross-ownership mergers on the local community. They are:

For you and your community, if one company owned a major local TV station and leading daily newspaper, would you say it would be ...very good... somewhat good... no difference... somewhat bad... very bad?

If a major local TV station and leading newspaper were owned by one company in your community, do you think editorial viewpoints would become... much more diverse... a little more diverse... stay the same... a little less diverse... much less diverse?

If a major local TV station and leading newspaper were owned by one company in your community, do you think the variety of points of view in covering local news would become... much more diverse... a little more diverse... stay the same... a little less diverse... much less diverse?

DEFINING GEOGRAPHIC MARKETS

The survey questions address the issue of the “value” of each medium. They do not address their market reach. Thus the survey data must be combined with available data on media markets. To build a general model of media markets we have compiled data on the market shares of all TV stations, daily newspapers, weekly newspapers, and radio stations (see Exhibit 2). Following the Court’s reasoning, the exercise of estimating the size and make-up of the local news and information market is one of identifying which sources of independent local news respondents use.

We followed the FCC’s general approach to geographic market definition, which seems reasonable.⁵⁶ However, unlike the FCC, which ignored the size of the audience of each type of product, we focus on estimating the average daily output of relevant news and information for each media firm in the market. In defining the market on a city-by-city basis, with the household as the unity of analysis, we include the following:

- Households that use television during news day parts on an average daily basis.
- Listeners who tune in news/talk and information channels on a routine basis.
- Daily circulation of newspapers.
- Weekly circulation of newspapers (converted to an average daily basis).
- The percentage of population that uses the Internet on a routine basis.

For the purpose of intensive analysis, we focus on the ten markets that the FCC used to illustrate its index.

Weeklies

Weeklies provide a good example and starting point for how to proceed. We find that weeklies are a surprisingly influential source of local news. However, weeklies are a very targeted source of information. Indeed, they may be influential precisely because they are so targeted. They deal with the micro level detail that is directly relevant to the neighborhood or community. Because they are targeted they are not widely circulated. They are not sold all over a city on newsstands. A city may have a hundred weeklies, but only a few are readily available to the average citizen. Thus, it is important to factor circulation and the geographic reach of the source. We included all the weeklies in the DMA. This overstates the reach of weeklies, since most weeklies are only available in a restricted area. However, the small

Exhibit 2: Constructing the Media Market Measures

Media Weights:

Weighted Average of first and second mentions for usage and influence (Consumer Federation/Consumers Union Survey).

Reach:

Television = All channels in the DMA assumed to reach population in city. Population reached is households using television (HUT) in early evening and late evening day parts (news day parts) from BIA Financial, *Television Market Reports: 2003*. City population from Arbitron (*Market Ranks: Spring 2004*)

HUT (news day parts) x City Population

Dailies = Average daily circulation (*Editor and Publisher Database: 2003; Beacons Newspapers: 2003*)

Weeklies = Average daily circulation (average weekly circulation divided by seven) (*Beacons Newspapers: 2003*)

Radio = Households using news/information/talk programming (AHQ) (Arbitron, *Radio Today: 2004*)

AHQ (News/Info/Talk in the region) x City Population

Internet = Access to the Internet is assumed to be 70% ; 33% of those with Internet access assumed to have routine daily use for news gathering (Madde, Mary, *America's Online Pursuits*, Pew Internet and Life Project, December 2003).

City Population * .7 * .33

Concentration:

Television = Local Commercial share (BIA Financial, *Television Market Reports: 2003*)

Dailies = Average daily circulation (*Editor and Publisher Database: 2003; Beacons Newspapers: 2003*)

Weeklies = Weekly circulation (*Beacons Newspapers: 2003*)

Radio = Revenue market share (Federal Communications Commission, *Radio Industry Review 2002: Trends in Ownership, Formats, and Finance*, Media Ownership Working Group Study 11, September 2002, Appendix D)

Internet: Assumed to be atomistically competitive, 100 equal-sized voices

circulation, particularly when the weekly circulation is converted to daily equivalents to render it comparable to the daily reach of the other media, compensates for this.

For weeklies, we used the average circulation (from the Beacons data base). It is divided by seven to adjust to the daily basis of other media usage. Concentration ratios were calculated based on the total circulation of papers throughout the DMA.

Radio

If weeklies are the most “micro” of the local information sources, radio is likely the next most “micro.” In counting radio stations, we have the added problem that the vast majority of radio stations do not do news. Many of those that do provide news simply read wire service stories. They are not independent sources of local news as defined by the Court.

To estimate the reach of radio news and information dissemination, we used the Arbitron rating for households that listen to news, talk and information.⁵⁷ Arbitron provides this data at the regional level. We multiplied by the population of the city. Concentration ratios were taken from the FCC and converted to the equivalents of equal-sized voices.⁵⁸

Newspapers

In contrast to radio, which is the least news intensive of the media, daily newspapers are predominantly dedicated to news and cover a wider geographic area, usually a city or county.⁵⁹ In an earlier analysis, we found that the daily newspaper circulation in large metropolitan areas tends to be highly differentiated by county. Exhibit 3 shows the figures for the counties in the Los Angeles area, which is one of the least concentrated market in the U.S. We used average daily circulation for newspapers (the Editor and Publisher and Beacon data bases). The FCC defined daily newspaper markets as a city, apparently following Arbitron market areas, so we based the concentration ratio only on the newspapers included in the FCC analysis.

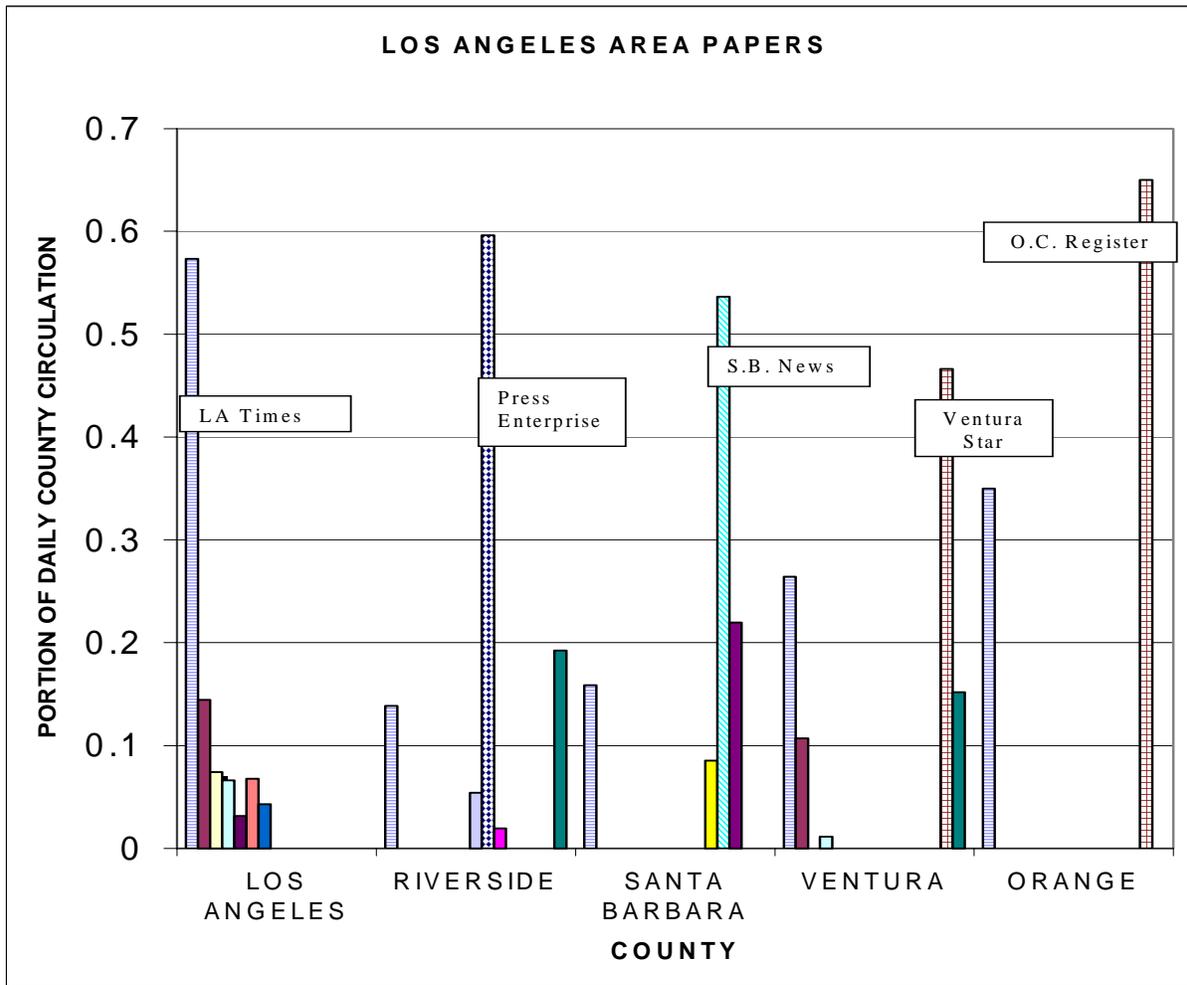
Broadcast Television

Since most households receive their television signals from cable or satellite and local stations have the right to be carried, they tend to be the most “macro” medium. They are available through a wider area, although not all stations are available throughout the Designated Market Area (which is the unit of analysis for the television industry).

However, only about half of all local stations provide news. All TV stations within a designated market area are included, since their signals are generally available. Based on Nielson ratings as reported in *BIA Television Market Report*, 2003, we used households using television (HUT) in the day parts that are usually devoted to news as the base of viewers. We use the HUT figure as the average of the early evening (e.g. 4:00 pm to 6:00 pm eastern) and late evening (e.g. 11:00 pm to 11:30 pm) news day parts. Although this implicitly assumes that all local TV stations provide news, which is not the case, in earlier analysis we have shown that the simple count of broadcasters that provide local news is close to the concentration ratio based on the viewer-based HHI. The largest firms that contribute most to the HHI are likely to be represented in each city in the DMA and they provide news.

The news day part of HUT was multiplied by the city population. The HUT analysis includes noncommercial stations. However, market shares were based on the local commercial audience viewing share as calculated by BIA Financial. This overestimates concentration slightly, since noncommercial stations are excluded.

Exhibit 3: Local Papers Dominate Home Counties



Sources: Eileen Davis Hudson and Mark Fitzgerald, "Capturing Audience Requires a Dragnet," *Editor and Publisher*, October 22, 2001, p. 20. Los Angeles is used as an example because it is the third least concentrated (for newspapers) DMA in the country and the five counties identified above account for 95 percent of the households in the DMA.

Internet

We use the 70 percent figure cited by the Court for penetration of the Internet. Survey evidence indicates that less than one-third of those with Internet access use it for news and information on a daily basis.⁶⁰ The Internet market was assumed to be atomistically competitive, with 100 equal-sized competitors. If ISP market share were used, the number would be closer to 10-equal sized competitors. We conducted the analysis with the Internet included and excluded, since the Court left that question up in the air.

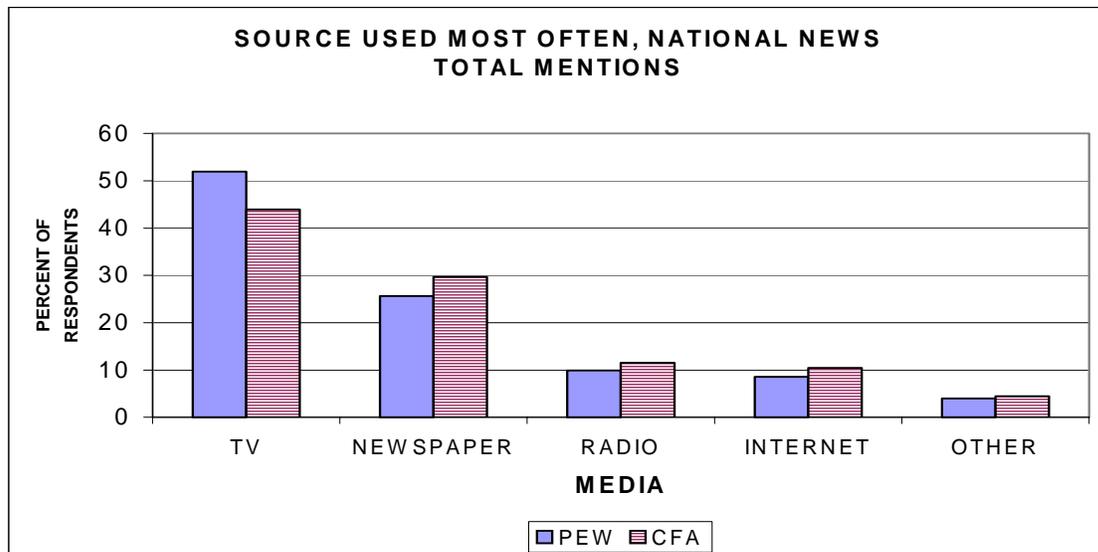
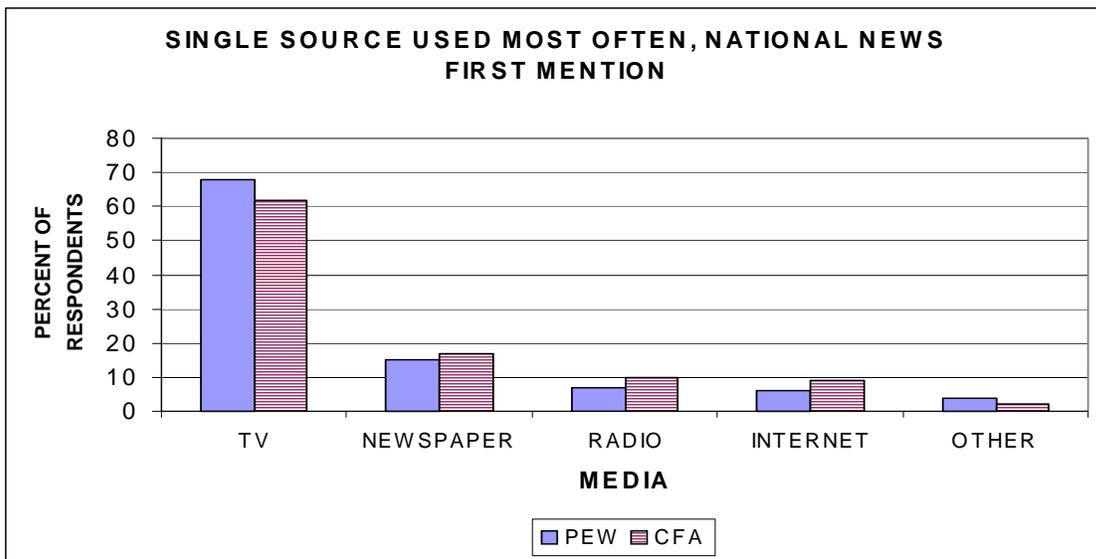
V. RESULTS

SOURCES OF LOCAL NEWS DIFFER DRAMATICALLY FROM SOURCES OF NATIONAL NEWS

Because we are stressing the difference between national and local sources, we begin the analysis by comparing our approach to asking people about their most frequent sources of national news and information to the Dec. 19, 2003 – Jan. 4, 2004 survey results obtained by The Pew Research Center for The People & The Press. Pew asked about national news; the results are very similar to ours (see Exhibit 4).

The results for both the first mentions and the total mentions are very similar. For national news, television dominates in both surveys, getting the first mention over 60% of the

Exhibit 4: National News Sources: CFA and PEW

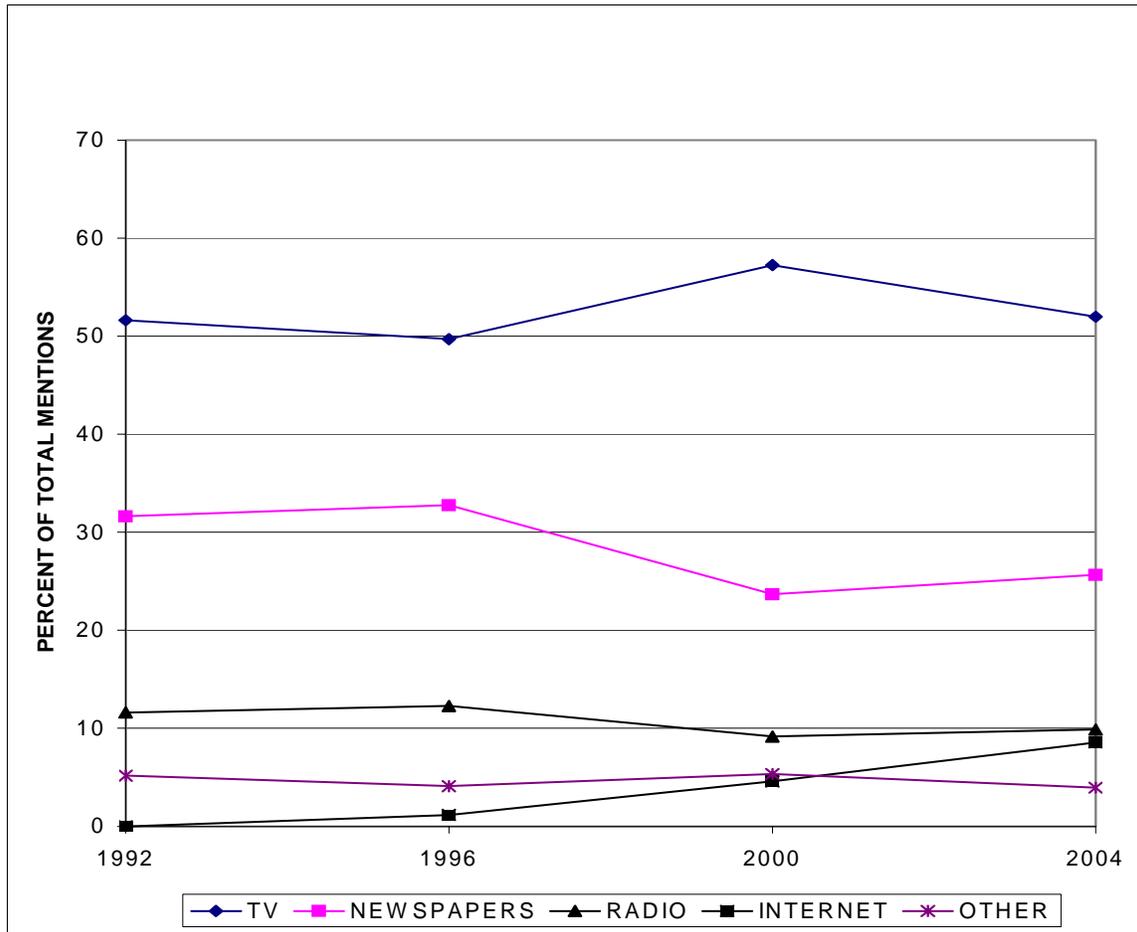


Source: Consumer Federation of America/Consumers Union Poll, January 2004; The Pew Research Center For The People & The Press, *Cable and Internet Loom Large in Fragmented Political News Universe*, January 11, 2003.

time. Newspapers are next, with first mentions in the mid teens. Radio and the Internet are 10% or slightly less.

Total mentions are similar. Throughout this analysis, whenever we show the sum of first and second mentions, we present them as a percentage of the total mentions. This is essentially what the FCC did by creating an index that summed to 100%. In both surveys, newspapers move up as a percentage of total (first plus second) mentions, while TV declines. Radio and the Internet remain at around 10%. In fact, these national results have been quite stable for over a decade. Over the course of the past dozen years, the Internet appears to have reduced the importance of newspapers, radio and other sources of national news by a few percentage points (see Exhibit 5).

Exhibit 5: Trends of Most Used Media: Early in Presidential Election Years



Sources: Graber, Doris A., *Processing Politics: Learning from Television in the Internet Age* (Chicago: University of Chicago Press, 2001), p. 3; Nielsen, *Consumer Survey on Media Usage* (Federal Communications Commission, Media Ownership Working Group, September 2002). The Pew Research Center For The People & The Press, *Cable and Internet Loom Large in Fragmented Political News Universe*, January 11, 2003.

A careful analysis of major sources for local news and information tells a very different story. Our survey shows that the difference between sources of national and local news is quite dramatic and consistent with widely recognized patterns of media usage (see Exhibit 6).

Exhibit 6: Frequency of Use and Importance of Sources of Local and National News and Information

	FIRST MENTION		TOTAL MENTIONS	
	Local	National	Local	National
M O S T O F T E N U S E D				
D a i l i e s	35	14	52	41
W e e k l i e s	22	3	34	11
B r o a d c a s t	21	27	41	44
C a b l e	6	35	16	49
I n t e r n e t	2	10	7	23
R a d i o	7	9	22	22
M a g a z i n e s	0	1	1	3
M O S T I M P O R T A N T				
D a i l i e s	34	16	51	42
W e e k l i e s	18	3	30	11
B r o a d c a s t	21	24	42	39
C a b l e	6	30	17	45
I n t e r n e t	3	10	8	18
R a d i o	8	9	25	20
M a g a z i n e s	0	2	1	2

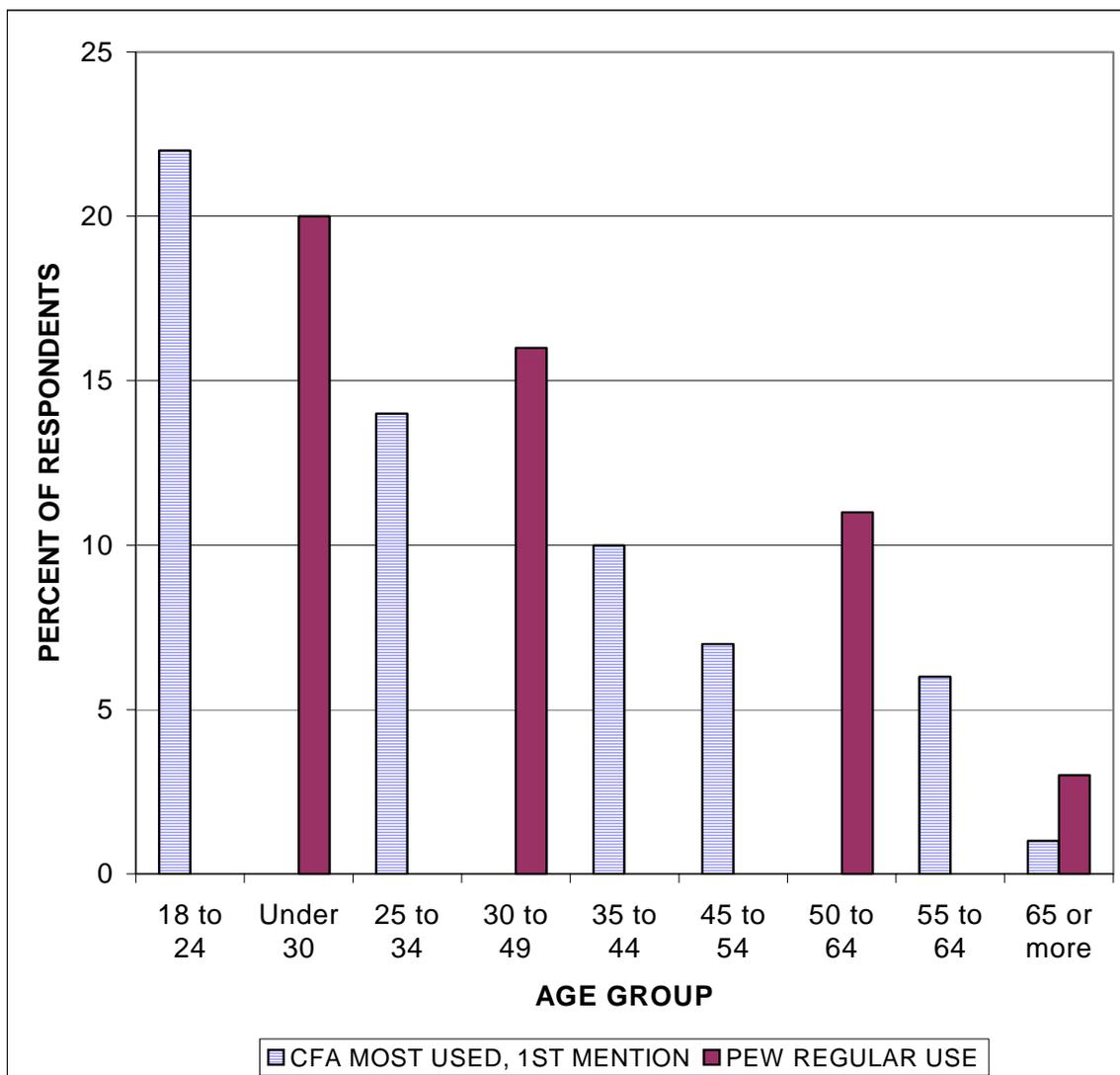
Source: Consumer Federation of America/Consumers Union Survey.

Newspapers are a much more important source of local news. Daily newspapers are the first mentions of 35% of the respondents compared to only 14% for national news. Weeklies are the first mention as a source of local news for 22% of respondents, compared to only 3% for national news. Television drops from 62% (for national news) to 27% (for local news). The bulk of the difference is for cable, which is the first mention for national news for 35% of the respondents, but only 6% for local news. Broadcast declines somewhat, from 27% to 21%. The Internet drops from 10% (for national news) to 2% (for local news). Radio is constant at just under 10% for both national and local news

For total mentions we found the same pattern. Newspapers are much more frequently mentioned for local news, TV and the Internet much less so. Radio is relatively constant.

The results for responses to the question asked about “the most important news source” track the results for responses to “the most often used news source” quite closely. For national news, TV is most frequently cited, followed by newspapers, radio and the Internet. For local, newspapers are the most important, followed by broadcast television.

Exhibit 7: Internet Use For National News Varies Strongly By Age Group



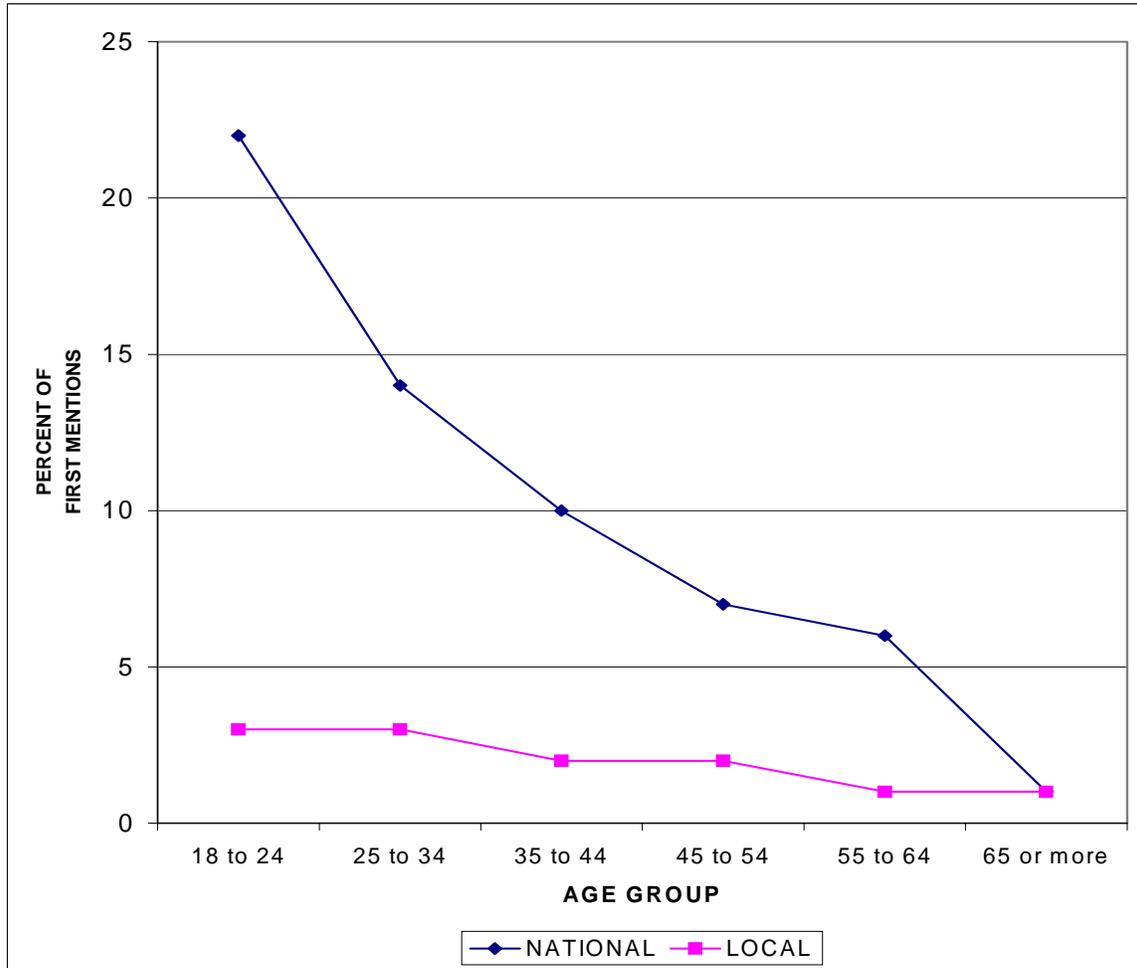
Source: Consumer Federation of America/Consumers Union Poll, January 2004; The Pew Research Center For The People & The Press, *Cable and Internet Loom Large in Fragmented Political News Universe*, January 11, 2003.

These results provide strong support for the Court’s lengthy discussion of the Internet. They confirm that the Internet is not a major source of local news, a fact that was repeatedly demonstrated in the FCC proceeding, but ignored by the FCC when it created its Diversity Index. We examined this in detail.

The recent Pew survey did find that the Internet was a particular source of national news for younger respondents (see Exhibit 7). We also find that the Internet is much more likely to be cited as a source of national news by younger respondents than by the remainder of respondents – about three times as often. However, the Internet drops off dramatically as a

source of local news even among this younger age group (see Exhibit 8). The percentage of respondents age 18-24 who mentioned the Internet first drops from 23% for national news to 3% for local news.

Exhibit 8: Internet Use For Local News Is Uniformly Low Across Age Groups



Source: Consumer Federation of America/Consumers Union Poll, January 2004.

The ability of respondents to distinguish between different media for different types of news is reinforced by their nuanced responses to the television question; this supports the Court’s finding that upholds the FCC’s decision not to include cable. Our survey question distinguished between cable and broadcast as sources of news. The FCC acknowledged that it had problems with the responses to these questions on its survey, noting that “[a]lthough the responses to one survey question... suggest... that cable is a significant source of local news and current affairs, other data from the study casts some doubt on this result... Our experience suggests that the local cable news response is too high.”⁶¹ The huge difference we find

between cable as a source of local and national news is consistent with the evidence in the FCC's media ownership record that cable does not provide a significant independent source of local news, while broadcast is a very significant source of local news.

Exhibit 9 presents a simple approach to combining the responses to the four questions asked about the media. A first response is given twice as much importance as a second response. This calculation is carried out separately for frequency of use and importance. We then take an average of use and importance and turn it into an index, as the FCC did.

Exhibit 9: Media Importance as a Source of Local News and Information

MEDIA	I	II	III	IV	V	VI	VIII
	USE			INFLUENCE			OVERALL
MEDIA	1ST	2ND	WGHTD ((2xI)+II)/ TOTAL)	1ST	2ND	WGHTD ((2xIV)+V)/ TOTAL)	WGHTD AVG III+VI
B'CAST	27	32	33	25	20	28	30
DAILIES	34	17	31	35	17	35	33
WEEKLIES	18	12	19	22	12	23	21
RADIO	8	17	13	7	10	10	12
INTERNET	3	5	4	2	5	4	4

Source: Calculated by author, see text.

Even on the basis of the use/influence questions, alone, the FCC's index dramatically underestimates the importance of newspapers and dramatically overestimates the importance of radio and the Internet. The Internet is given three to four times the weight it deserves, while radio is given two to three times the weight it deserves. Newspapers should be given one and one-half to two times as much weight.

In theory we would like to have this type of data for each local market. The cost of such intensive surveying would be prohibitive. However, our analysis of market reach is very much influenced by individual market characteristics, which may compensate for this weakness.

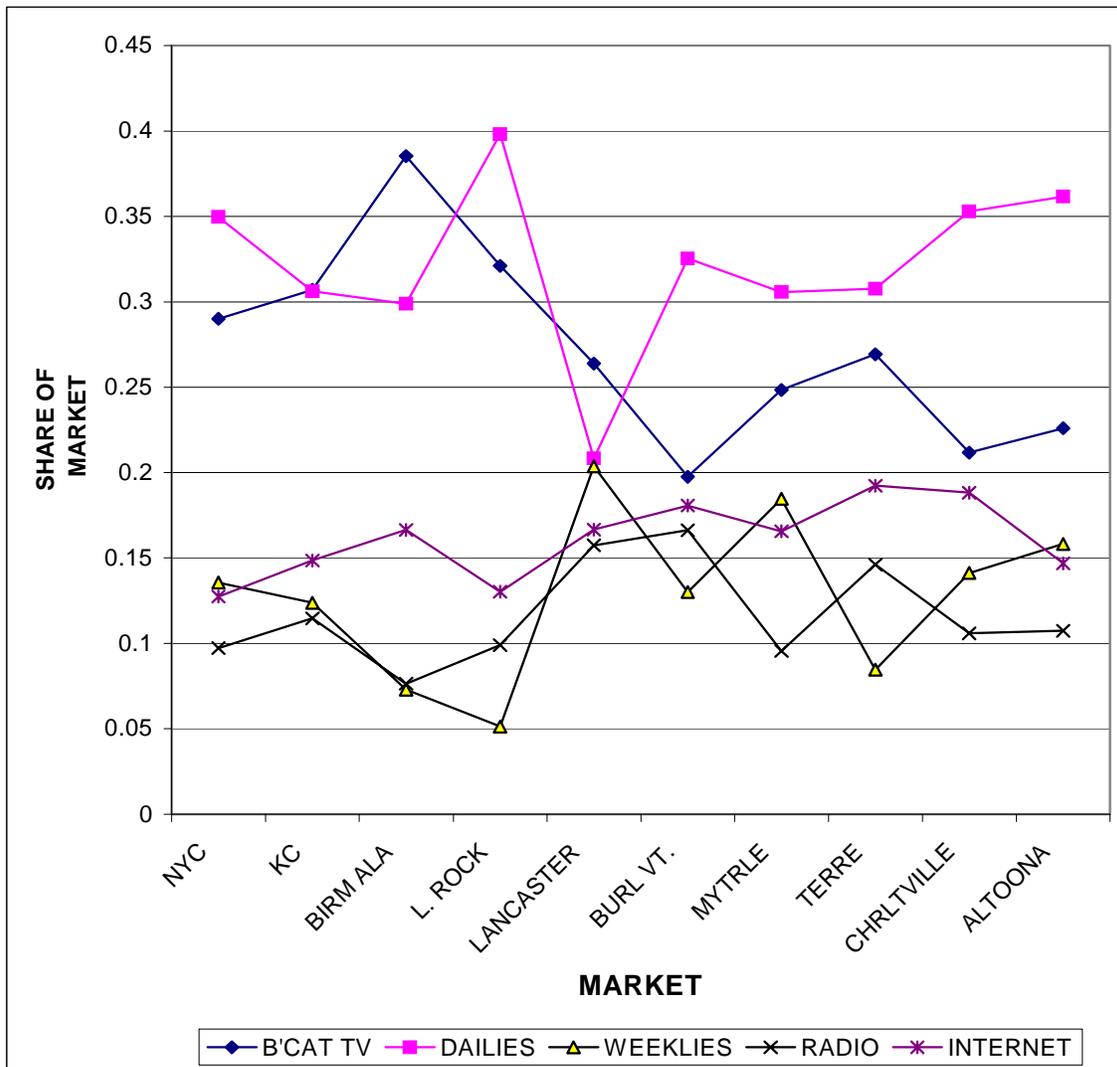
THE REACH OF THE MEDIA

The weight of the media type is one of the factors that defines its role in the market. The second factor is its reach in the market. This characteristic is specific to the market. The reach of the media varies substantially from market to market.

For example, the Arbitron estimates of listenership for news, talk and information varies by a factor of two, from 10% in the South Central region to over 21% in New England. Similarly, households using television varies by a factor of two even within the ten markets studied, from a low of 27% in Charlottesville, VA to a high of 53% in Birmingham AL. Cable penetration, which was assumed to make broadcast signals available, varies from 54 to 80 percent.

Exhibit 10 shows the reach of each medium, which is the share of the each medium in the total news and information market as described above. The reach of the media varies substantially from market to market.

Exhibit 10: Media Reach in Ten Markets



Source: Calculated by author, see text.

The media share in these markets is calculated as the product of its influence and reach. An index is created which totals to 100% to parallel the Diversity Index (see Exhibit 11). This detailed analysis of local sources of news demonstrates that the FCC’s rules derived from the weights it used to create a Diversity Index are far off the mark. The combination of weight and reach increases the relative importance of newspapers substantially and television slightly, compared to the weight based on the survey. Compared to the Diversity Index, when we factor in the reach of the sources, the importance of newspapers was underestimated by a factor of two. Weeklies were underestimated by almost 50 percent. Television and newspapers are the dominant sources by far, accounting for about eighty percent of the total market.

Exhibit 11: Average Media Weights, Reach and Final Media Share Compared to FCC Diversity Index (10 Markets)

MEDIA	INFLUENCE	REACH	MEDIA SHARE	FCC DI
BROADCAST TV	28	27	35	33.8
DAILIES	35	32	45	20.2
WEEKLIES	23	13	12	8.6
RADIO	10	12	6	24.8
INTERNET	4	16	3	12.5

Source: Calculated by author, see text.

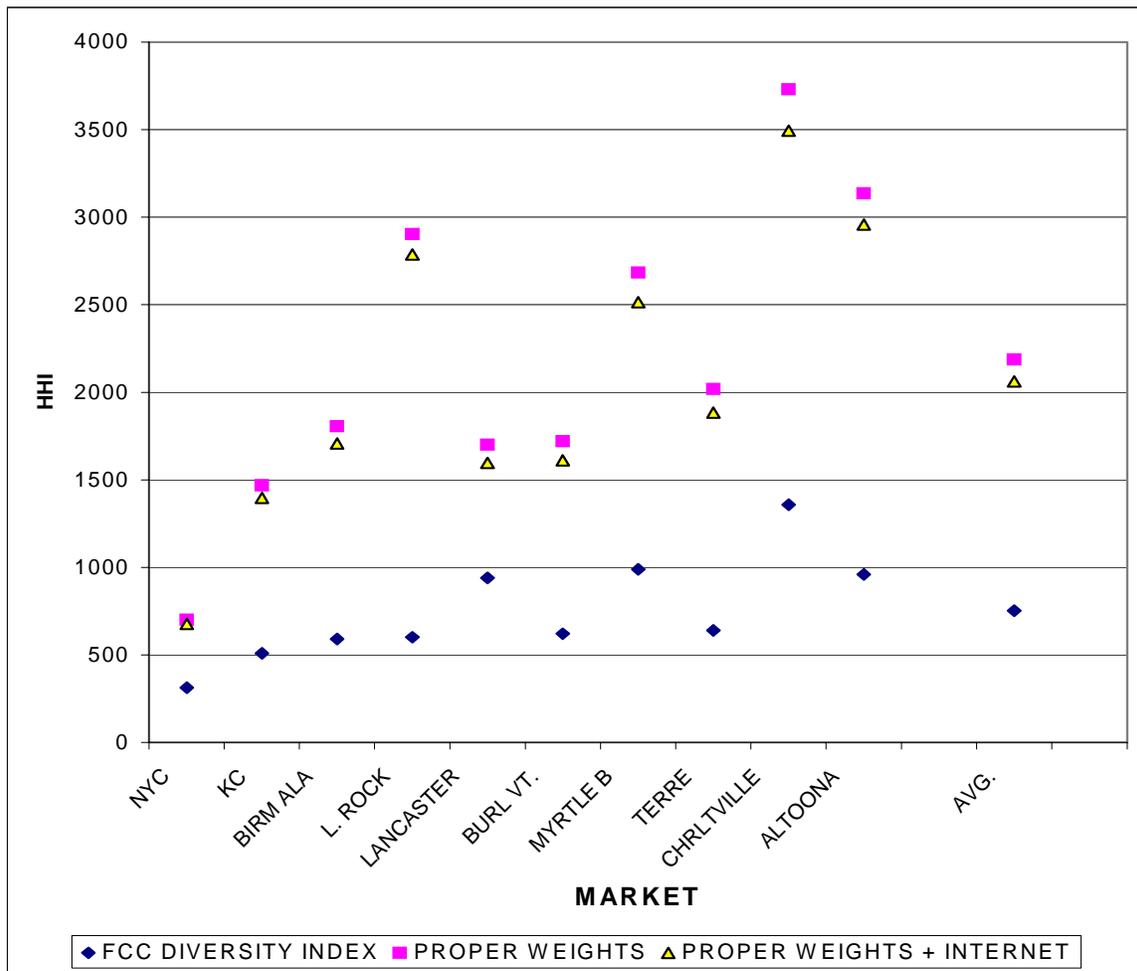
The underweighting of newspapers is both ironic and important. The ban on holding a television broadcast license and ownership of a newspaper in the same market was the oldest of all the rules that the Commission proposed to change. The change it proposed was more pervasive than for any other rule. The cross media limit it proposed was not much of a limit, as it would have allowed mergers to take place in over 85 percent of all markets in the country, where over 95 percent of the population resides. By underestimating the importance of newspapers, the Commission opened the door to a massive wave of cross-media mergers.

THE FCC ANALYSIS UNDERESTIMATES THE CONCENTRATION OF LOCAL MEDIA MARKETS

Since we have estimated the total local news media market, the market concentration analysis is based on a firm’s market share of the media share. For example, a daily newspaper owner with a 30% market share in a market where dailies have a 45% media share would have a 13.5% share of the media market. It would add 182 points to the HHI (13.5x 13.5 = 182).

The FCC’s flawed approach to market structure analysis painted a picture of relatively unconcentrated markets (see Exhibit 12). Nine of the ten markets for which it presented detailed data were below the concentrated level. One was in the moderately concentrated range. We calculated two sets of concentration ratios with the re-weighted media and audience market shares of the firms – one included the Internet, one excluded it. We arrive at a very

Exhibit 12: Concentration of Sample Media Markets



Source: Calculated by author, see text.

different conclusion from the FCC. Three of the ten markets are moderately concentrated; six are highly concentrated.

The public policy implications of these different conclusions are immense. The point of the analysis is to establish limits on mergers. The Department of Justice *Merger Guidelines* indicate that mergers in moderately concentrated markets that raise the HHI by more than 100 points deserve scrutiny. Mergers in highly concentrated markets that raise the HHI more than 50 points are a special concern. The FCC adopted a much more lenient standard, noting that the Department of Justice rarely challenges a merger in court that raised the HHI by less than 400 points. We have argued that the standard should be higher for media mergers and that the FCC has drawn the wrong lesson from the 400-point behavior of the DOJ, but those matters can be put to the side here. As shown in Exhibit 13, even by the FCC’s lax standard, once careful market structure analysis is conducted, most markets would fall in the range where mergers between any major media outlets would not be allowed.

Exhibit 13: FCC Analysis and Approval of Mergers

(Highlighted mergers violate The Department of Justice Merger Guidelines; Dashed lines indicate mergers that would not be allowed under the Diversity Index)

BASE CASE INDEX		AVERAGE CHANGE IN DIVERSITY RESULTING FROM MERGERS			
TV Stations In Market	Average Diversity Index	Newspaper and Television	Newspaper, TV, and ½ Radio	Newspaper and TV Duopoly	Newspaper, Radio, and TV Duopoly
1	1707	<u>910</u>	<u>1321</u>	----	----
2	1316	<u>731</u>	<u>1009</u>	----	----
3	1027	<u>331</u>	<u>515</u>	----	----
4	928	<u>242</u>	<u>408</u>	----	----
5	911	<u>223</u>	<u>393</u>	<u>376</u>	<u>846</u>
6	889	<u>200</u>	<u>340</u>	<u>357</u>	<u>688</u>
7	753	121	<u>247</u>	242	<u>533</u>
8	885	<u>152</u>	<u>314</u>	<u>308</u>	<u>734</u>
9	705	86	207	172	<u>473</u>
10	635	51	119	101	292
15	595	48	145	97	302
20	612	40	128	80	350

Rigorous analysis places most markets here

FCC Diversity Index places most markets here

Source: Federal Communications Commission, “Report and Order,” In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets,” MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244 July 2, 2003, Appendix D.

A REALITY CHECK

The example that bothered the Court of “a community college television station mak[ing] a greater contribution to viewpoint diversity than a conglomerate that includes the third-largest newspaper in America” provides a reality check. In our analysis the conglomerate (New York Times) accounts for about 9% of the New York media market, while the community college TV station accounts for barely a speck.

Interestingly, even that large newspaper conglomerate comes in second in its market, since it happens to reside in a market where the largest news media conglomerate in the world (News Corporation) owns one of the few TV-newspaper combinations (New York Post, Fox) that has been waived through the ban and one of the TV duopolies that were made possible by the Telecommunications Act of 1996. It is a close call between the two (News Corp. has just under 10 percent of market share). But that is the point. When one thinks about the New York media market, the fact that the New York Times and News Corporation come through as the two largest players makes sense. In fact, our earlier qualitative analysis demonstrating that “ownership matters,” started by recounting a battle between the New York Times and Fox.⁶²

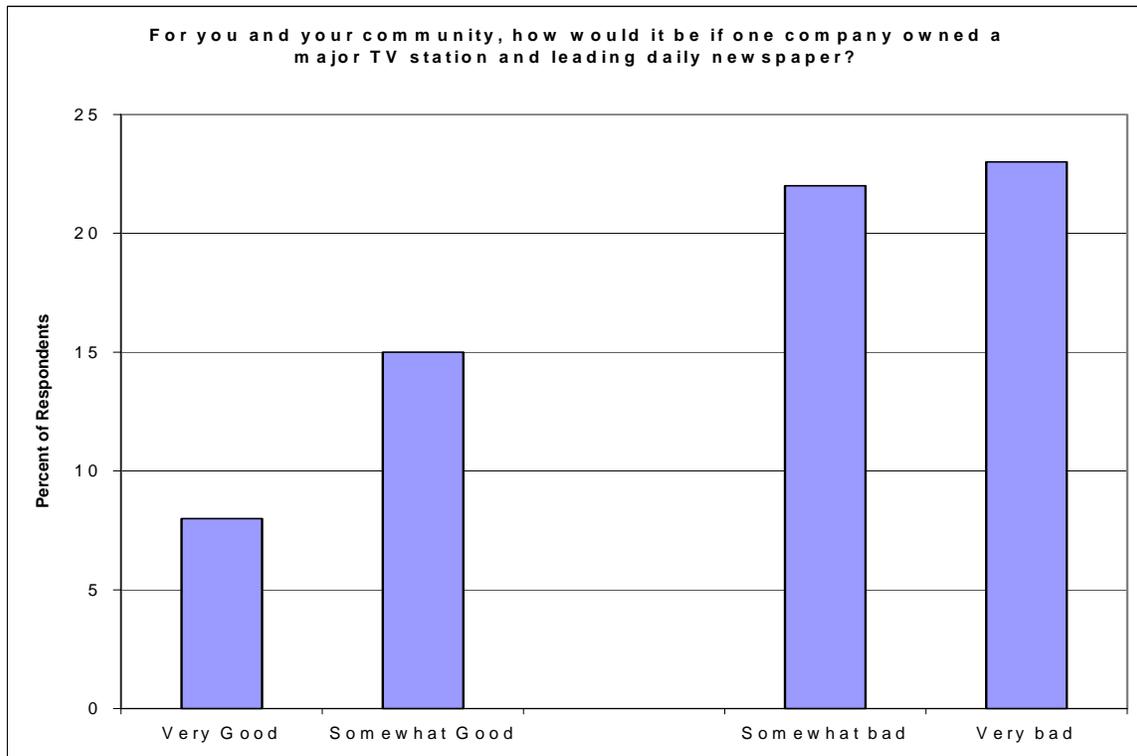
It is also reassuring to find that the Tribune Company (which also owns a TV-newspaper combination) comes in a very close third. The fourth and fifth largest firms in the market are ABC and NBC, at about half the size of the top three because they do not own newspapers. These are the entities that influence public opinion. The analysis must get the major features of the media landscape right.

PUBLIC OPINION ABOUT THE IMPACT OF MEDIA MERGERS

The Court accepts the proposition, long embraced in First Amendment jurisprudence, that ownership is related to diversity. Over the course of the media ownership proceedings, public opinion polls reflected a belief that media markets are too concentrated.⁶³ The media map we have drawn is consistent with that feeling and the survey evidence reinforces that conclusion. Public opinion deserves special attention for a second reason. Over the course of the regulatory proceeding, the public became mobilized and engaged in the debate over media ownership to an extent that caught even the most experienced of policy makers by surprise.⁶⁴

Respondents express concern about mergers in media markets (see Exhibit 14). Respondents perceive these mergers to be bad for their community as a general proposition by

Exhibit 14: Attitudes Towards Mergers

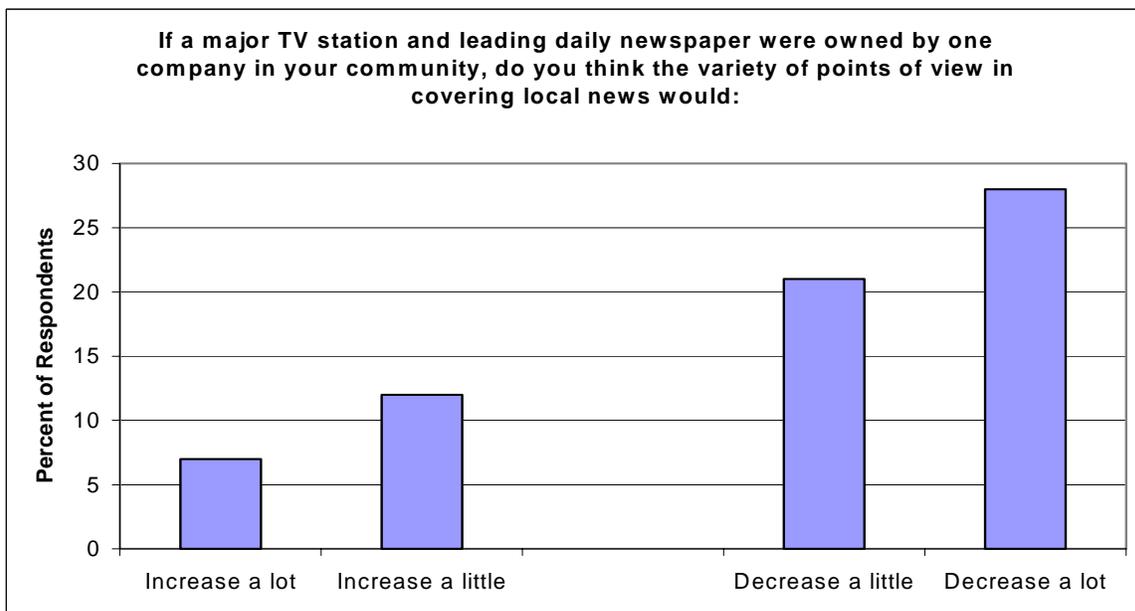
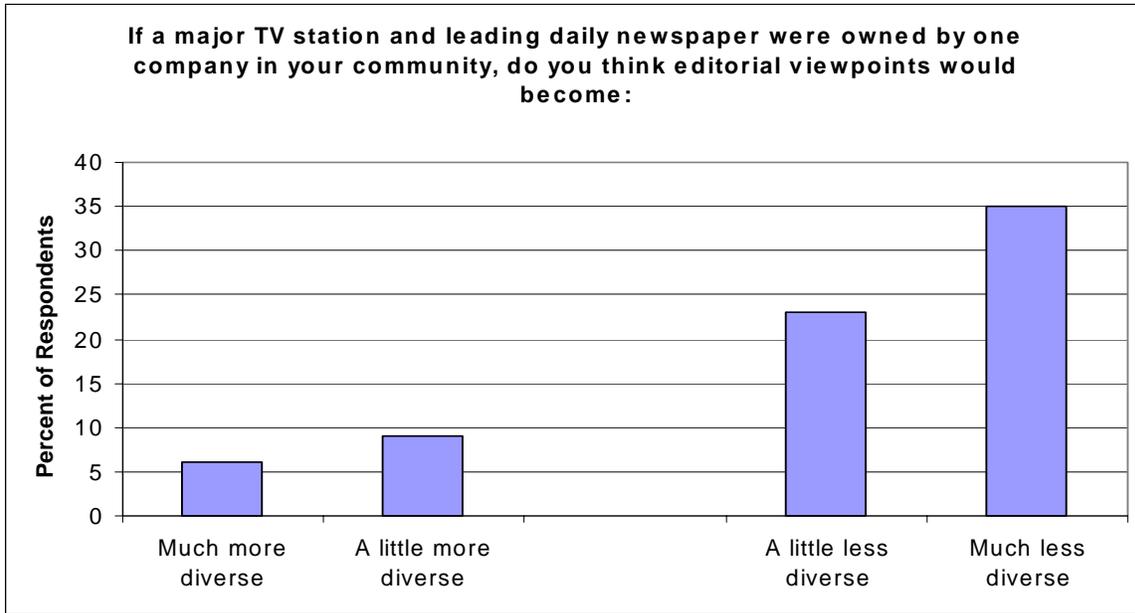


Source: Consumer Federation of America/Consumers Union Poll, January 2004.

a two-to-one margin (45% to 23%). Those who believe it would be very bad outnumber those who believe it would be very good by almost a three-to-one margin (23% to 8%).

There is an even stronger negative perception of the impact on diversity (see Exhibit 15). With respect to editorial diversity, respondents believe that newspaper-TV mergers would result in less diversity by almost a four-to-one margin (58% to 15%). Those who think

Exhibit 15: Opinions About the Impact of Cross Media Mergers on Diversity



Source: Consumer Federation of America/Consumers Union Poll, January 2004.

it would make editorial viewpoints much less diverse outnumber those who think they would become much more diverse by almost six-to-one (35% to 6%). The negative perception of the impact of TV-newspaper mergers on the variety of points of view in local reporting is also quite strong. Respondents believe it would diminish rather than increase diversity by a 2.5-to-one margin (50% to 20%). Those who think there will be a large negative impact outnumber those who think there will be a large positive impact by four-to-one.

VI. THE BEGINNING

The FCC set out to create a bright-line test to provide certainty for the industry. On one side of the line all mergers would be approved, with no questions asked, on the other side, they would be rejected. This is not the way the *Merger Guidelines* work. DOJ uses merger thresholds as a screen, but deals with each merger on a case-by-case basis. The Court accepted the approach, but the FCC's narrow view of the First Amendment led to assumptions and analyses that led to entirely illogical results. The Court demanded that the lines be drawn on the basis of a more realistic map of the media landscape. The information and analyses necessary to portray the media marketplace are, of necessity, social scientific in nature. Much of the data in preliminary form had been introduced in the hearing record and provided the basis for rejecting the FCC's approach.

This is the beginning of a new era in FCC media ownership rules. Although the Supreme Court has not yet spoken, the circuit courts have set off down a path in which social science analysis will play a key role. We believe that this type of analysis meets the standards the Court established. The social science analysis is certainly "messy" in terms of defining markets and finding data to fit the definitions, but the law does not require perfection. It requires a reasonable, consistent, rational fit.

ENDNOTES

¹ Prometheus Radio Project v. Federal Communications Commission, (3rd Cir. 2004) (hereafter, Prometheus)

² Federal Communications Commission, “Report and Order,” *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244 July 2, 2003, para. 420. (hereafter, Order).

³ *Sinclair Broadcasting, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002)

⁴ Cooper, Mark, “Testimony on Media Ownership,” before *The Senate Commerce Committee*, October 2, 2003; *Promoting The Public Interest Through Media Ownership Limits: A Critique Of The FCC’s Draft Order Based On Rigorous Market Structure Analysis And First Amendment Principles* (Consumer Federation of America and Consumers Union, Washington, D.C.: May 2004), *Ex Parte*, filed in Federal Communications Commission, *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets*, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244 July 2, 2003.

⁵ Powell, Michael, *FCC Chairman Michael Powell Reacts to Third Circuit Media Ownership Decision*, June 24, 2004.

⁶ *Associated Press v. United States*, 326 U.S. 1, 20 (1945) [hereafter, *Associated Press*].

⁷ *Ibid.*

⁸ *Prometheus*, p. 16, citing the Supreme Court ruling in *FCC v. Nat’l Citizens Committee For Broadcasting*, 436 U.S. 775, 780 (1978).

⁹ *Sinclair Broadcasting, Inc. v. FCC*, 160 F.3d 148 (D.C. Cir. 2002).

¹⁰ *MCCONNELL V. FEDERAL ELECTION COMM’N* (02-1674) 251 F. Supp. 2d 176, 251 F. Supp. 2d 948 (2003), affirmed in part and reversed in part.

¹¹ *Red Lion Broadcasting v. FCC*, 395 US 367 (1969) [hereafter, *Red Lion*].

¹² *Red Lion*.390.

¹³ *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 638-39 (1994) [hereafter, *Turner I*].

¹⁴ *Turner I*, 663-64 .

¹⁵ *Prometheus*, p. 56.

¹⁶ *Id.*, p. 31.

¹⁷ *Id.*, p. 31.

¹⁸ *Id.*, p. 31.

¹⁹ *Id.*, p. 32

²⁰ “Narrowing the Lines of Communications?,” *Washington Post*,

It is only a matter of time before nearly all barriers to cross-ownership in the media industry are lifted ... In major metropolitan areas it may be possible, even common, for one giant corporation to own the dominant newspaper, the cable television monopoly, a local broadcast station, several radio stations and even the dominant Internet access provider.

The decisions will give added support to FCC Chairman Michael K. Powell, who views such restrictions as anachronisms in an era of Internet, broadband and satellite technology ... Any excess concentration, Powell argues, can be handled by the Justice Department in its traditional role as enforcer of the antitrust laws.

²¹ Owen, Bruce M., 2003, “Statement on Media Ownership Rules,” Attachment to *Comments of Fox Entertainment Group and Fox Television Stations, Inc., National Broadcasting Company, Inc. and Telemundo Group, Inc., and Viacom*, In the Matter of 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Cross Ownership of Broadcast Stations and Newspapers, Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, Definition of Radio Markets, MB Docket No. 02-277, MM Dockets 02-235, 01-317, 00-244, January 2.

²² Owen.

²³ *Id.*

²⁴ *Id.*

²⁵ Order, para., 420.

²⁶ Order, 353.

²⁷ Prometheus, pp. 69-70.

²⁸ *Id.*, p. 73.

²⁹ *Id.*, p. 75.

³⁰ *Id.*, p. 48.

³¹ *Id.*, p. 49.

³² *Id.*, p. 54.

³³ *Id.*, pp. 54-55.

³⁴ *Id.*, p. 58.

³⁵ U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, 1997.

³⁶ William G. Shepherd, *The Economics of Industrial Organization* (Englewood Cliffs, NJ: Prentice Hall, 1985), p. 389, gives the following formula for the Herfindahl-Hirschman Index (HHI):

$$H = \frac{n}{\sum_{i=1}^n S_i^2} \times 10,000$$

where

n = the number of firms

m = the market share of the largest firms (4 for the four firm concentration ratio)

S_i = the share of the ith firm.

The HHI is calculated based on ratios rather than percentages and the decimals are cleared by multiplying by 10,000. For ease of discussion the Court adopts the convention of describing the calculation in percentages.

³⁷ The HHI can be converted to equal-sized equivalents as follows:

Equal-sized voice equivalents = (1/HHI)*10,000.

³⁸ Shepherd, p. 4.

³⁹ Viscusi, W. Kip, John M. Vernon, and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust* (Cambridge: MIT Press, 2001), pp. 147-149.

⁴⁰ Order, 120.

⁴¹ Prometheus, p. 58.

⁴² *Id.*, p. 64.

⁴³ *Id.*, pp. 64... 65.

⁴⁴ *Id.*, pp. 66...67.

⁴⁵ *Id.*, p. 62.

⁴⁶ *Id.*, p. 63.

⁴⁷ *Id.*, p. 63.

⁴⁸ *Id.*, p. 65.

⁴⁹ *Id.*, p. 68.

⁵⁰ *Id.*, p. 68.

⁵¹ *FCC Ownership Rules Order*, at ¶¶ 410 (emphasis added), "If media differ in importance systematically across respondents (e.g. if television were most important to everyone, and everyone made only minor use of radio to acquire news and current affairs information), then it would be misleading to weight all responses equally."

⁵² *FCC Ownership Rules Order*, at ¶¶ 410-411 (emphasis added)

⁵³ Nielsen Media Research, *Consumer Survey On Media Usage* (Media Ownership Working Group Study No. 8, September 2002) (hereafter, MOWG Study No. 8), question no. 10.

⁵⁴ MOWG, Study No. 8, question no. 1.

⁵⁵ “Perception of Partisan Bias Seen as Growing—Especially by Democrats” Pew survey (released Jan. 11, 2004), go to <http://people-press.org/reports/display.php3?ReportID=200>

⁵⁶ Order, Appendix C.

⁵⁷ Arbitron, *Radio Today: 2004*.

⁵⁸ Williams, George and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format and Finance* (Media Ownership Working Group Study No. 11, September 2002), Appendix F.

⁵⁹ Cooper, Mark, *Media Ownership and Democracy in the Digital Information Age* (Center for Internet and Society, Stanford, 2003), pp. 127-130.

⁶⁰ Madde, Mary, *America’s Online Pursuits*, Pew Internet and Life Project, December 2003.

⁶¹ Order, para. 413-414.

⁶² Cooper, Media Ownership, pp. 45-47.

⁶³ Id., p. 30.

⁶⁴ “Opening Statement of Senator John McCain,” *The Senate Commerce Committee*, October 2, 2003.