UNITED STATES GOVERNMENT

memorandum

DATE: October 12, 2006

TO: Marlene H. Dortch, Secretary

FROM: Rosemary C. Harold, Deputy Chief, Media Bureau

SUBJECT: Ex Parte Presentation in *2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996* (MB Docket Nos. 06-121, 02-277, 01-235, 01-317, 00-244)

On October 11, 2006, Rudy Brioche, Legal Advisor to Commissioner Jonathan Adelstein, and I participated in a Continuing Legal Education seminar on the media ownership rules hosted by the Federal Communications Bar Association. Other participants in the CLE presentation were Parul Desai, Media Access Project; David Honig, Minority Media and Telecommunications Council; John F. Garziglia, Womble Carlyle Sandridge & Rice, PLLC; Kathleen Kirby, Wiley Rein & Fielding LLP; Angela Campbell, Institute for Public Representation, Georgetown University Law Center; Kathryn R. Schmeltzer, Pillsbury Winthrop Shaw Pittman LLP; Jonathan Blake, Covington & Burling LLP; David Fleming, Gannett Co., Inc.; Andrew Jay Schwartzman, Media Access Project; and Richard Kaplar, The Media Institute. The participants discussed the Commission's current ownership rules and issues raised the pending ownership rulemaking, consistent with the issues and questions presented in the Commission's Further Notice of Proposed Rulemaking, FCC 06-93 (rel. July 24, 2006) ("Further Notice"), in the docket. A copy of the Further Notice is included in the seminar course materials, which are appended.

I am submitting this *ex parte* memorandum to the FCC Secretary for inclusion in the public record pursuant to our *ex parte* rules.

Rosemary C. Harold
Deputy Chief, Media Bureau

cc: Rudy Brioche, Office of Commissioner Adelstein

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List A B C D E

Federal Communications Bar Association

Reconsideration of the Media Ownership Rules

A CLE Seminar Discussion on Whether the Current Broadcast Ownership Rules Are Necessary to Serve the Public Interest

Sponsored by the Diversity Committee and Mass Media Committee

Dow Lohnes LLP, 1200 New Hampshire Ave. NW, Washington DC.
Wednesday, October 11, 2006, 6:00 - 8:30 p.m.

Panelists will discuss the purpose and goals of the rules, whether limits are necessary, and what issues/developments should the FCC consider in evaluating the rules. The audience will also have a chance to ask the panelists questions.

AGENDA:

6:00 – 6:05 Welcome & Introduction
Parul Desai, Assistant Director, Media Access Project
Rudy Brioche, Legal Advisor, Commissioner Jonathan S. Adelstein, Federal Communications Commission

Moderator: Rosemary C. Harold, Deputy Bureau Chief, Media Bureau, Federal Communications Commission

6:05 – 6:50 Local Radio Ownership Rule:
Panelists:
David Honig, Executive Director, Minority Media and Telecommunications Council
John F. Garziglia, Member, Womble Carlyle Sandridge & Rice, PLLC
Kathleen A. Kirby, Of Counsel, Wiley Rein & Fielding LLP

6:50 – 7:35 Local Television and Radio-Television Cross Ownership Rules
Panelists:
Angela Campbell, Professor, Institute for Public Representation, Georgetown University Law Center
Kathryn R. Schmeltzer, Partner, Pillsbury Winthrop Shaw Pittman LLP
Jonathan Blake, Partner, Covington & Burling LLP

7:35 – 7:45 Break

7:45 – 8:30 Newspaper-Broadcast Cross Ownership Rule
Panelists:
Dr. Mark N. Cooper, Director of Research, Consumer Federation of America
David Fleming, Senior Legal Counsel, Gannett Co., Inc., General Counsel, Gannett Broadcasting
Andrew Jay Schwartzman, President and CEO, Media Access Project
Richard Kaplar, Vice President, The Media Institute

SPEAKER BIOGRAPHIES

JONATHAN D. BLAKE heads the Technology, Media and Communications group at Covington & Burling LLP, which embraces the fields not only of communications and media law where he practices but also of technology transactions, Internet law, privacy, security, education, and intellectual property. *The National Law Journal* named him one of America's top 100 lawyers, and he is often profiled by publications such as *Chambers* as one of the country's leading communications practitioners. Mr. Blake is featured in *The Best Lawyers in America* 2007 for Communications Law. He was also Chairman of Covington's Management Committee from 1996-2001.

Mr. Blake represented the NAB and the affiliate associations in connection with the national cap ownership rule issues at the FCC, in the courts and in Congress in 2002-2004 and similarly represented small and mid-market stations in seeking reform of the duopoly rule to allow combinations that will help bolster locally-oriented service outside the large markets. He has played a leadership role in the decades-long, and still ongoing transition of television service to the new digital technologies. He advised the special committee of independent directions of Adelphia in connection with their efforts to investigate possible wrongdoing by that company's previous management. He was also involved in defending 64 cell phone and other auction winners against the largest *qui tam* suit ever brought.

ANGELA CAMPBELL is a Professor at Georgetown University Law Center, where she has directed the Citizens Communications Center Project of the Institute for Public Representation for since 1988. The Institute for Public Representation functions as a clinical education program. Law students and Graduate Fellows working under Professor Campbell's supervision provide *pro bono* legal assistance to public interest groups before the Federal Communications Commission and the federal courts. Recent projects undertaken by the clinic include the successful challenge to the FCC's broadcast ownership rules in *Prometheus Radio Project v. FCC*, representing the Office of Communication of the United Church of Christ in challenging the license renewals of television stations in Washington, D.C. and Cleveland, Ohio, that have not provided adequate service to children, and representing the Children's Media Policy Coalition in the FCC's rulemakings concerning public interest obligations for digital television.

Prior to joining the faculty at Georgetown University Law Center, Professor Campbell was an attorney with the Antitrust Division of the United States Department of Justice and an associate with Fisher, Wayland, Cooper & Leader. She holds an LL.M. from Georgetown University Law Center, a J.D. from UCLA School of Law and a B.A. from Hampshire College.

DAVID P. FLEMING is Senior Legal Counsel for Gannett and General Counsel of Gannett Broadcasting with chief responsibility for overseeing legal matters for its 23 television stations. Mr. Fleming joined Gannett in 1995, having served as Vice President/General Counsel/Government Relations for Multimedia, Inc.'s Broadcasting, Cablevision and Security Divisions from 1987-95. Prior to joining Multimedia, he was a partner in the law firm of Dow, Lohnes & Albertson in Washington, D.C., where he specialized in telecommunications, administrative and contract law. Before entering private practice, he served as an Attorney/Advisor with the Federal Communications Commission handling broadcast and cable television matters.

Mr. Fleming holds a Bachelor of Arts Degree in Political Science from the University of Notre Dame, a Juris Doctor from Georgetown University Law Center, and an L.L.B. (Cantab) specializing in Public International Law from Cambridge University, Cambridge, England.

JOHN F. GARZIGLIA is a Member of Womble Carlyle Sandridge & Rice, PLLC, which merged with Pepper & Corazzini, LLP in March 2002. Prior to joining Pepper & Corazzini, John served in the mid-1980s at the Federal Communications Commission as an attorney in the AM Branch and as a trial attorney in the Hearing Branch of the Mass Media Bureau.

John was formerly a broadcaster, working in the industry in St. Louis, Washington, D.C., and several smaller markets. John represents many broadcasters with regard to questions that arise in the day-to-day operations of stations. He is a frequent speaker at both national and state broadcaster conventions, and is frequently quoted in industry trade publications on broadcasting legal issues.

John served as a co-chair of the FCBA's Membership and Marketing Committee for terms in 2004-05 and 2005-06. He received is B.A. in 1972 from St. Louis University and his J.D. in 1979 from the Washington University School of Law.

ROSEMARY HAROLD is Deputy Chief of the Federal Communications Commission's Media Bureau. At the Bureau, she oversees the work of the Industry Analysis Division, which is responsible for developing ownership rules and reviewing major non-broadcast transactions, and the Policy Division, through which many of the agency's significant media-oriented rulemakings are conducted. Among the current major efforts that Ms. Harold oversees are the latest round of the Commission's media ownership proceeding and the agency's "Section 621" video franchising proceeding. She came to the Bureau in 2005 from the law firm of Wiley, Rein & Fielding, LLP, where she was a partner specializing in media, advertising, and First Amendment law. In private practice, she represented media companies and advertising clients before the FCC, the Federal Trade Commission and the U.S. Food and Drug Administration, as well as various appellate courts. Before beginning her law career, Ms. Harold was a newspaper and magazine reporter and editor. Her journalism experience includes stints at the *Miami Herald*, C-SPAN, and the Reporters Committee for Freedom of the Press. She holds a bachelor's degree from the College of William and Mary, a master's degree in journalism from the University of Missouri, and a J.D. magna cum laude from the Georgetown University Law Center.

DAVID HONIG co-founded the Minority Media and Telecommunications Council (MMTC) in 1986. MMTC currently represents 62 minority, civil rights and religious national organizations in selected proceedings before the FCC, and it operates the nation's only full service, minority owned media and telecom brokerage. Mr. Honig serves MMTC as Executive Director.

Mr. Honig serves on the National Urban League's Technology Advisory Council and as a member of the FCC's Advisory Committee on Diversity for Communications in the Digital Age. He holds a B.A. in Mathematics from Oberlin College, an M.S. in Systems Analysis from the University of Rochester, and a law degree cum laude from Georgetown University.

RICHARD T. KAPLAR is Vice President of The Media Institute, a nonprofit research foundation in Arlington, Va., that specializes in communications policy and First Amendment issues. He joined the Institute in 1981, and has held his current position since 1984.

Mr. Kaplar has written, edited, or produced more than 40 books and monographs on a variety of topics in the communications policy field. His publications include "Cross Ownership at the Crossroads" and "Advertising Rights," and he edited the annual volume "The First Amendment and the Media," published by The Media Institute from 1996 to 2003.

Mr. Kaplar's areas of interest include the First Amendment and freedom of speech; competition and market economics; and government regulation of the communications industry. He has discussed these topics in numerous speaking engagements and appearances on television and radio talk shows.

A former U.S. Army officer, Mr. Kaplar holds a Bachelor's degree in English (magna cum laude) from John Carroll University in Cleveland, Ohio, and a Master's degree in Public Administration from The American University in Washington, D.C.

KATHLEEN A. KIRBY, Of Counsel, Wiley Rein & Fielding LLP, represents broadcast clients, including major radio and television group owners, on regulatory and transactional matters before the Federal Communications Commission. She has particular expertise in newsgathering, content regulation and First Amendment issues and advises clients on media transactions, including compliance with Federal Communications Commission ownership, attribution rules, and regulatory compliance, including rules governing indecency, political advertising, children's programming, license renewal and reporting requirements.

Kathleen is a member of the American Bar Association, Communications Law Forum, the Federal Communications Bar Association, and the District of Columbia Bar, Arts, Entertainment and Sports Law Section, Media Law Committee.

KATHRYN SCHMELTZER is a partner in the communications group of Pillsbury Winthrop Shaw Pittman LLP. She represents commercial and noncommercial radio and television licensees, as well as schools, colleges and universities with broadcast and other telecommunications licenses. Her work covers a variety of regulatory and enforcement issues, FCC licensing proceedings, assignments and transfers, administrative hearings and court appeals. Kathy's experience in the broadcast industry began in the mid 1970s when she served as an attorney at the Federal Communications Commission. She subsequently worked at Fisher Wayland which merged into Shaw Pittman LLP. Kathy has served as an officer of the Federal Communications Bar Association and of American Women in Radio and Television, Inc.

ANDREW JAY SCHWARTZMAN is the President and CEO of Media Access Project (MAP). He has directed the organization since June, 1978. MAP is a non-profit public interest telecommunications law firm which represents the public's in promoting the First Amendment rights to speak and to hear. It seeks to promote creation of a well informed electorate by insuring vigorous debate in a free marketplace of ideas. It has been the chief legal strategist in efforts to oppose major media mergers and preserve policies promoting media diversity. In recent years, MAP has also led efforts to insure that broad and affordable public access is provided during the deployment of advanced telecommunications networks and the Internet.

Mr. Schwartzman is a faculty member of the Johns Hopkins University School of Arts and Sciences, where he teaches in its Communication in Contemporary Society Program. He serves on the International Advisory Board of Southwestern Law School's National Entertainment & Media Law Institute and was the Distinguished Lecturer in Residence at the Institute's Summer 2004 program at Fitzwilliam College, Cambridge University. His board memberships include the Advisory Board of the Center for Democracy and Technology, and the Board of Directors of the Minority Media Telecommunications Council. He was co-founder and President of the Board of the Safe Energy Communications Counsel from 1991 through 2003.

Mr. Schwartzman graduated from the University of Pennsylvania in 1968, and its law school in 1971,

FCC MULTIPLE OWNERSHIP RULES

Rule	1999 Rule (in effect today)	2003 Rule (remanded by 3rd Circuit)	3rd Circuit Finding re: 2003 Rule
TV Duopoly	Duopoly allowed if (a) at least 1 of the stations is not in top 4 *and* (b) 8 independently owned full-power stations remain after combination. Waiver allowed if station (a) has failed, is failing or is un-constructed, (b) no out-of-mkt buyer is willing to operate *and* (c) sale to out-of-market buyer would artificially depress price	May not combine stations within top 4 Duopoly allowed in markets with 5 or more stations Triopoly allowed in markets with 18 or more stations Top 4 ban subject to waiver policy in markets with less than 12 stations if combination would serve local interests	FCC correctly found that media other than TV may contribute to viewpoint diversity in local markets Consolidation can improve local programming FCC supported its decision to retain top 4 ban via evidence of audience share drop from 4th to 5th station in markets FCC did not justify decision to assume equal market shares among stations (*e.g.*, combo of 4th & 5th-ranked stations no different than 16th & 17th-ranked stations) Based on evidence in the record, FCC likely could not rely significantly on cable and Internet as viewpoint diversity substitutes for TV, because they don't produce much independent local news
Radio/TV	If otherwise allowed by applicable local ownership rules, may combine: - 2 TV and 6 radio stations if at least 20 independently-owned voices remain - 2 TV and 4 radio stations if 10 independently-owned voices remain - 2 TV and 1 radio station regardless of voices	[FCC struck radio/TV and broadcast/ newspaper in favor of cross-media rule] Markets with 9 or more TV stations have no cross-ownership limits If 4-8 TV stations in market, entity may own (a) 1 newspaper, 1 TV station, and multiple radio stations so long as don't own > 50% of radio allowed under local radio rule; *or* (b) 1 newspaper and multiple radio stations up to local radio limit; *or* (c) 2 TV stations and up to the local radio limit	FCC failed to support the specific cross-media limits it chose. Commission's use of "Diversity Index" (based on HHI) to determine limits was flawed because: - Although FCC properly excluded cable from Diversity Index, in light of record evidence it should also have excluded the Internet – nether produce much local news - FCC failed to justify decision to assign all outlets within the same media type an equal market share, especially given that it assigned relative weights among the types

		If 3 or less TV stations, no cross-ownership, but waiver possible if TV station doesn't serve area served by the target radio station or newspaper	of media - Cross-media limits were not rationally derived from the Diversity Index; the limits allow some combinations that ranked poorly on the Index while prohibiting others that ranked better
Broadcast/ Newspaper	No co-ownership of station and newspaper if station's contour (Grade A for TV; 1 mV/m for FM; 2 mV/m for AM) encompasses entire community of paper's publication	[FCC struck radio/TV and broadcast/ newspaper in favor of cross-media rule; see above]	FCC justified its decision to eliminate ban on broadcast/newspaper combinations. Such combos can promote localism, and in light of contribution of at least *some* viewpoint diversity by cable and Internet, ban isn't necessary to protect diversity [see above for critique of numerical limits]
Local Radio	If 45+ commercial stations in market, may control up to 8 stations, with up to 5 in same service (AM/FM) If 30-44 comm. stations in market, may control up to 7 stations, with up to 4 in same service If 15-29 comm. stations in market, may control up to 6 stations, with up to 4 in same service If 14 or less comm. stations in market, may control up to 5 stations, with up to 3 in same service (but no party may control >50% of stations)	Same numerical limits, but will define market boundaries based on Arbitron markets instead of using signal-strength, contour-overlap method FCC will include noncommercial stations in measuring number of stations in market Attribution of JSAs where joint advertising represents more than 15% of brokered station's advertising time [note: TV JSA proceeding is pending]	FCC did not support decision to retain existing numerical limits FCC properly supported its new definition of radio markets and decision to attribute certain JSAs
UHF Discount	For nat'l cap, attribute UHF stations at 50% of TV households in DMA	No change, but will sunset application of the discount to stations owned by top 4 networks as DTV transition is completed; will later consider whether to phase out for other stations	FCC may decide scope of its authority to modify/eliminate UHF discount

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
2006 Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 06-121
	)	
2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996	)	MB Docket No. 02-277
	)	
Cross-Ownership of Broadcast Stations and Newspapers	)	MM Docket No. 01-235
	)	
Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets	)	MM Docket No. 01-317
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: June 21, 2006 **Released: July 24, 2006**

Comment Date: September 22, 2006
Reply Comment Date: November 21, 2006

By the Commission: Chairman Martin and Commissioners Tate and McDowell issuing separate statements; Commissioners Copps and Adelstein concurring in part, dissenting in part and issuing separate statements.

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I. INTRODUCTION

1. With this *Further Notice of Proposed Rulemaking* ("*Further Notice*"), we seek comment on how to address the issues raised by the opinion of the U.S. Court of Appeals for the Third Circuit in *Prometheus v. FCC*[1] and on whether the media ownership rules are "necessary in the public interest as the result of competition."[2] On June 2, 2003, the Commission adopted a Report and Order in its third biennial review of its broadcast ownership rules (the "*2002 Biennial Review Order*"). The *2002 Biennial Review Order* addressed all six of the Commission's broadcast ownership rules: the national television multiple ownership rule,[3] the local television multiple ownership rule,[4] the radio/television cross-ownership rule,[5] the dual network rule,[6] the local radio ownership rule,[7] and the newspaper/broadcast

[1] *See 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*, 18 FCC Rcd 13620, 13711-47 (2003) ("*2002 Biennial Review Order*"), *aff'd in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C.*, 373 F.3d 372 (2004) ("*Prometheus*"), *stay modified on rehearing*, No. 03-3388 (3d Cir. Sept. 3, 2004) ("*Prometheus Rehearing Order*"), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177).

[2] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 202(h) (1996) ("1996 Act"); Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) ("Appropriations Act") (amending Sections 202(c) and 202(h) of the 1996 Act).

[3] 47 C.F.R. § 73.3555(d) (2005).

[4] 47 C.F.R. § 73.3555(b) (2005) (allowing the combination of two television stations in the same Designated Market Area ("DMA"), as determined by Nielsen Media Research or any successor entity, provided: (1) the Grade B contours of the stations do not overlap; or (2) (a) at least one of the stations is not among the four highest-ranked stations in the market, and (b) at least eight independently owned and operating full power commercial and noncommercial television stations would remain in that market after the combination).

[5] 47 C.F.R. § 73.3555(c) (2005) (allowing common ownership of one or two TV stations and up to six radio stations in any market in which at least 20 independent "voices" would remain post-combination; two TV stations and up to four radio stations in a market in which at least ten independent "voices" would remain post-combination; and one TV and one radio station notwithstanding the number of independent "voices" in the (continued .)

cross-ownership rule.[8] The 2002 biennial ownership review was conducted pursuant to Section 202(h) of the Telecommunications Act of 1996, which requires the Commission to periodically review its media ownership rules to determine "whether any of such rules are necessary in the public interest as the result of competition" and to "repeal or modify any regulation it determines to be no longer in the public interest."[9] Section 202(h) requires that the next quadrennial review of the media ownership rules commence this year. Accordingly, we initiate a comprehensive review of the media ownership rules in this *Further Notice*. In the *2002 Biennial Review Order,* the Commission concluded that neither the newspaper/broadcast cross-ownership rule nor the radio/television cross-ownership rule remained necessary in the public interest. Accordingly, it replaced those rules with new cross-ownership regulations called the Cross Media Limits ("CML"). The Commission also revised its market definition and the way it counts stations for purposes of the local radio ownership rule, revised the local television multiple ownership rule, modified the national television ownership cap, and retained the dual network rule.

2. Several parties sought appellate review of various aspects of the *2002 Biennial Review Order*; others filed petitions for reconsideration. The court challenges were consolidated into a single proceeding, and on June 23, 2004, the U.S. Court of Appeals for the Third Circuit issued its decision on review of the *2002 Biennial Review Order*, affirming some Commission decisions and remanding others for further Commission justification or modification.[10] On June 13, 2005, the U.S. Supreme Court denied petitions for certiorari which had sought review of *Prometheus*.

(Continued from previous page)
market. If permitted under the local radio ownership rules, where an entity may own two commercial TV stations and six commercial radio stations, it may own one commercial TV station and seven commercial radio stations. For this rule, a "voice" includes independently owned and operating same-market, commercial and noncommercial broadcast TV stations, radio stations, independently owned daily newspapers, and cable systems (all cable systems within the DMA are counted as a single voice).

[6] 47 C.F.R. § 73.658(g) (permitting a television broadcast station to affiliate with a network that maintains more than one broadcast network, unless the dual or multiple networks are created by a combination between ABC, CBS, Fox, or NBC).

[7] 47 C.F.R. § 73.3555(a) (2005). The local radio ownership rule was the subject of a separate proceeding which was incorporated into the 2002 Biennial Review. *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets,* 16 FCC Rcd 19861 (2001) (*"Local Radio Ownership NPRM"*); *Definition of Radio Markets*, 15 FCC Rcd 25077 (2000) (*"Definition of Radio Markets NPRM"*).

[8] 47 C.F.R. § 73.3555(c) (2005) (prohibiting common ownership of a daily newspaper and a broadcast station in the same market). The newspaper/broadcast cross-ownership rule was the subject of a separate proceeding which was incorporated into the 2002 Biennial Review. *See Cross-Ownership of Broadcast Stations and Newspapers*, 16 FCC Rcd 17283 (2001) (*"Newspaper/Broadcast Cross-Ownership NPRM"*).

[9] 1996 Act, § 202(h); Appropriations Act, § 629.

[10] *Prometheus*, 373 F.3d 372. The court had earlier stayed the effectiveness of the Commission's decision pending review. *See Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3rd Cir. Sept. 3, 2003) (*per curiam*). In *Prometheus*, the court continued the stay pending its review of the Commission's action on remand. On September 3, 2004, in response to the Commission's petition for rehearing, the court allowed certain revisions to its local radio ownership rules – "specifically, using Arbitron Metro markets to define local markets, including noncommercial stations in determining the size of a market, attributing stations whose advertising is brokered under a Joint Sales Agreement to a brokering station's permissible ownership totals, and imposing a transfer restriction (collectively, the "Approved Changes")" – to go into effect, but continued its stay of the other revisions. *Prometheus Radio Project, et al. v. FCC*, No. 03-3388 (3d Cir. Sept. 3, 2004) (*"Prometheus Rehearing*
(continued .)

3. In this *Further Notice*, we discuss each rule that was remanded individually[11] and invite comment on how we should address the issues remanded by the court in the *Prometheus* decision. We encourage commenters to buttress their arguments with current empirical evidence and sound economic theory.

II. DISCUSSION

4. In the *2002 Biennial Review Order,* the Commission determined that its long-standing goals of competition, diversity, and localism would continue to guide its actions in regulating media ownership.[12] These policy objectives also will guide our actions on remand. In addition to the other requests for comment discussed below, we ask that commenters address whether our goals would be better addressed by employing an alternative regulatory scheme or set of rules.

5. The *Prometheus* court noted that the Commission deferred consideration of certain proposals for advancing ownership by minorities. The court stated that "the Commission's rulemaking process in response to our remand order should address these proposals at the same time."[13] We therefore seek comment on the proposals to foster minority ownership advanced by MMTC in its filings in the 2002 biennial review proceeding, including those that were listed in the *2002 Biennial Review Order* and referenced by the court.[14] Are any of these proposals effective and practical ways to increase minority ownership? If so, how could they best be implemented? Do we have the statutory authority to adopt them? Are there any constitutional impediments to adoption? Are there any other alternatives that we should consider that would be more effective and/or would avoid any statutory or constitutional impediments?[15]

6. More generally, we urge commenters to explain the effects, if any, that their ownership rule proposals will have on ownership of broadcast outlets by minorities, women and small businesses. We also urge commenters to discuss the potential effects, if any, of the broadcast ownership rules currently in effect, and any changes proposed in this proceeding on: advertising markets, the ability of independent stations to compete, the availability of family-friendly and children's programming, the amount of

(Continued from previous page)
Order"). Accordingly, except for the Approved Changes, the ownership rules that were in effect prior to the *2002 Biennial Review Order* remain in effect.

[11] The national television ownership limit and the dual network rule were not remanded to the Commission. Petitioners did not appeal the Commission's decision regarding the dual network rule. The court held that challenges to the Commission's decision to raise the national TV ownership limit to 45 percent were moot because Congress subsequently directed the Commission by statute to set the cap at 39 percent and stated that the quadrennial review requirement does not apply to this limitation. *Prometheus,* 373 F.3d at 396. Because of this statutory directive, we do not address the national television ownership limit in this *Further Notice.*

[12] *2002 Biennial Review Order,* 18 FCC Rcd at 13627 para. 17. *See also, Prometheus*, 373 F.3d at 446-47.

[13] *Prometheus,* 373 F.3d at 421 n.59.

[14] *2002 Biennial Review Order,* 18 FCC Rcd at 13634, 13636 paras. 46, 50. *See also, e.g.,* MMTC Jan. 2, 2003 Comments, MMTC Feb. 3, 2003 Reply Comments.

[15] For example, the Advisory Committee on Diversity for Communications in the Digital Age has submitted recommendations regarding policies and practices intended to enhance the ability of minorities and women to participate in telecommunications and related industries. *See* Letter from Julia Johnson, Chairperson, Federal Advisory Committee on Diversity in the Digital Age to Kevin J. Martin, Chairman, FCC (June 8, 2006) (filed in MB Docket 02-277).

indecent and/or violent content broadcast over-the-air, and the availability of independent programming.

7. The Commission has a long-standing policy to foster broadcast "localism," which it has defined as the airing of "programming that is responsive to the needs and interests of their communities of license."[16] In its 2002 Biennial Review, the Commission invited comment on the extent to which its broadcast ownership rules were necessary to foster localism.[17] Subsequently, the Commission established its Localism Task Force ("Task Force") to study the issue of localism and advise the Commission on whether any new rules or policies were required to promote it.[18] The Task Force conducted a series of public hearings around the country, including in Monterey, CA, Rapid City, SD, Charlotte, NC, and San Antonio, TX, in which numerous members of the public and others representing interested parties expressed their views. In addition, the Commission issued a *Notice of Inquiry* ("*NOI*") seeking comment from the public on how broadcasters are serving the interests and needs of their communities; whether the Commission needs to adopt new policies, practices, or rules designed to promote localism in broadcast television and radio; and what those policies, practices, or rules should be.[19] The *NOI* also asked, in the alternative, whether the Commission should continue to rely on market forces and the existing issue-responsive programming rules to encourage broadcasters to meet their obligations.[20]

8. The record compiled in the localism docket, MB Docket No. 04-233, is extensive. The four hearings included 52 formal presentations and remarks from community and broadcaster representatives, as well as elected and appointed officials from state and federal government. The proceedings also included testimony from 52 witnesses and from 278 additional participants during the "open microphone" sessions. In response to the *NOI*, the Commission as of June 2006 has received more than 82,000 written comments from broadcasters, broadcast industry organizations, public interest groups, and members of the public. Many broadcast entities submitted information with their comments outlining the process that each follows to determine the needs and interests of people within their respective communities of license. Licensee commenters also provided detailed data concerning the amount, nature, and variety of the programming that each airs to meet those needs and problems. A number of public interest organizations submitted with their comments studies of various aspects of the nature and quality of localism broadcast programming.

9. The Media Bureau will compile a summary of the comments in the localism proceeding and submit it into this docket. The Commission will consider the evidence received in MB Docket No. 04-233 as it moves forward with this rulemaking.

10. Finally, we note that the media marketplace continues to evolve. We seek comment on the impact of new technologies and providers such as digital video recorders, video-on-demand, and the availability of television programming and music on the Internet on media consumption and ownership issues.

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[16] *Broadcast Localism (MM Docket No. 04-233)*, Notice of Inquiry, 19 FCC Rcd 12425 (2004) (the "*Broadcast Localism NOI*"), para. 1.

[17] *2002 Biennial Review Order*, 18 FCC Rcd at 136643 para. 73.

[18] Public Notice, "FCC Chairman Powell Launches 'Localism in Broadcasting' Initiative" (rel. Aug. 20, 2003).

[19] *Broadcast Localism NOI*, 19 FCC Rcd at 12425.

[20] *Id.* at 12427-28, para. 7.

A. Local TV Ownership Rule

1. Revisions Adopted in the *2002 Biennial Review Order*

11. The Commission's local TV ownership rule, as currently in effect, provides that an entity may own two television stations in the same designated market area ("DMA") if (1) the Grade B contours of the stations do not overlap; or (2) at least one of the stations in the combination is not ranked among the top four stations in terms of audience share, *and* at least eight independently owned and operating commercial or non-commercial full-power broadcast television stations would remain in the DMA after the combination. To determine the number of voices remaining after the merger, the Commission counts those broadcast television stations whose Grade B signal contours overlap with the Grade B signal contour of at least one of the stations that would be commonly owned.[21]

12. In *Sinclair Broadcast Group, Inc. v. FCC*, the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission had not justified its exclusion of non-broadcast media from its count of independent owners for the eight-voice threshold under the local TV ownership rule.[22] After analyzing the rule in the *2002 Biennial Review Order*, the Commission determined that non-broadcast media compete with broadcast television stations[23] and contribute to viewpoint diversity in local markets and that the local TV ownership rule could not be justified because it did not account for these contributions.[24] Given the "abundance of viewpoint diversity" in most local markets, the Commission decided that the existing rule was not necessary to promote viewpoint diversity.[25] Moreover, the Commission found that the restrictions did not foster, and might even hamper, its goals of localism and program diversity.[26] The Commission cited evidence that owners of more than one station in a market are better able to preserve, or even raise, their level of local news and public affairs programming due to the increased efficiencies that multiple ownership affords.[27] The Commission concluded, however, that restrictions on local television ownership were necessary to promote competition.[28]

13. The Commission revised the local TV ownership rule to permit an entity to own up to two television stations in markets with 17 or fewer television stations, and up to three television stations in markets with 18 or more television stations.[29] These numerical limits on television station ownership were intended to ensure that there would be at least six equal-sized owners of television broadcast outlets

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[21] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13668 para. 132 and cites therein.

[22] *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 163-65 (D.C. Cir. 2002) ("*Sinclair*").

[23] The Commission's competition analysis focused not on competition for advertising, but on competition for viewers in the "delivered video programming market," which includes television broadcast stations as well as multichannel video programming distributors ("MVPDs"). *2002 Biennial Review Order*, 18 FCC Rcd at 13671-74 paras. 141-46.

[24] *Id.* at 13668 para. 133.

[25] *Id.* at 13686 para. 171.

[26] *Id.* at 13668 para. 133.

[27] *Id.* at 13685 para. 169.

[28] *Id.* at 13668 para. 133.

[29] *Id.* at 13668 para. 134.

in most markets.[30] The Commission retained the prohibition on combinations involving more than one station ranked among the top four in the market, thus prohibiting combinations in markets with four or fewer television stations.[31] For purposes of setting its numerical limits, the Commission defined firm size in terms of the number of licenses held, rather than some other measure such as market share, because of the fluidity of market share in the markets in which television broadcast stations compete.[32] The Commission added that as a broadcast station requires a license, the number of licenses that a firm controls is the measure of its capacity to deliver programming.[33] The Commission also eliminated consideration of overlapping Grade B contours,[34] and decided to look instead only at whether a station is assigned by Nielsen to a DMA.[35] All full-power commercial and non-commercial television stations within the DMA would be counted for purposes of applying the rule.[36]

14. The *2002 Biennial Review Order* also modified the Commission's criteria for waiver of the local TV ownership rule.[37] Although the Commission stated that it would continue to allow entities to seek a waiver if at least one of the stations in the proposed combination is failed, failing, or unbuilt,[38] it removed the requirement that the waiver applicant demonstrate that there is no buyer outside the market willing to purchase the station at a reasonable price.[39]

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[30] *Id.* at 13693 paras. 192-93. The Commission's decision to set limits that would result in six firms was partly based upon the horizontal merger guidelines used by the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") in antitrust analysis. *Id.* (citing *Horizontal Merger Guidelines issued by the U.S. Department of Justice and the Federal Trade Commission*, 57 Fed. Reg. 41552 (dated Apr. 2, 1992, revised, Apr. 8, 1997) ("*DOJ/FTC Merger Guidelines*")). Under these guidelines, markets with Herfindahl-Hirschmann Index ("HHI") levels between 1000 and 1800 are considered moderately concentrated. The HHI score of a market with six equal-sized competitors is below the *DOJ/FTC Merger Guidelines* 1800 threshold for highly concentrated markets. *Id.*

[31] *2002 Biennial Review Order*, 18 FCC Rcd at 13668 para. 134. As under the existing rule, the revised rule provided that a station's rank would be based on the station's most recent all-day audience share, as measured by Nielsen or any comparable professional and accepted rating service, at the time an application for transfer or assignment of license is filed. *Id.* at 13692 para. 186.

[32] *Id.* at 13694 para. 193.

[33] *Id.*

[34] *Id.* at 13692 para. 187. Combinations in existence as of the time of the *2002 Biennial Review Order* were grandfathered. *2002 Biennial Review Order*, 18 FCC Rcd at 13807-08 paras. 482-84.

[35] *Id.* at 13692 para. 186-87 n.399.

[36] *Id.* at 13691-92 para. 186. Satellite stations, which retransmit all or a substantial part of the programming of a commonly-owned parent station, are exempted from the rule. *Id.* at 13710 para. 233.

[37] *Id.* at 13708 para. 225 (eliminating requirement to show that no out-of-market buyer is available for failed, failing and unbuilt station waivers); *Id.* at 13710 para. 231 (stating that the Commission also would consider waivers of the local TV ownership rule where the stations at issue are in the same DMA, but are not available over-the-air or via MVPDs in any of the same geographic areas); *Id.* at 13708-10 paras. 227-30 (in markets with 11 or fewer stations, parties can seek a waiver of the top four-ranked restriction by making certain showings).

[38] *2002 Biennial Review Order*, 18 FCC Rcd at 13708 para. 225. *See* 47 C.F.R. 73.3555 Note 7 (setting forth the criteria that must be met in order for a station to qualify as "failed, failing, or unbuilt").

[39] *2002 Biennial Review Order*, 18 FCC Rcd at 13708 para. 225.

2. Remand Issues

15. On review, the *Prometheus* court upheld the Commission's determination that "broadcast media are not the only media outlets contributing to viewpoint diversity in local markets."[40] In light of its decision to remand the Commission's numerical limits, the court found that it need not decide "the degree to which non-broadcast media compensate for lost viewpoint diversity to justify the modified [local TV] rule."[41] The court nonetheless noted that "it seems that the degree to which the Commission can rely on cable or the Internet to mitigate the threat that local station consolidations pose to viewpoint diversity is limited."[42] In addition, in light of evidence in the record, including evidence that "commonly owned television stations are more likely to carry local news than other stations" and studies showing that "consolidation generally improved audience ratings," the court rejected petitioners' contention "that the Commission's finding of localism benefits from consolidation was unsupported."[43] The court also upheld the Commission's decision to retain the top four-ranked station restriction, stating that it "must uphold an agency's line-drawing decision when it is supported by evidence in the record."[44] It found "ample evidence in the record" to support the Commission's reliance on a "cushion" of audience share percentage points between the fourth and fifth-ranked stations in most markets to restrict combinations among the top four-ranked stations "as opposed to the top three or some other number."[45]

16. The court, however, remanded the numerical limits of the new rule for further justification. As explained above, the limits were based on a benchmark of six equal-sized competitors. The size of an owner was tied to the number of stations owned, rather than the audience shares of those stations. The court held that the Commission had unreasonably failed to consider the audience shares of stations in setting its numerical limits, finding that "[n]o evidence supports the Commission's equal market share assumption, and no reasonable explanation underlies its decision to disregard actual market share."[46] Further, although the court recognized that the Commission did not intend the numerical limits to be a mechanical application of the *DOJ/FTC Merger Guidelines*, it concluded that the rule was unreasonable because it would allow levels of concentration exceeding the 1800 HHI benchmark relied upon by the Commission in setting its numerical limits, a result which it called "a glaring inconsistency between rationale and result."[47]

17. The court also remanded for further consideration the Commission's elimination of the requirement to demonstrate that no out-of-market buyer is reasonably available when seeking a failed, failing, or unbuilt television station waiver. The Court found that ". . . in repealing the rule without any discussion of the effect of its decision on minority television station ownership," the Commission "entirely failed to consider an important aspect of the problem."[48] The court also noted that the

[40] *Prometheus*, 373 F.3d at 414.

[41] *Id.* at 415.

[42] *Id.* at 415.

[43] *Id.* at 415.

[44] *Id.* at 417-18 (citing *Sinclair*, 284 F.3d at 162; *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000).

[45] *Id.* at 417-18.

[46] *Id.* at 418-19.

[47] *Id.* at 419-20.

[48] *Id.* at 421.

Commission deferred consideration of certain proposals for advancing broadcast ownership by minority and disadvantaged businesses and for promoting diversity in broadcasting for a future Notice of Proposed Rulemaking.[49] The court stated that "the Commission's rulemaking process in response to our remand order should address these proposals at the same time."[50]

3. Request for Comment

18. We invite comment on all of the issues remanded by the *Prometheus* court regarding the local TV ownership rule. Should the limits on the number of stations that can be commonly owned adopted in the *2002 Biennial Review Order* be revised, or is there additional evidence or analysis upon which the Commission can rely to further justify the limits it adopted? How should we address the court's concern that the revised numerical limits allow concentration to exceed the 1800 HHI benchmark relied upon by the Commission in setting the limits? Is there additional evidence to support the Commission's decision to treat capacity as an important factor in measuring the competitive structure of television markets? Is there evidence to support fluidity of television station market shares? Should the limits vary depending on the size of the market? How would any changes impact the need for the top four-ranked restriction? We urge commenters to consider and discuss whether their proposals with respect to the local TV ownership rule also would be consistent with the *Sinclair* decision.

19. We also invite comment on the court's remand of the elimination of the requirement that waiver applicants demonstrate that there is no reasonably available out-of-market buyer. Should we reinstate this requirement? Is it unduly burdensome? Are there less burdensome means of ensuring that unnecessary concentration of ownership does not occur? Has the requirement had an effect on minority and/or female ownership of broadcast stations?

B. Local Radio Ownership Rule

1. Revisions Adopted in the *2002 Biennial Review Order*

20. In the *2002 Biennial Review Order*, the Commission retained the local radio numerical limits and the AM/FM service caps that Congress adopted in the 1996 Act.[51] Under these limits, an entity may own, operate, or control (1) up to eight commercial radio stations, not more than five of which are in the same service (*i.e.*, AM or FM), in a radio market with 45 or more radio stations; (2) up to seven commercial radio stations, not more than four of which are in the same service, in a radio market with between 30 and 44 (inclusive) radio stations; (3) up to six commercial radio stations, not more than four of which are in the same service, in a radio market with between 15 and 29 (inclusive) radio stations; and (4) up to five commercial radio stations, not more than three of which are in the same service, in a radio market with 14 or fewer radio stations, except that an entity may not own, operate, or control more than 50 percent of the stations in such a market.[52] The Commission determined that its contour-overlap

[49] *Prometheus*, 373 F.3d at 421 n.59. In the *2002 Biennial Review Order*, the Commission stated that it would commence a separate proceeding to examine proposals to advance broadcast ownership opportunities for minorities and women. *2002 Biennial Review Order*, 18 FCC Rcd at 13634, 13636 paras. 46, 50.

[50] *Prometheus*, 373 F.3d at 421 n.59.

[51] *2002 Biennial Review Order*, 18 FCC Rcd at 13712, 13733-34 paras. 239, 294. The Commission maintained the AM and FM ownership limits due to technical and marketplace disparities between the two services. *Id.*, 18 FCC Rcd at 13733-34 para. 294.

[52] *See* 1996 Act § 202(b); 47 C.F.R. § 73.3555(a).

methodology for defining radio markets and counting stations in the market was flawed as a means to protect competition in local radio markets.[53] The Commission therefore modified the definition of a local radio market by replacing the contour-overlap approach with an Arbitron Metro market definition, where Arbitron markets exist.[54] The Commission initiated a rulemaking proceeding, MB Docket No. 03-130, to seek comment on how to define local radio markets in geographic areas that are not defined by Arbitron.[55] In addition, the Commission decided to include non-commercial stations when determining the number of radio stations in a market for purposes of the ownership rules.[56] The Commission also decided to attribute certain radio station Joint Sales Agreements ("JSA").[57] Recognizing that there could be some existing combinations of broadcast stations that would exceed the revised ownership limits, the Commission grandfathered existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations.[58]

2. Remand Issues

21. The *Prometheus* court concluded that the Commission's decision "to replace contour-overlap methodology with Arbitron radio metro markets was 'in the public interest' within the meaning of §202(h)" and that the decision was "a rational exercise of rulemaking authority."[59] The court also upheld the Commission's attribution of JSAs.[60] The court further held that the Commission had justified its decisions to count noncommercial stations in defining the size of a market and to restrict the transfer of grandfathered combinations except to certain eligible entities.[61] Although it affirmed the Commission's rationale that numerical limits help guard against consolidation and foster opportunities for new entrants and therefore upheld the use of numerical limits, the court remanded the Commission's decision to retain the existing specific local radio ownership limits. The court held that the limits were unsupported by the

[53] *2002 Biennial Review Order*, 18 FCC Rcd at 13712, 13724-28 paras. 239, 273-81.

[54] *Id.* at 13712, 13724-28 paras. 239, 273-81.

[55] *Id.* at 13729, 13870-73 paras. 282-83, 657-70. For areas not covered by Arbitron Metros, the Commission adopted a modified contour-overlap methodology pending the outcome of the rulemaking. This interim contour-based rule excludes from a market radio stations that have transmitter sites farther than 92 kilometers (58 miles) away from the perimeter of the overlapping area that defines the radio market. The interim rule does not count as in the market any commonly owned stations that are not counted against an owner in a market for purposes of applying the local radio ownership rule. *Id.* at 13717-28, 13729-30 paras. 250-54, 284-86. The issues raised in the non-Arbitron market proceeding will be addressed separately.

[56] *Id.* at 13713 para. 239. The Commission held that its prior exclusion of these stations failed to account for their competitive impact on a radio market. *Id.* at 13730 para. 287. The Commission found that although they do not compete in the radio advertising market, noncommercial stations exert competitive pressure in the radio listening and radio program production markets. *Id.* at 13734 para. 295.

[57] *Id.* at 13742-46 paras. 316-25.

[58] *2002 Biennial Review Order*, 18 FCC Rcd at 13807-09 paras. 482-86.

[59] *Prometheus*, 373 F.3d at 425.

[60] *Id.* at 429-30.

[61] *Id.* at 421-30. Although the Commission did not require owners to divest their interests in stations, it held that parties would have to comply with the ownership rules at the time a transfer of control or assignment application is filed, unless the entity acquiring control of the combination was an "eligible entity," which was defined as an entity that would qualify as a small business consistent with Small Business Administration ("SBA") standards for its industry grouping. *2002 Biennial Review Order*, 18 FCC Rcd at 13809-12 paras. 487-90.

Commission's rationale that they ensure five equal-sized competitors in most markets.[62] The court held that the Commission had failed to justify five as the appropriate benchmark and did not reconcile that benchmark with the *DOJ/FTC Merger Guidelines* it had used to derive the local TV ownership limits. The court also stated that the Commission had failed to show that the limits ensured that five equal-sized competitors have emerged or would emerge under the numerical limits.[63] The court further faulted the Commission for not explaining why it could not take "actual market share" into account when deriving the numerical limits. Finally, the court held that the Commission did not support its decision to retain the AM subcaps.[64]

3. Request for Comment

22. We invite comment on the issues remanded by the *Prometheus* court with respect to the local radio ownership limits. In order to address the court's concerns, should the numerical limits be revised, or is there additional evidence that could be used to further justify the limits? If the Commission should revise the limits, what revisions are appropriate? Should we create additional tiers? How should the Commission address the court's concern that the limits adopted do not account for actual market share? Should the rule still seek to ensure a specific number of competitors in a market, and, if so, what is the appropriate benchmark for that number? Finally, should we retain the AM/FM subcaps? Lastly, we seek comment on whether the local radio ownership rule currently in effect is necessary in the public interest as a result of competition.

C. Cross-Media Limits

1. Revisions Adopted in the *2002 Biennial Review Order*

23. In the *2002 Biennial Review Order*, the Commission concluded that neither the newspaper/broadcast cross-ownership rule nor the radio/television cross-ownership rule was necessary in the public interest as the result of competition.[65] The Commission replaced these rules with a single set of cross-media limits, as discussed below.

24. The newspaper/broadcast cross-ownership rule prohibits common ownership of a full-service broadcast station and a daily newspaper if the broadcast station's service contour completely

[62] *Prometheus,* 373 F.3d at 432-34 (Because the Commission "has in the past extolled the value of audience share data for measuring diversity and competition in local markets," its "reliance on the fiction of equal-sized competitors, as opposed to measuring their actual competitive power, is even more suspect in the context of the local radio rule.").

[63] The court noted that the Commission's decision to rely on a five firm theory for purposes of the local radio ownership rule conflicts with the *DOJ/FTC Merger Guidelines*, under which a market with five equal-sized competitors is considered "highly concentrated." The court held this conflict "suspect" because, elsewhere in the *2002 Biennial Review Order*, the Commission had relied on the *DOJ/FTC Merger Guidelines* to derive its local TV ownership limits. The court directed the Commission to address this apparent discrepancy on remand. *Prometheus,* 373 F.3d at 433. In addition, the Commission had cited game theory articles to support its finding that a market that has five or more relatively equal-sized firms can achieve a level of market performance comparable to a fragmented, structurally competitive market. The court directed the Commission to respond to the argument that these game theory articles do not rule out market structures other than equal-sized competitors (such as one large firm and many small ones) as equally competitive markets. *Id.* at 432-33.

[64] *Id.* at 434-35.

[65] *2002 Biennial Review Order,* 18 FCC Rcd at 13747 para. 327.

encompasses the newspaper's city of publication.[66] In the *2002 Biennial Review Order,* the Commission concluded that this rule, which does not account for either market size or the availability of other media outlets that may serve a market, was not necessary to promote competition, diversity, or localism.[67] The Commission held that, because newspapers and broadcast stations do not compete in the same economic market, elimination of the ban could not harm competition.[68] The Commission found that efficiencies resulting from common ownership of a newspaper and a television station can actually promote localism, because newspaper-owned television stations tend to produce local news and public affairs programming in greater quantity and of a higher quality than non-newspaper-owned stations.[69] Furthermore, the Commission determined that the blanket ban on cross-ownership was not needed to promote viewpoint diversity given that (1) a vast array of media outlets is available in many markets today, (2) the Commission's revised local cross-media ownership rules will protect diversity sufficiently, and (3) common ownership efficiencies can facilitate the broadcasting of higher quality programming.[70]

25. Similarly, the Commission found that the existing radio/television cross-ownership rule could not be justified under Section 202(h).[71] As with the newspaper/broadcast cross-ownership rule, the Commission found that the radio/television cross-ownership rule was not necessary to promote competition, localism, or diversity because radio and television compete in distinct product markets; the efficiencies of common ownership can enhance localism and diversity; the multitude of media outlets in most local markets renders the rule obsolete; the Commission's revised intra-service ownership rules (*i.e.*, the local TV and local radio rules) afford sufficient protection with regard to competition; and the new CML were targeted more precisely at specific types of markets in which particular combinations could harm diversity.[72]

26. To determine the availability of media outlets in markets of various sizes, the Commission developed a Diversity Index (the "DI"), which it used to analyze and measure the availability of outlets that contribute to viewpoint diversity in local media markets.[73] The DI, which was modeled after the HHI used in economic and antitrust analyses, measured the availability of various media outlets and assigned a weight to each type of outlet based on its relative use by consumers.[74] The Commission stated that the DI would not be used to measure viewpoint diversity in particular local markets. Rather, it was used to evaluate in the aggregate the contributions to diversity of various media outlets in order to determine

[66] The service contour for AM radio stations is the 2mV/m contour; the service contour for FM radio stations is the 1mV/m contour; and the service contour for TV stations is the Grade A contour. The previous definition of a daily newspaper was one that was published at least four times a week in English. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13747 para. 328; *Id. at* n. 717. In the *2002 Biennial Review Order*, the Commission revised this definition to include non-English newspapers published in the primary language of the market. *Id.* at 13799-800 paras. 457-58.

[67] *Id.* at 13747-48 paras. 328-30.

[68] *Id.* at 13748-49 paras. 331-32.

[69] *Id.* at 13753-60 paras. 342-54.

[70] *Id.* at 13760-62 paras. 355-59.

[71] *Id.* at 13768 para. 371.

[72] *Id.* at 13775 para. 390.

[73] *Id.* at 13775-76 para. 391.

[74] *Id.* at 13776-79 paras. 393-400.

which size markets are most at risk for viewpoint concentration.[75]

27. Reasoning that small markets are at greater risk for diversity concentration, the Commission's CML were tiered according to the size of the market. The Commission prohibited newspaper/broadcast and radio/television cross-ownership in markets with three or fewer television stations.[76] In markets with between four and eight stations, the Commission held that an entity may own a combination that includes a newspaper and either (a) one television station and up to 50 percent of the radio stations that may be commonly owned under the applicable radio cap, or (b) up to 100 percent of the radio stations allowed under the applicable radio cap.[77] In markets with nine or more television stations, cross-media combinations would be permitted without limit, so long as they comply with the applicable local television and local radio caps.[78] In the *2002 Biennial Review Order*, the Commission held that parties may seek a waiver of these limits if they can demonstrate that an otherwise impermissible combination would enhance the quality and quantity of broadcast news available in their market.[79]

2. Remand Issues

28. The *Prometheus* court affirmed the Commission's decision to eliminate the newspaper/broadcast cross-ownership rule,[80] holding that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."[81] The court rejected attacks on the "Commission's conclusion that the newspaper/broadcast cross-ownership ban undermined localism."[82] The court upheld the Commission's determination that the prohibition was not necessary to protect diversity, agreeing that the Commission reasonably concluded that it did not have enough confidence in the proposition that commonly owned outlets have a uniform bias to warrant sustaining the prohibition[83] and that "it was acceptable for the Commission to find that cable and the Internet contribute to viewpoint diversity" in local markets.[84] The court found the Commission did not violate Section 202(h) by concluding that (1) repealing the cross-ownership ban was necessary to promote competition and localism, and (2) retaining some limits was necessary to ensure diversity. The court also held that the Commission's continued regulation of cross-ownership was constitutionally sound.[85]

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[75] *Id.* at 13776 para. 392.

[76] *Id.* at 13797-801 paras. 452-61. The revised rules do not, however, bar a broadcast station from starting a new newspaper in its market. *Id.* at 13799 para. 456. For purposes of counting the number of stations in a market under the cross media limits, the Commission counts both commercial and noncommercial full power television stations assigned to the DMA. *Id.* at 13798 para. 454.

[77] *Id.* at 13803 para. 466.

[78] *Id.* at 13804 paras. 472-73.

[79] *Id.* at 13806-07 para. 481.

[80] *Prometheus*, 373 F.3d at 398-400.

[81] *Id.* at 398.

[82] *Id.* at 399.

[83] *Id.* at 399-400.

[84] *Id.*

[85] *Prometheus*, 373 F.3d at 400-02 (citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 801-02 (1978) ("*NCCB*")).

29. The court concluded, however, that the specific limits selected by the Commission were not supported by reasoned analysis, and remanded the CML to the Commission for further justification or modification. The court stated that it did not object to the Commission's reliance on the HHI as a starting point for measuring diversity, but found that the Commission placed too much weight on the Internet in its DI, irrationally assigned outlets of the same media type equal market shares, and inconsistently derived the CML from its DI results.[86]

30. With regard to the Commission's inclusion and weighting of the Internet in the DI, the court held that the Commission's "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was not rational."[87] The court also distinguished several sources of information available via the Internet from "media outlets," stating that 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."[88] The court also contrasted certain Internet sites with media outlets by stating that media have "an aggregator function" as well as a "distillation function (making a judgment as to what is interesting, important, entertaining, etc.)," while the websites of, for example, political candidates or local governments do not aggregate or distill information.[89]

31. The court also remanded for further consideration the Commission's decision to assign all outlets within the same media type equal market shares in constructing the DI. The court held that the "assumption of equal market shares is inconsistent with the Commission's overall approach to its DI, and also makes unrealistic assumptions about media outlets' relative contributions to viewpoint diversity in local markets."[90] The court determined that the Commission's efforts to justify this approach were not persuasive.[91] The court rejected the Commission's rationale that actual-use data are not relevant in predicting future behavior, noting that the Commission employed actual-use data in assigning relative weight to different types of media, even as it used equal market shares, rather than actual market shares, for outlets within a media type. The court also rejected the Commission's assertion that consumer preferences for particular media outlets are more fluid than their preferences for different types of media because the outlet's format or content can be easily changed, stating that the Commission provided no evidence to show that media outlets actually or regularly undergo a content change. Lastly, the court rejected the Commission's claim that relying on actual audience share data would require it to make a constitutionally problematic categorization of programming as news or "non-news" because the Commission obtained actual-use data by asking respondents where they got their local news.[92] Finally, the court held the Commission did not rationally derive its CML from the DI, because the CML would allow certain broadcast combinations where the increases in the DI scores were generally higher than for other combinations that are not allowed.[93]

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[86] *Id.* at 402-03

[87] *Id.* at 405.

[88] *Id.* at 407.

[89] *Id.* at 407-08.

[90] *Id.* at 408.

[91] *Id.* at 402-12.

[92] *Id.* at 408-09.

[93] *Id.* at 409-11.

3. Request for Comment

32. We invite comment on all of the issues remanded by the *Prometheus* court regarding cross-ownership. Many of these issues relate to the DI. In light of the court's extensive and detailed criticism of the DI, we tentatively conclude that the DI is an inaccurate tool for measuring diversity. Moreover, we recognize that some aspects of diversity may be difficult to quantify. To the extent that we will not use the DI to justify changes to the existing cross-ownership rules, we seek comment on how we should approach cross-ownership limits. Should limits vary depending upon the characteristics of local markets? If so, what characteristics should be considered, and how should they be factored into any limits? We seek comment on the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule. Are there aspects of television and radio broadcast operations that make cross-ownership with a newspaper different for each of these media? If so, should limits on newspaper/radio combinations be different from limits on newspaper/television combinations? Lastly, are the newspaper/broadcast cross-ownership rule and the radio/television cross-ownership rule necessary in the public interest as a result of competition?

D. Dual Network Rule

33. The Commission's dual network rule provides "A television broadcast station may affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such dual or multiple networks are composed of two or more persons or entities that, on February 8, 1996, were 'networks' as defined in Section 73.3613(a)(1) of the Commission's regulations (that is, ABC, CBS, Fox, and NBC)."[94] Thus, the rule permits common ownership of multiple broadcast networks, but prohibits a merger between or among the "top four" networks. In the *2002 Biennial Review Order*, the Commission determined that the dual network rule was necessary in the public interest to promote competition and localism and retained the rule.[95] The Petitioners in *Prometheus* did not appeal the Commission's retention of the rule. We seek comment on whether the dual network rule remains necessary in the public interest as a result of competition.

E. UHF Discount

34. In *Prometheus*, the Third Circuit held that challenges to the Commission's national television ownership rule were moot following Congressional action that set the national cap at 39 percent.[96] In so doing, the court also addressed the Commission's UHF discount rule, which we have used in calculating a UHF station's audience reach under the national TV cap.[97] The court stated that the UHF discount rule "is insulated from this and future periodic review requirements" and yet also noted that the "Commission is now considering its authority going forward to modify or eliminate the discount and recently took public comment on the issue."[98] The court then concluded that that Commission may decide

[94] 47 C.F.R. § 73.658(g).

[95] *2002 Biennial Review Order*, 18 FCC Rcd at 13850 para. 599.

[96] *Prometheus*, 373 F.3d at 395-97. As noted above, the court held that challenges to the Commission's the national TV ownership rule were moot because Congress subsequently directed the Commission by statute to set the cap at 39 percent. *See* Appropriations Act, § 629.

[97] 47 C.F.R. § 73.3555(d)(2)(i).

[98] *Prometheus*, 373 F.3d at 397 (citing the FCC Public Notice published at 69 Fed. Reg. 9216-17 (Feb. 27, 2004)).

the scope of our authority to modify or eliminate the UHF discount outside of the Section 202(h) mandate.[99]

35. We seek comment on whether the court's holding on the UHF discount rule was ambiguous. We seek comment on whether the Commission should retain, modify, or eliminate the UHF discount. Commenters who urge us to modify or eliminate the UHF discount rule should discuss the basis for our authority to take such action.

III. PETITIONS FOR RECONSIDERATION

36. A number of parties filed petitions for reconsideration of the *2002 Biennial Review Order*. These petitions, opposing pleadings, and replies are listed in Appendix A attached hereto. The petitions have already been the subject of public notice and comment during their own pleading cycle. Parties who wish to refresh the record concerning the petitions may do so in their comments filed in response to this *Further Notice*.

IV. PROCEDURAL MATTERS

A. Comment Information

37. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://www.fcc.gov/cgb/ecfs/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the website for submitting comments.

  - For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

  Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

[99] *Id.*

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail should be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: Contact the FCC to request materials in accessible formats (Braille, large print, electronic files, audio format, etc.) by e-mail at FCC504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0531 (voice), 202-418-7365 (TTY).

B. Regulatory Flexibility Act

38. As required by the Regulatory Flexibility Act,[100] the Commission prepared an Initial Regulatory Flexibility Analysis (IRFA) in the initial *Notice of Proposed Rulemaking* in this proceeding.[101] We have now prepared a Supplemental IRFA, which is set forth in Appendix B. Written public comments are requested on the Supplemental IRFA. These comments must be filed in accordance with the same filing deadlines for comments on the *Further Notice of Proposed Rulemaking*, and should have a separate and distinct heading designating them as responses to the Supplemental IRFA.

C. Paperwork Reduction Act

39. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any proposed new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4). However, depending on the rules adopted as a result of this *Further Notice of Proposed Rule Making*, the *Report and Order* (*R&O*) ultimately adopted in this proceeding may contain information collections. The Commission will provide a period for public comment on any PRA burdens contained in the R&O and will submit such burdens to the Office of Management and Budget for approval when the R&O is adopted and released.

D. Ex Parte Information

40. This is a permit-but-disclose notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided that they are disclosed

[100] *See* 5 U.S.C. § 603.

[101] *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 Broadcast Stations in Local Markets, Definition of Radio Markets,* 17 FCC Rcd 18503, 18558 App. A (2002).

as provided in the Commission's Rules.[102]

41. *Contact Information.* The Media Bureau contact for this proceeding is Mania Baghdadi at (202) 418-7200. Press inquiries should be directed to Rebecca Fisher at (202) 418-2330, TTY: (202) 418-7365 or (888) 835-5322.

V. ORDERING CLAUSES

42. Accordingly, IT IS ORDERED, that pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and section 202(h) of the Telecommunications Act of 1996, this *Further Notice of Proposed Rulemaking* IS ADOPTED.

43. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2(a), 4(i), 303, 307, 309, and 310 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 154(i), 303, 307, 309, and 310, and section 202(h) of the Telecommunications Act of 1996, NOTICE IS HEREBY GIVEN of the proposals described in this *Further Notice of Proposed Rulemaking.*

44. IT IS FURTHER ORDERED that MB Docket No. 03-130 SHALL BE severed from this proceeding.

45. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Further Notice of Proposed Rulemaking*, including the Supplemental Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[102] *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).