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

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

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Executive Summary

The National Association of Broadcasters ("NAB") hereby submits its comments responding to the *Further Notice of Proposed Rulemaking* in MB Docket 06-121, addressing the Commission's broadcast ownership rules. As all parties to the many ownership proceedings conducted at the Commission have recognized, broadcasting is an important part of our American culture. Local broadcasters provide national and local news, information and entertainment to the American public free of charge. Broadcasters participate in their local communities – they understand the needs of their audiences and work every day to provide programming to address those needs. As our record demonstrates, broadcasters recognize and embrace their obligation to serve the public interest. In light of this important role, NAB urges the Commission to approach its review of the broadcast ownership regulations with an eye toward maintaining the vibrancy of the broadcast industry so that it can continue to provide the vital service that all Americans have come to expect.

As an initial matter, NAB emphasizes that the Commission has a clear duty, under both general administrative law and Section 202(h) of the 1996 Telecommunications Act, to reevaluate the broadcast ownership rules to ensure they still serve the public interest in a rapidly changing media marketplace. Section 202(h) explicitly requires the repeal or modification of the existing ownership regulations if they are no longer necessary in the public interest as the result of competition. In this regard, the Commission must recognize the continuing proliferation of media outlets accessible to American consumers and the profound impact such proliferation has had on the broadcast industry and the need for continued ownership regulation.

The Commission originally adopted its local broadcast ownership restrictions decades ago in a very different media environment. Technological advancements, the growth of multichannel video and audio outlets and the Internet, and an expansion in the number of broadcast outlets in the past several decades have altered the media marketplace in two fundamental ways. First, consumers nationally and in local markets of all sizes now have access to a vast array of information and entertainment from broadcast and nonbroadcast outlets. Numerous surveys, including a very recent one conducted by BIA Financial Network ("BIA"), have documented this proliferation of media outlets in local markets, and a further BIA study demonstrated that consumers routinely access many additional "out-of-market" outlets. Second, due to this explosion of outlets, as the Commission found even four years ago, traditional broadcasters are struggling to maintain their audience and advertising shares "in a sea of competition." NAB herein documents how the more recent development of broadband and new video and audio Internet applications have exponentially increased the number of sources for information, opinion and entertainment, and created new and growing competitors for the advertising support that is crucial to free over-the-air media.

In light of these technological and marketplace developments, the Commission must seriously consider whether the current broadcast ownership rules continue to serve the agency's stated goals of competition, diversity and localism. NAB believes that they do not.

Competition

In a multichannel environment dominated by consolidated cable and satellite system operators, broadcasters are clearly unable to obtain and exercise any undue market power. For this reason, the traditional competition rationale for maintaining a regulatory regime applicable only to local broadcasters and not their competitors is not a proper basis for keeping the current rules. Indeed, the primary competition-related concern in today's digital, multichannel marketplace is the continued ability of local broadcasters to compete effectively and to offer free, over-the-air entertainment and informational programming that American citizens rely upon. NAB documents, in detail, the audience fragmentation and increasing competition for advertising revenue experienced by broadcast stations, as the result of new entry by cable television, satellite television and radio, numerous Internet video and audio applications, and mobile devices such as MP3 players. To best achieve the Commission's goals of a competitive media marketplace that provides lower prices, better service and greater innovation to consumers, the Commission should now structure its local ownership rules so that traditional broadcasters and newer programming distributors can all compete on an equitable playing field.

A level regulatory playing field is particularly urgent, given that local broadcasters' most prominent competitors enjoy dual revenue streams of both subscriber fees and advertising revenues. Broadcasters, of course, are almost solely dependent on advertising, and local stations today must struggle to maintain needed revenues in a vastly more competitive advertising market. Any realistic assessment of today's media marketplace leads to the conclusion that competition considerations dictate change in the broadcast ownership rules.

Diversity

NAB submits that the Commission must also consider whether its existing ownership rules are necessary to the traditional goal of promoting diversity. The proliferation of broadcast outlets and the rise of new multichannel video and audio programming distributors and the Internet have produced an exponential increase in programming and service choices available to viewers and listeners. Strong evidence shows that the public's interest in receiving diverse content is therefore being met both nationally and on a market basis. Numerous studies, including one just completed by BIA, have confirmed that the post-1996 ownership changes within local broadcast markets, especially among radio stations, have enhanced the diversity of programming offered by local stations. This new BIA study also showed that radio stations are providing a wide range of programming targeted for diverse audiences, including minority groups and groups with niche tastes and interests. Moreover, both older and more recent studies indicate that the joint ownership of media outlets in local markets does not significantly inhibit the expression of diverse viewpoints by these commonly owned outlets.

The ability of consumers to obtain diverse programming and viewpoints is only enhanced by the growing level of substitutability between media for both entertainment and informational purposes. Studies previously conducted for the Commission and more recent surveys on media usage reveal considerable substitutability between media for various uses. Indeed, the recent studies showed that multichannel outlets and the Internet compete with – and substitute for – the use of traditional media including broadcast and newspapers for both entertainment and information, especially among younger consumers.

Localism

As shown by NAB in the Commission's pending localism proceeding, local stations provide a wealth of local news and public affairs programming, political information, emergency information, other locally produced and responsive programming, and additional, unique community service. But given the relentless competition for audience and advertising shares from the vast array of other media outlets, the real threat today to the extensive locally-oriented service offered by television and radio broadcasters is not the group ownership of stations. Rather, it is the challenge stations face in maintaining their economic viability in a market dominated by consolidated multichannel providers and other competitors. If the Commission seeks to maintain a system of viable commercial broadcast stations offering free, over-the-air service to local communities, then stations must be allowed to form efficient and financially sustainable ownership structures.

Local Radio Ownership

The Commission must reject calls for stringent ownership restrictions on local radio. Numerous studies have demonstrated that radio programming diversity has continued to increase since Congress opened the door to more efficient and economically viable radio ownership structures in 1996. Stations today serve very diverse audiences, including minority groups, with entertainment and informational programming targeted to their needs and interests. Radio stations also clearly operate in an increasingly competitive marketplace and face continuing audience fragmentation such that even market leading stations must find new ways to earn audience and advertising revenue share. Several previous studies moreover found no evidence that post-1996 ownership changes have lead to increases in the price of radio advertising or other exercises of market power by station groups. Perhaps most interestingly, two empirical studies have concluded that any potential exercise of market power by radio groups can be countered by the ability of other stations, including smaller groups and individual stations, to gain substantial increases in listening share through programming changes. And, finally, a further NAB study demonstrated that, despite the post-1996 changes in the radio industry, large numbers of radio stations either remain "standalones," or are part of local duopolies, in their respective markets.

In this current competitive marketplace, NAB supports continuing relaxation of the radio ownership rules. Congress adopted the existing numerical station limits in 1996 before the emergence of satellite radio, Internet streaming of radio stations, the development of Internet applications such as podcasting, on-line music sites, music file-sharing and downloading, and the growth of mobile audio technologies such as MP3 players and even mobile phones. XM and Siruis alone now put hundreds of channels of music, news, talk and sports into every local market in the United States, and earn dual revenue streams from subscriber fees and advertisers, all without being subject to comparable ownership restrictions. In the Internet age, every local radio station is potentially competing against thousands of radio stations from around the country or the world, and estimated monthly audiences for Internet radio are over 52 million. With satellite radio and a host of mobile gadgets, terrestrial radio stations now also face growing competition for listeners while consumers are in automobiles or outside the home or office. Because past changes in ownership structures have enhanced local stations' abilities to serve diverse audiences and their communities, without resulting in the exercise of undue market power by radio groups, the Commission should find that a further liberalization of the decade-old radio ownership restrictions would serve the public interest.

Local Television Ownership

The Commission should reform the television duopoly rule to reflect the current competitive television marketplace and allow more freely the formation of duopolies in markets of all sizes. As shown by NAB's analysis of television market revenues, medium and small market stations compete for disproportionately smaller revenues than stations in large markets. Other specific factors – including the costs of the digital television transition and the decline of network compensation – have combined to further squeeze the profits of local television broadcasters, especially in medium and small markets. A new report on television station finances confirmed the declining financial position of small market television stations, particularly for those stations not among the ratings leaders in their markets. And given the considerable and growing expense of maintaining local news operations, some television stations (even in larger markets) have already been forced by financial considerations to cut back on or forego entirely the provision of local news. These numbers will only continue to grow if local stations are not allowed greater flexibility in ownership structures.

Freely permitting local television duopolies is necessary to preserve and enhance television broadcasters' ability to serve their viewers and communities in markets of all sizes. As the Commission recognized (and the court affirmed) in the last ownership review, multiple studies and persuasive anecdotal evidence have shown that television duopolies result in efficiencies that produce public interest benefits, such as improved news, sports, weather and other local programming, in all markets including large ones. A new BIA study confirmed that stations in local combinations in medium-sized markets are stronger financially and offer more programming preferred by local viewers.

The Commission must therefore recognize the positive benefits of reforming the current duopoly rule. Further, it must recognize that the rule, including the top-four restriction, is not necessary in the public interest as the result of competition. The top-four prohibition unduly prevents the formation of duopolies, including those combinations involving financially struggling stations, which would enable stations to compete successfully in local video markets. A strict duopoly rule containing this restriction also fails to properly take into account the competition presented by cable and satellite outlets in local markets, both for viewers and for advertisers. Multiple studies have demonstrated how the competitive position of local television stations has been impacted by increases in cable and satellite viewing and the growth of local cable operators' share of television ad revenues in local markets. The existing duopoly rule, which remains unduly focused on broadcast television stations alone, simply defies marketplace reality.

Cross-Media Ownership

As NAB has previously shown, the case for repealing the anachronistic ban on joint ownership of newspapers and broadcast outlets is clear and compelling. The ban inhibits the development of new innovative media services, especially on-line and digital services, and precludes struggling broadcast and newspaper entities, particularly those in smaller markets, from joining together to improve, or at least maintain, existing local news operations. In fact, numerous previous studies spanning several decades have demonstrated that broadcast television stations co-owned with newspapers offer greater amounts of local programming generally, and more local news and public affairs programming specifically, than non-newspaper owned stations. Clearly, the Commission and the court were correct in the last ownership review when they agreed that the blanket ban on newspaper/broadcast cross-ownership no longer served the public interest. In light of ever-increasing new media competition for viewers, listeners, readers and advertisers, this rule – which NAB opposed as unnecessary even in the much less competitive and diverse media market of the 1970s – should not be retained today.

The radio/television cross-ownership rule similarly does nothing to advance the public interest under current marketplace conditions. The rule is no longer needed to ensure diversity in local markets, but in its current form primarily serves to limit radio station ownership arbitrarily. With television and radio broadcasters facing unprecedented competition from cable, satellite television and radio, and audio and video Internet applications, a cross-ownership rule applicable only to local radio and television broadcast stations is inequitable and outdated. Particularly if the Commission retains the local radio ownership rule and the television duopoly rule in some form, no plausible reason exists to also retain the cross-ownership rule, as any diversity or competition concerns can be addressed more directly by these other local rules.

Finally, in response to the Commission's request for comment on proposals to foster ownership of broadcast outlets by minorities, women and small businesses, NAB reiterates its long held belief that the Commission should pursue constitutionally sustainable programs to further opportunities for such groups. NAB recognizes that improving access to capital is key to this effort and suggests ways to achieve this goal, including reform of attribution and auction rules.

For all these reasons set forth in detail in NAB's comments, the Commission should reform its local ownership rules to reflect the vast technological and marketplace changes that have already occurred and are only accelerating today. Ensuring that local broadcasters are not hampered by outmoded regulation in their efforts to compete and serve their audiences in today's digital, multichannel environment would clearly be in the public interest.

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To: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Further Notice of Proposed Rulemaking* in this proceeding.[2] Pursuant to

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[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts.

[2] *Further Notice of Proposed Rule Making* in MB Docket Nos. 06-121 and 02-277 and MM Docket Nos. 01-235, 01-317, and 00-244, FCC 06-93 (rel. July 24, 2006) ("*Notice*").

Section 202(h) of the 1996 Telecommunications Act, which requires the Commission to review its broadcast ownership rules every four years, the *Notice* initiated a comprehensive examination of the multiple ownership rules. The Commission also sought comment on how to address the issues raised by the United States Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3rd Cir. 2004), which affirmed some of the Commission's decisions made in its 2002 review of the ownership rules[3] and remanded other decisions for further agency justification or modification.

In this proceeding, the Commission has broadly requested comment on whether the media ownership rules remain necessary in the public interest as the result of competition. *Notice* at ¶ 1. It stressed that its "long-standing goals of competition, diversity, and localism would continue to guide its actions in regulating media ownership," and asked whether these goals would be better addressed by alternative rules. *Id*. at ¶ 4. The Commission also sought comment on a range of more specific issues, including the ownership of broadcast outlets by minorities, women and small businesses, *id.* at ¶¶ 5-6, and the "impact of new technologies and providers" on media consumption and ownership. *Id*. at ¶ 10.

To address these wide-ranging and complex issues, NAB first analyzes the technological and marketplace developments that should inform the Commission's approach as it seeks to ensure that its broadcast ownership rules remain in the public interest in a rapidly changing media environment. Given the continuing proliferation of media outlets and content (including news and information) that consumers may easily access, NAB then discusses how the

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[3] Report and Order and Notice of Proposed Rulemaking, *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 (2003) ("*2002 Biennial Review Order*").

Commission's competition, diversity and localism goals would best be served by allowing local broadcasters to adopt more economically viable ownership structures.

As all parties to the Commission's many prior ownership proceedings have recognized, broadcasting is an important part of our American culture. Broadcasters play a vital role in their communities – they understand the needs of their audiences and work every day to provide programming and additional services to address those needs. NAB and many radio and television broadcasters have demonstrated in the Commission's pending proceeding on broadcast localism that local stations provide valuable news, information and entertainment to the American public free of charge. Local broadcasters recognize and embrace their obligation to serve the public interest. To continue to do so, however, they must have the flexibility to form competitively viable ownership structures. Broadcast ownership rules that limit the ways broadcasters can compete in a digital multichannel environment adversely affect stations' abilities to serve their diverse audiences and local communities.

NAB shows in these comments that the Commission's existing bundle of broadcast-only local ownership restrictions are increasingly outmoded and unjustified, and no longer serve the public interest. Indeed, these restrictions are increasingly arbitrary due to their narrow focus, and threaten the continued ability of broadcasters to provide important local programming and services.

I. The Commission Is Obligated To Reexamine Its Broadcast Regulatory Regime To Ensure All Rules Continue To Serve The Public Interest In The Twenty-First Century Media Marketplace

The Commission has a clear duty to revise its ownership rules to reflect the dramatic changes that began in the media marketplace several decades ago and are accelerating today – changes that the Commission itself has documented in numerous previous proceedings. *See* *infra* Section II. As a matter of general administrative law, courts have expressly held that "changes in factual and legal circumstances may impose upon the agency an obligation to reconsider a settled policy or explain its failure to do so." *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("*Bechtel I*").[4] After decades of experience with the multiple ownership rules, the Commission should be expected to produce "evidence" demonstrating that these rules promote diversity, competition and localism. *Compare Bechtel v. FCC,* 10 F.3d 875, 880 (D.C. Cir. 1993) ("*Bechtel II*") (court invalidated a FCC criterion for licensing broadcast applicants because, after 28 "years of experience with the policy," the Commission had "no evidence to indicate that it achieves even one of the benefits that the Commission attributes to it"). In short, to justify retention of the broadcast ownership rules in their current form, the Commission now bears the burden of empirically demonstrating their benefits in today's digital, multichannel marketplace.[5]

Even beyond the Commission's general "duty to evaluate its policies over time," *Bechtel I*, 957 F.2d at 881, Section 202(h) of the Telecommunications Act of 1996 ("1996 Act") directs the Commission to review all of its ownership rules quadrennially to determine if they "are necessary in the public interest as the result of competition."[6] This section also requires the Commission to "repeal or modify any regulation it determines to be no longer in the public

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[4] *Accord Geller v. FCC,* 610 F.2d 973, 980 (D.C. Cir. 1979) (cable television rules originally implemented to facilitate enactment of new copyright legislation could not continue to be adhered to once that "predicate disappear[ed]," absent a showing that the rules served the public interest in some other manner).

[5] *See Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455, 1457 (D.C. Cir. 1985) (court invalidated cable must carry rules because the FCC had, in 20 years after rules' original promulgation, never substantiated with empirical evidence the speculative assumptions underlying the rules); *Bechtel II,* 10 F.3d at 880 (rather than relying on "unverified predictions," FCC needed to produce evidence to support long-standing rule).

[6] Pub. L. No. 104-104 § 202(h), 110 Stat. 56 (1996), as amended by Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004).

interest." *Id*. Thus, the Commission has an explicit statutory duty to reexamine its broadcast ownership rules every four years, in light of competitive changes in the marketplace, to determine whether their retention serves the public interest.

The Third Circuit in *Prometheus* found that Section 202(h) imposes an "obligation" on the Commission that "it would not otherwise have." 373 F.3d at 395. It "requires the Commission periodically to justify its existing regulations," and if a regulation no longer remains necessary in the public interest, "it must be vacated or modified." *Id.* According to the Court, this requirement is "[w]hat . . . makes § 202(h) 'deregulatory.'" *Id*. at 394-95 ("acknowledg[ing] that § 202(h) was enacted in the context of deregulatory amendments"). Under this standard and in light of the technological and marketplace developments discussed in detail below, NAB submits that the Commission is obligated to reform the current local broadcast ownership rules.

II. The Explosion Of Outlets And The Growth Of Digital Multichannel Providers And The Internet Have Fundamentally Changed The Media Marketplace

The tremendous growth in the number and variety of outlets competing in the media marketplace has been documented on many occasions. In the *2002 Biennial Review Order* (at ¶ 86), for example, the Commission stated that the "media marketplace is characterized by abundance," and noted that "the number of outlets for national and local news, information, and entertainment is large and growing." Since 2002, Internet-related technologies have caused even more fundamental changes to the media landscape. As a result, consumers today have access through myriad outlets to a virtually unlimited range of information and entertainment. In such an environment, it would be arbitrary and capricious for the Commission merely to rely on old assumptions about the broadcast industry and its place in the media landscape to justify the uniquely restrictive ownership regulations currently imposed on local stations.[7]

A. The Growth of Traditional Broadcasters and Multichannel Providers Have Resulted in a Proliferation of Outlets Available to Consumers Nationally and in Local Markets

By March 2006, the Commission had licensed 13,748 full power radio stations, 1,752 full power television stations, 712 low power FM stations, and 2,157 low power and 589 Class A television stations. FCC News Release, *Broadcast Station Totals as of March 31, 2006* (May 26, 2006). In contrast, in 1975 when the Commission adopted the "newest" local ownership rule (the newspaper/broadcast cross-ownership ban), there were only 7,785 radio stations and 952 television stations licensed in the United States.[8] Beyond this growth in the number of traditional broadcasters, in recent decades new video and audio distribution technologies have altered the media landscape even more dramatically. Today, cable television systems, Direct Broadcast Satellite ("DBS"), and other multichannel video programming distributors ("MVPDs") provide dozens, if not hundreds, of channels of programming to nearly 86% of all television households in the nation.[9] And the more recent development of satellite radio services

[7] *See, e.g., Geller*, 610 F.2d at 980 (FCC could no longer adhere to cable television rules when the "justification" for those rules had "long since evaporated"); *ALLTEL Corp. v. FCC*, 838 F.2d 551, 560-61 (D.C. Cir. 1988) (FCC rules pertaining to local exchange carriers found to be arbitrary and capricious because they relied on "questionable assumptions" rather than any showings); *Cincinnati Bell Telephone Company v. FCC*, 69 F.3d 752, 764 (6th Cir. 1995) (court found ownership limitations in the wireless industry to be arbitrary because they were based on "generalized conclusions" and "broadly stated fears," rather than "documentary support").

[8] *Order and Notice of Proposed Rule Making* in MM Docket Nos. 01-235 and 96-197, 16 FCC Rcd 17283, 17288 (2001).

[9] Twelfth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶ 8 (rel. March 3, 2006) ("*Twelfth Annual Report*").

allows consumers to obtain dozens of additional channels of radio programming, including music, news, talk and sports.

As documented in several studies submitted to the Commission in previous proceedings, the growth of media outlets in individual markets has also been impressive. For example, a comprehensive examination of traditional media "voices" in each of the nation's 210 Designated Market Areas ("DMAs") in 2001 found that, on average, each DMA was home to 81 media voices for which there were 39 separate owners.[10] Another study examined the number of local media outlets available in five different communities over time, and found that the number of outlets had steadily increased over the years in all of the communities and that the rate of increase in the number of outlets actually rose after passage of the 1996 Act.[11] These studies are consistent with the Commission's own 2002 study, which compared the availability and ownership of media outlets in ten different Arbitron radio markets from 1960 to 2000. The Commission found that the increase in the number of outlets averaged almost 200% across all ten markets over the 40-year period, and that the increase in the number of owners averaged 140%.[12]

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[10] *See* Comments of Hearst-Argyle Television, Inc. in MM Docket Nos. 01-235 and 96-197 at 5-10 (filed Dec. 3, 2001) ("*Hearst-Argyle Media Voices Survey*"). This survey counted full power television stations, low power and Class A stations that originate programming, radio stations, daily newspapers, cable systems, and DBS providers with uplink facilities by which they offer local-into-local service.

[11] *See* David Pritchard, *A Longitudinal Study of Local Media Outlets in Five American Communities*, Appendix A, Comments of Viacom Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002) (examining Lisbon, North Dakota; Florence, South Carolina; Rockford, Illinois; Syracuse, New York; and New York, New York in 1942, 1962, 1982, 1995, and 2002).

[12] Scott Roberts, Jane Frenette and Dione Stearns, *A Comparison of Media Outlets and Owners for Ten Selected Markets (1960, 1980, 2000)* (Sept. 2002) ("*FCC Media Outlet Study*") (counting the number of broadcast stations, cable systems, DBS systems and daily newspapers).

A new survey by BIA Financial Network has reconfirmed the findings of these previous studies. Looking at 25 DMAs ranging from Boston, MA to North Platte, NE during a two-decade period (1986-2006), this survey found an average increase of 39.0% in the number of full power television stations, and an average increase of 42.3% in the number of radio stations.[13] In addition, multichannel video programming service penetration in these markets increased by more than 34 percentage points over the past 20 years (from 52.0% to 86.5%), and the average number of cable delivered channels in use grew from 31.7 channels in 1986 to 283.3 channels in 2006, a percentage increase of 793%. *BIA Media Outlets Survey* at 9, 11. And these 25 DMAs are also served by an average of 15.2 low power television stations, an average of 8.1 daily and 28.6 weekly newspapers, two multichannel satellite radio services, not to mention the virtually unlimited voices offered by the Internet. *Id*. at 5, 7, 15-16.

These and other studies together show that there has been a vast proliferation of media outlets in recent decades, and that a wide array of outlets now exists even in smaller markets.[14] As the Commission recognized in its 2002 *Media Outlet Study*, this proliferation of outlets has also resulted in a significant increase in the number of independent *owners* of media outlets since 1960. Indeed, the more recent *BIA Media Outlets Survey* found that, on average, the 25 DMAs examined had 11.7 full power television stations owned by 8.8 different owners, and 73 full

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[13] Attachment A, BIA Financial Network, *Media Outlets Availability by Markets* at 4, 6 (Oct. 23, 2006) ("*BIA Media Outlets Survey*").

[14] *See, e.g.*, *BIA Media Outlets Survey* (in Greenville, NC, the 105th ranked DMA, there are nine full power and two low power television stations; 61 radio stations; an MVPD penetration rate of 87%; 286 cable delivered channels in use; five daily newspapers and 15 weekly newspapers); *FCC Media Outlet Study* at Table 1 (in 2000, finding 53 media outlets in the Burlington, VT radio market, 33 outlets in Terre Haute, IN, and 23 in Altoona, PA, which are the 141st, 197th and 253rd ranked Arbitron markets, respectively); *Hearst-Argyle Media Voices Survey* at Exhibit 1 (finding 91 total voices in the Yakima, WA television market, 53 voices in the Rapid City, SD market, and 36 in the Casper, WY market, which are the 125th, 175th and 200th ranked DMAs, respectively).

power radio stations owned by 37.6 separate owners. *Id*. at 4, 6. And of course these local markets have many more separate owners of low power television and radio stations, daily and weekly newspapers, magazines,[15] cable/satellite audio and video channels, and web sites.

While some commenters have suggested that the changes Congress mandated to the Commission's ownership rules in 1996 produced unintended results, a study conducted by NAB confirms that the overall impact of the post-1996 changes in the radio industry is far less dramatic than those commenters assume. This study shows that today nearly 37% of commercial radio stations operating in Arbitron markets either remain "standalones," or are part of local duopolies, in their respective markets.[16] In the ten largest Arbitron markets, for instance, 21.7% of the commercial radio stations are standalones, and an additional 15.7% of the stations are in local duopolies. In a number of smaller market groupings, the percentages of standalone stations and those in local duopolies are even higher and, in some market groups, approach 47%.[17] Thus, despite recent ownership changes within the broadcast industry, myriad independent voices remain and competition is robust.

Indeed, NAB emphasizes that the studies discussed above seriously undercount the number of competing media outlets currently available to consumers in local markets. The *FCC Media Outlet Study* did not, for example, consider Class A and other low power television

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[15] "In 2005, 350 new magazines were introduced to satisfy consumers' growing need to be informed and entertained." Magazine Publishers Association, *The Magazine Handbook: A Comprehensive Guide 2006/07* at 7 (2006).

[16] Attachment B, NAB, *Independent Radio Voices In Radio Markets* at 1 (Aug. 2006) ("*Independent Radio Voices Study*").

[17] For instance, in markets 11-25, 46.7 % of the commercial radio stations are either standalones (27.4%) or are part of a local duopoly (an additional 19.3%). Similarly, 43.3% of the commercial radio stations in markets 26-50 fall in these categories. *Independent Radio Voices Study* at 2.

stations, satellite or low power radio, weekly newspapers, local or national magazines, or the Internet. Similarly, the *Hearst-Argyle Media Voices Survey* was conservative in its estimates of available media voices because it did not consider the Internet, low power or satellite radio, magazines, or weekly, foreign or other specialty newspapers.[18] These studies also counted cable systems as only a single outlet, even though they offer dozens of separate and independently owned channels to consumers, including a number of national (*e.g.*, CNN, MSNBC, CNBC, C-SPAN, Fox News Channel) and regional or local cable news services.[19] Moreover, none of these studies, including the new *BIA Media Outlets Survey*, counted the almost infinite number of voices available via the Internet.[20]

Perhaps less obviously, surveys such as the *BIA Media Outlets Survey* and the *FCC Media Outlet Study* further underestimate the number of outlets – and thus the levels of competition and diversity – in local media markets because they do not consider the substantial number of "out of market" radio and television outlets routinely accessed by consumers. A new study by BIA Financial Network has confirmed that listeners are able to receive many more radio stations than those assigned to their Arbitron markets, and, as a result, there is a considerable amount of listening in markets to stations that are not listed by Arbitron as being

[18] Recent scholarship has in particular recognized the marketplace significance of weekly newspapers, especially away from central metropolitan areas. *See, e.g.*, S. Lacy, D.C. Coulson and H. Cho, *Competition for Readers Among U.S. Metropolitan Daily, Nonmetropolitan Daily, and Weekly Newspapers*, 15 J. Media. Econ. 21, 38-39 (2002).

[19] There are now dozens of regional and local cable news channels serving millions of viewers in markets across the country. *See Cable News: A Look at Regional News Channels and State Public Affairs Networks*, Radio and Television News Directors Foundation (2004). Growing numbers of cable systems now also carry state public affairs networks, which provide coverage of state government, including legislative proceedings, regulatory hearings and state supreme court arguments.

[20] The impact of the World Wide Web and Internet-related technologies on consumers and the media marketplace is addressed in Section II.B. below.

"home" to that market. In fact, on average, just over two-thirds (67.2%) of the listening within a market is attributable to commercial radio stations listed by Arbitron as being "home" to that market, and the levels of in-market listening have declined by 4.5-5.0% since the late 1990s.[21] Significantly, this study also showed that the level of listening to in-market radio stations *decreases* with market size. *See BIA Out-of-Market Voices Study* at 7 (in Arbitron markets ranked 1-10, 81.3% of the listening is to in-market stations, but "home" market stations receive only 64.3% of the listening in markets 101+). In other words, over one-third of the listening in these smaller Arbitron markets is attributable to out-of-market sources. Thus, consumers in smaller Arbitron markets that have relatively fewer radio stations more frequently access out-of-market radio stations, thereby enhancing the diversity of their radio programming choices.

Because television markets (DMAs) are generally larger than Arbitron radio markets, the levels of out-of-market television viewing are generally lower than the above-described levels of out-of-market radio listening. However, the viewing of out-of-market broadcast television stations is still significant in a number of DMAs, especially smaller ones. In May 2005, there were 68 DMAs in which television stations from adjacent DMAs received a reportable viewing share, and, in some smaller markets, about one-third of the total television viewing was of stations located in adjacent DMAs. *See BIA Out-of-Market Voices Study* at 8-9.[22] This data shows that viewers, even in the smallest markets with relatively fewer television stations, are

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[21] *See* Attachment C, BIA Financial Network, *A Second Look at Out-of-Market Listening and Viewing: It Has Even More Significance* at 5-6 (Oct. 23, 2006) ("*BIA Out-of-Market Voices Study*").

[22] These markets include Mankato, MN, Lafayette, IN and Zanesville, OH. Television stations from adjacent DMAs received about one-fifth to one-quarter of the viewing in other markets, including St. Joseph, MO, Harrisonburg, VA, Parkersburg, WV and Ottumwa, IA. Even some larger markets such as Providence, RI (DMA # 51) showed a significant amount of out-of-market television viewing. *See BIA Out-of-Market Voices Study*, Table 1.

today accessing a diversity of television programming via additional broadcast stations located outside of their DMAs and, of course, via cable/satellite channels. It would be arbitrary and capricious for the Commission to ignore this substantial diversity added by out-of-market outlets when addressing the need to retain broadcast ownership restrictions.

B. The Rapid Development of Internet Technologies Allows Consumers to Access Virtually Unlimited Content and Has Radically Altered the Media Marketplace

The growth of traditional broadcast outlets and multichannel providers alone – even without considering the impact of the Internet – has resulted in an explosion of outlets available to consumers across the nation and in local markets. But the Internet and the World Wide Web have truly transformed the landscape by allowing consumers anywhere access to "content" (including news and political information) as "diverse as human thought." *Reno v. ACLU*, 521 U.S. 844, 870 (1997). In light of the recent burgeoning of Internet-related technologies, the role of the Internet, and its growing impact on consumers and traditional media, must be reexamined in this review of the broadcast ownership restrictions.

Since the Commission's 2002 biennial review, increasing broadband access has fueled the emergence of thousands of independent media voices, which have challenged traditional media and radically altered the information marketplace. Four years ago, platforms such as blogs, podcasts and YouTube either did not exist or were mere blips on the radar; today they are important elements of the media landscape and are changing the way consumers access news and entertainment.[23] These new technologies have also given individuals and groups, including less

[23] *See The Wired Guide to the Online Video Explosion*, Wired Magazine, Issue 14.05 at 121 (May 2006) ("Thanks to growing bandwidth, easy access to the means of production, and cheap storage, [online video is] exploding all around us and becoming a very real, very different way to experience news and entertainment.").

mainstream voices, greater access to much wider audiences, and have reduced the traditional media's intermediation role between news makers and citizens. Driven by the young, these changes in the media marketplace will only accelerate in the coming decades.[24]

This recent explosion in new media outlets and voices has clearly been fueled by rapid growth in broadband deployment. Between the end of 2002 and March 2006, broadband use at home increased by more than 225%, from 25 million to more than 84 million users. Horrigan, *Home Broadband Adoption* at 1-2. Today, households with broadband Internet access significantly outnumber those with dial-up access.[25] Studies show that home high-speed broadband access "draws people deeper into Internet use" and makes streaming video, audio and multimedia downloads far more accessible. Horrigan, *Home Broadband Adoption* at 10. Furthermore, thanks to higher access speeds and "always on" connections, home broadband users spend more time online and depend on the Internet as a primary news source.[26] According to a 2006 study, "[p]eople turn more often now to online news than they did four years ago because the offerings are more attractive *and* because they have formed online news consumption habits." Horrigan, *Online News* at 2. Last year overall, approximately 70% of

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[24] *See* John B. Horrigan, *Home Broadband Adoption 2006* at 3, 13, Pew Internet and American Life Project (May 28, 2006). According to this study, 18-29 year olds are most likely to have broadband access at home, and most likely to post content online.

[25] Bill Rose and Joe Lenski, *Internet and Multimedia 2006: On-Demand Media Explodes*, Arbitron/Edison Media Research at 5 (2006) (58% of those who have Internet access at home use either a cable or DSL modem for a high-speed Internet connection, compared to 38% who use a dial-up service). In total, 81% of Americans ages 12 and older are now online, and 71% have the Internet at home. *Id*. at 10.

[26] *See* John B. Horrigan, *Online News* at 2, Pew Internet and American Life Project (March 22, 2006).

American adults who had gone online said they had used the Internet for news specifically,[27] and over 56% of users consider the Internet to be a very important or extremely important source of information.[28] Among the top ten most popular online activities, "reading news" is third behind only e-mail and general Web surfing. *2005 Digital Future Report Highlights* at 3.

Internet usage has also "truly matured across all segments of American society." *Id*. at 2. The fastest growing use of the Internet today is among Americans with the lowest incomes. In 2005, Internet use among survey respondents with incomes of less than $30,000 jumped from around 50% to 61%. *Id*. at 3.[29] Older Americans are also embracing the Internet, with usage among persons age 56-65 increasing from 55% in 2000 to nearly 75% in 2005. *Id*. Minority groups too are part of the Internet revolution. The percentage of Hispanics with broadband at home is now virtually equal to whites (41% to 42%), and the percentage of African Americans with broadband in their homes saw a 121% increase from 14% in 2005 to 31% in 2006.[30]

In addition to broadband use, the increased numbers of alternative, especially portable, media devices has vastly enlarged the number of outlets available for information and entertainment. Laptop computers, mobile phones, iPods and portable gaming devices, such as

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[27] Project for Excellence in Journalism, *The State of the News Media 2006: An Annual Report on American Journalism, Online/Audience* at 2 (2006) (noting that everyday use of the Internet for news had also increased to about one-third of users).

[28] Center for the Digital Future, USC Annenberg School, *Surveying the Digital Future: A Longitudinal International Study of the Individual and Social Effects of PC/Internet Technology* at 4 (Dec. 2005), available at http://www.digitalcenter.org/pdf/Center-for-the-Digital-Future-2005-Highlights.pdf ("*2005 Digital Future Report Highlights*").

[29] Among non-users of the Internet, those who say that their reason for not being online is the expense of using the Internet dropped by almost half in 2005. *2005 Digital Future Report Highlights* at 12.

[30] Horrigan, *Home Broadband Adoption* at 3. Beyond merely accessing the Internet, those who post content online include a range of Internet users across class, gender and racial lines. *See id.* at 13. Forty-eight million American adults have posted content to the Internet. *Id*. at 10.

the Sony PSP, are all outfitted for audio and video playback – and content producers have responded by boosting downloadable and streaming media. The iPod alone – with sales recently passing 50 million units – has revolutionized the portable media market. Coupled with Apple's online music and video distribution service iTunes, the iPod is responsible for a remarkable shift in media priorities, as networks, music companies, and independent producers scramble to make their content available for digital download.[31] Sales of the iPod promise to increase with the recent announcement that General Motors and Ford plan to integrate iPods into their new car audio systems, creating another direct competitor to local radio for listeners.[32]

Perhaps most indicative of the expanding role of the Internet in the media marketplace has been the explosion of Internet audio and video. The weekly Internet radio audience has increased 50% in the past year alone, and 21% of Americans ages 12 and older have listened to Internet radio in the past month. Rose and Lenski, *Internet and Multimedia 2006* at 24-25. Nearly 20% of Americans have watched video over the Internet in the past month, and the weekly Internet video audience grew 50% from January 2005 to January 2006. Even greater numbers – nearly one-third of Americans – have watched video on demand. *Id*. at 18-19. Broadcast networks recently added many of their more popular television shows to the Web in ad-supported free broadcasts, including primetime shows and network newscasts.[33] In addition,

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[31] According to Apple's Web site, as of August 2006, more than 35 million videos have been sold through iTunes for playback on a personal computer or iPod, and more than 200 television shows from broadcast and cable networks are available for download.

[32] *See* May Wong, *Apple iPod Compatibility in More Cars*, Associated Press (August 3, 2006). ("Carmakers say they are responding to a booming trend in which sales of iPods and other Mp3 players are predicted to more than double from 58 million units in 2005 to 132 million in 2009.").

[33] ABC started the trend in May by broadcasting recent episodes of their hit shows such as *Lost* and *Desperate Housewives*. CBS recently announced it will be airing *CBS News with Katie Couric* on the Internet as a live simulcast, the first for a major network newscast. *See* David

they have added to the Web several exclusive original shows and other niche programming.[34] While this growing trend might be seen merely as an expansion of traditional media's reach, it also reflects a shift in consumer expectation. Internet users, especially broadband Internet users, are turning to the Web as a supplement and replacement to traditional television, radio and the newspaper. Just last month, Apple introduced a device that will display movies, television shows and other videos purchased over the Internet on television sets.[35]

New voices are taking advantage of this shift in consumer preferences. Perhaps the most remarkable development of the last 12 months has been the stunning surge in user-generated content, especially video on sites such as YouTube, Google Video and Yahoo Video. Founded in 2005, YouTube is already one of the most popular sites on the Internet, and last summer reported that more than 100 million videos (made mostly by amateurs) are watched through its Web site every day.[36] Examples of videos on YouTube that reflect "important" issues include videos made by American soldiers in Iraq, clips filmed by Lebanese and Israeli children during the recent Mideast conflict, and videos from the war torn Darfur region of the Sudan.[37]

Bauder, *CBS to Simulcast Katie Couric Online*, CBSNews.com, *available at* http://www.cbsnews.com/stories/2006/08/17/ap/entertainment/mainD8JIA6200.shtml.

[34] *See, e.g.*, Brooks Barnes, *Big TV's Broadband Blitz*, The Wall Street Journal at B1 (Aug. 1, 2006) ("Not long ago, video on the Web consisted of pirated TV shows and movies, amateur videos posted on blogs and a scattered array of news and sports programs mostly available by subscription. But suddenly, Web video is exploding -- fueled by high-speed connections, easier downloads and a flood of new entertainment offerings.").

[35] Nick Wingfield and Merissa Marr, *Apple Computer Aims to Take Over Your Living-Room TV*, Wall Street Journal at B1 (Sept. 13, 2006).

[36] *You Tube Hits 100m Video Per Day*, BBC News.com (July 17, 2006), *available at* <http://news.bbc.co.uk/go/pr/fr/-/2/hi/technology/5186618.stm>

[37] *See* Joe Garofoli, *Cell Phone Videos of War Let Internet Viewers Hear the Rockets, Feel the Terror*, San Francisco Chronicle (July 28, 2006), *available at* <http://www.sfgate.com/cgibin/article.cgi?file=/c/a/2006/07/28/MNG2RK79S61.DTL>

Recently, a former employee of a major defense contractor posted a video on YouTube claiming critical security flaws in a fleet of Coast Guard patrol boats.[38] Senator Edward Kennedy has used YouTube to promote his arguments for net neutrality legislation.[39] Video posted on the Internet has also played roles in Senate races this year in several states, including Montana, Pennsylvania and Missouri.[40]

Sites such as YouTube and Google Video are also transforming entertainment, as "budding video artists" with low-priced video editing software can create material that can be seen by millions, including traditional media companies on the outlook for new talent.[41] Recently, three major music groups and CBS reached agreements with YouTube to distribute content, including copyrighted material such as music videos.[42] YouTube signals a transformation from traditional "mass" media to a world where individuals and small groups with minimal resources can reach millions with remarkable ease.[43] Now that Google is acquiring YouTube for approximately $1.65 billion, the ubiquity and influence of online video should only increase. In fact, observers of this acquisition have commented that the combination "will

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[38] Griff White, *On YouTube, Charges of Security Flaws*, Washington Post at D1 (Aug. 29, 2006).

[39] *Senator Kennedy Stars on YouTube*, Broadcasting & Cable TV Fax at 5 (Sept. 21, 2006).

[40] *See* Amy Schatz, *In Clips on YouTube, Politicians Reveal their Unscripted Side*, Wall Street Journal at A1 (Oct. 9, 2006).

[41] Anne Becker, *TV's New Greenhouse: Broadband Channels Provide Fertile Ground for Today's Video Talent*, Broadcasting & Cable at 14 (Aug. 21, 2006).

[42] *See* Associated Press, *Warner to Distribute Videos Through YouTube*, nytimes.com (Sept. 18, 2006); Associated Press, *YouTube Strikes Content Deals*, washingtonpost.com (Oct. 9, 2006) (CBS will provide short-form video content, including news, sports, Showtime and prime time programming, for a CBS "brand channel" on YouTube's site).

[43] *See generally* Terry Eastland, Williams Powers and David Mindich, *The Collapse of Big Media*, Wilson Quarterly (Spring 2005).

impact every element of the industry" from a "bigger war for ad dollars" to new opportunities "for indies."[44]

The user-generated video is just one of the new competitors in the media marketplace. Another is the blog, short for "weblog," a type of personal diary that operates as a digital soapbox for various opinion makers. Blogs come in many forms, both text and video, and cover a range of subjects, from personal reflection to sports, local news, politics and technology. Blogs gained mainstream popularity during the 2004 Presidential race by providing breaking news on the candidates, and by influencing traditional media reporting, most notably when bloggers questioned a CBS News story on President Bush's military record.[45] According to recent studies, more than 12 million Americans keep blogs, while more than 57 million Americans actively read blogs to obtain information.[46] In sum, blogs today exemplify the "citizen journalist" movement, in which "power" has moved "from journalists as gatekeepers over what the public knows," and "citizens" are "more active" in assembling, editing and even creating "their own news."[47]

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[44] Anne Becker, Ben Grossman, John Higgins and Allison Romano, *Big Changes Ahead: How Google-YouTube Will Shake Up the TV Industry*, Broadcasting & Cable at 14, 16 (Oct. 16, 2006).

[45] *See* Lada Adamic and Natalie Blance, *The Political Blogosphere and the 2004 U.S. Election: Divided They Blog* (March 4, 2005), *available at* <http://www.blogpulse.com/papers/2005/AdamicGlanceBlogWWW.pdf> This report also highlights the rise and fall of the Howard Dean candidacy, "fueled by means of the Internet," both as fundraiser and "echo chamber" following the well-publicized "Dean Scream." The blogosphere was also deeply involved in the controversy over John Kerry's Vietnam War service and the Swift Boat Veterans. *See* Eastland, *et al*., *Collapse of Big Media* at 46-47.

[46] Amanda Lenhart and Susannah Fox, *Bloggers: A Portrait of the Internet's New Storytellers* at 1-2, Pew Internet and American Life Project (July 19, 2006).

[47] Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Overview/Introduction* at 1 (2006).

Beyond providing information and opinion on national or even international matters, blogs today offer local information as well. Collaborative blogs have emerged in the last few years that provide original local news, commentary and community announcements in one place, much like a virtual town square. Some examples, among many, include Gothamist.com and its progeny of Web sites that provide professional-quality local news for a number of cities around the world, each site updated several times daily by local, on-the-ground editors and writers. These and other similar developments represent a substantial change in circumstance since the Commission and the *Prometheus* Court considered the state of local information sources on the Internet.[48]

Yet another significant change that the Commission must acknowledge has been the recent emergence of the podcast as a challenger to radio. Like blogs, podcasts are often produced by individuals and cover a wide range of subjects. Described by experts as a "new form of radio," podcasts have grown on the back of the iPod's popularity. Rose and Lenski, *Internet and Multimedia 2006* at 29. But, increasingly, those without iPods are accessing podcasts as one-time downloads or as part of a subscription service that feeds new "episodes" to a user's PC desktop.[49] Podcasting (the word is a combination of "iPod" and "broadcasting") provides content that is more episodic than traditional radio, which may be appealing to users who prefer to control the content they receive. And, because creating a podcast requires little more than a PC microphone and computer, it is a medium amenable to filling niche content categories.

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[48] *Compare Prometheus*, 373 F.3d at 415 (finding that the Internet was limited as a source of local content).

[49] Technically, a podcast is a subscription-based audio program that is "pushed" to users via an RSS feed. However, the term has come to encompass almost any form of originally produced audio file available via download or stream.

Local programming benefits from podcasting as well. A search on Podcast.net, an aggregator Web site that categorizes many of the more popular podcasts, shows more than 1,100 podcasts under the "local" category in the United States. And the number grows every month as Internet users become accustomed to utilizing content such as podcasts from the Web. Examples of local podcasts on Podcast.net include:

- Michigan listeners can download "East Detroit Radio," a podcast highlighting local bands; "Polskie Detroit," a Polish-language podcast serving the Polish community in Hamtramck and Detroit; and "The Enlightened Spartan Podcast," which features independently-produced discussions of Michigan State University sports.

- Floridians can hear "The Miami Podcast," which focuses on important issues, such as immigration and the current hurricane season, facing the southern city.

- Residents of the Tar Heel State can link to "The Carolina Connection" and "GoRadio Podcasts," programming that highlights local people, music and events.

- "Big Island Life" is a podcast featuring political views, local astronomy notes, restaurant reviews, and "a bit of Hawaiiana" each week from the big island of Hawaii.

- Run by a local nonprofit organization, the "San Diego Volunteer Podcast" highlights local charities hoping to match up listeners with nonprofits and encourage volunteerism in the San Diego area.

The Commission must further recognize that the Internet also supplements one of the most important roles traditionally played by the media – that of intermediary between news makers, such as political leaders and government officials, and citizens. With the Internet, candidates and government officials can directly reach through to voters, using e-mail or by creating Web sites, blogs and podcasts. The 2004 Presidential election illustrated this trend, from Howard Dean's rise as the Internet candidate to the effect on both parties from the flow of information through blogs, candidate Web sites, and discussion boards. Federal and state political candidates are now using social networking sites, such as MySpace and Facebook, to communicate with young voters, attract volunteers and raise money.[50] As Jeffrey Cole, director of the USC Annenberg School Center for the Digital Future has stated, the Internet provides "a direct conduit through which office seekers can reach voters, without media gatekeepers sifting and interpreting politicians' messages."[51] With more sites dedicated to individual towns and local issues, "the influence of Web-based politics" is reaching the local level as well.[52] Local government officials also utilize the Internet to provide citizens with direct access to information and services.[53]

More generally, the number of people who believe that the Internet can be a tool for learning about the political process continues to increase.[54] According to a 2004 study, the "Internet is contributing to a wider awareness of political views," and "may improve the quality of democratic deliberation as people have a new and easy-to-use resource to become informed

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[50] *See* Erika Lovley, *Politicians Try Out MySpace*, Wall Street Journal at A4 (Oct. 14, 2006).

[51] *2005 Digital Future Report Highlights* at 2. This recent report also generally stressed the "increasing role of the Internet in political decision-making." *Id*. at 1. Nearly 62% of respondents to this study (both Internet users and non-users) agreed that the Internet has become important to political campaigns. Perhaps most significantly, of Internet users who went online to seek campaign information, 77.4% sought information about issues and candidates about which they were undecided. *Id*. at 2.

[52] Soni Sangha and Joseph Ax, *Internet Creates Political Minefield*, NorthJersey.com (Oct. 6, 2006) (detailing influence of blogs and Internet forums in mayoral, House and Senate races in New Jersey).

[53] *See* John B. Horrigan, *How Americans Contact Government* at 1-2, Pew Internet and American Life Project (May 24, 2004).

[54] *See 2005 Digital Future Report Highlights* at 2 (60.4% of Internet users agreed that by utilizing the Internet, people can better understand politics).

about civic issues."[55] In these ways, the Internet must now clearly "count" as contributing significantly toward viewpoint diversity.[56]

Given the emergence of Internet applications such as blogs, user-generated video, and podcasts, the number of available outlets for opinion, information and entertainment, including locally-oriented content, is far greater than at any point in history. Local broadcasters remain important providers of local news and content even in this much more competitive and diverse media landscape. However, it would be arbitrary and capricious for the Commission to ignore the new and unprecedented opportunity for individual citizens and small groups, including minority and non-mainstream groups, to both obtain and to offer information and entertainment to the world at large, as the agency reevaluates the need for regulating ownership of broadcast outlets. Given the dramatic changes to the media landscape produced by the development of the Internet and digital technologies, observers on all sides of the political spectrum have come to see the long-standing controversies over ownership of traditional media outlets to be "increasingly anachronistic."[57]

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[55] John Horrigan, Kelly Garrett, and Paul Resnick, *The Internet and Democratic Debate* at i and 3, Pew Internet and American Life Project (Oct. 27, 2004). *See also* Lovley, *Politicians Try Out MySpace* (use of online social networking and other sites seen by political scientists and others as "a way to plant civic awareness in the minds of young adults").

[56] *Compare Prometheus*, 373 F.3d at 407 (at least in part due to the "Commission's professed intent to focus its consideration of viewpoint diversity on *media* outlets," the court discounted the use of the Internet by individuals and entities, including political candidates, local governments and community organizations, as contributing to viewpoint diversity, even though they "disseminate information and opinions about matters of local concern").

[57] Markos Moulitsas Zuniga, *Use the Tools*, The Nation (July 3, 2006). *Accord* Benjamin M. Compaine, *The Media Monopoly Myth: How New Competition Is Expanding Our Sources of Information and Entertainment*, New Millennium Research Council (2005); Adam D. Thierer, *Media Myths: Making Sense of the Debate Over Media Ownership*, Progress & Freedom Foundation (2005).

III. Given The Proliferation Of Media Outlets And Providers, The Commission Must Reevaluate How To Fulfill Its Long-Standing Goals Of Competition, Diversity And Localism

A. The Explosion of Outlets Has Created an Extraordinarily Competitive Media Market Offering Unprecedented Levels of Service to Consumers, Thus Undermining the Competition Rationale for Maintaining Unique Ownership Restrictions on Local Broadcasters

Due to the proliferation of media outlets and technological advancements, competition in this 21st century mass media marketplace has been accurately characterized as "relentless."[58] The *Notice* (at ¶ 10) specifically inquired as to the impact of these new technologies and providers on consumers and the Commission's ownership rules. As a result of this increased number of broadcast and nonbroadcast outlets, NAB believes that service to the public has continued to improve, and that the primary competition-related concern is now the ability of local broadcasters to earn advertising revenues sufficient to compete effectively in a digital, multichannel environment.

The Commission has correctly recognized that competition – rather than regulation – "is the most effective means" of ensuring that "[c]onsumers receive more choice, lower prices, and more innovative services." *2002 Biennial Review Order* at ¶¶ 55, 57. The dramatic increase in the number of television and radio stations over the past several decades has in fact improved service to the public, particularly by widening the array of viewing and listening choices available in local markets. And it is not only entertainment programming choices that have expanded. Empirical studies have demonstrated that, as competition between television stations

[58] Amy Korzick Garmer, *American Journalism in Transition: A View at the Top*, A Report of the Fifth Annual Aspen Institute Conference on Journalism and Society at 2 (2001).

increased during the 1980s and 1990s, their commitment to local news also increased.[59] Broadcast television stations aired more hours of local news programming in 2003 than they did in either 1980 or 1960. *Biennial Review Order* at ¶ 122.

Similarly, the competition resulting from the increase in the number of radio stations during the past decades has benefited consumers by making more programming choices available. The Commission recognized in 1992 that, due to "intense inter- and intra-industry competition, radio station programming has become increasingly diverse," with the number of programming formats increasing dramatically.[60] A study of radio programming covering 1975 through 1995 showed "a pronounced upward trend in the number of formats reported over this period."[61] Assuming the "number of identifiable formats" to be "a broad" measure of programming diversity, this study concluded that "the overall trend is toward an increase in

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[59] *See, e.g.*, John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 J. Media Econ. 63, 65-66 (Fall 1988) (an increase in the number of television stations in a market was found to be positively related to the minutes of local news, as well as the minutes of all local programming, provided by stations in that market); S. Lacy, T. Atwater and X. Qin, *Competition and the Allocation of Resources for Local Television News*, 2 J. Media Econ. 3, 11 (Spring 1989) (study found that, as ratings competition intensified between television newscasts in local markets, the overall resources, both expenditures and staff, allocated to these newscasts increased); Angela Powers, *Toward Monopolistic Competition in U.S. Local Television News*, 14 J. Media Econ. 77, 82 (2001) (study found that the number of competitors in local television news markets increased between 1989 and 1998 and that stations in these markets responded to the increased competition by increasing the number of newscasts they aired each day).

[60] *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755, 2758 (1992), *recon. granted in part, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 7 FCC Rcd 6387 (1992) ("*1992 Radio Ownership Order*") (noting that by one count the number of programming formats had increased from eight to 35 since the 1970s).

[61] Thomas W. Hazlett and David W. Sosa, *Was the Fairness Doctrine A "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. Legal Stud. 279, 292 (1997) ("*Radio Market Programming Study*"). According to this study, in 1975 music programming "was dominated by only a few formats such as country-western and adult contemporary." By 1995, there were "more than 20 specific" music formats, such as "urban contemporary" or "new age." *Id*.

program listening choices." Hazlett and Sosa, *Radio Market Programming Study* at 292. This growth in the number of programming formats included an "explosion in news, talk, and public affairs formats, on both AM and FM," between 1975 and 1995.[62]

Beyond the increase in consumer choices resulting from competition between proliferating broadcast outlets, the development and growth of multichannel video and audio programming distributors have provided vastly more programming and service choices to viewers and listeners.[63] The rise of these multichannel distribution technologies has also dramatically increased the level of competition facing television and radio broadcasters. Even several years ago, it was clear that traditional broadcasters were swimming "in a sea of competition," as "DBS and the expansion in cable availability and channel capacity have created an increasingly competitive environment for television broadcasting."[64] Today, these trends are only continuing, "as cable and DBS penetration, the number of cable channels, and the number of nonbroadcast networks continue to grow." *Twelfth Annual Report* at ¶ 93.

Obviously the competitive environment for local, free over-the-air broadcast television has become progressively more difficult, as video competition has fragmented viewership and forced local stations to compete for viewers and advertising against multichannel operators that

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[62] Thomas W. Hazlett and David W. Sosa, *Chilling the Internet? Lessons from FCC Regulation of Radio Broadcasting*, Cato Policy Analysis No. 270 at 5, 16 (March 1997).

[63] *See* August Grant, *The Promise Fulfilled? An Empirical Analysis of Program Diversity on Television*, 7 J. Media Econ. 51 (1994) (demonstrating that, as the number of channels of television programming increases, the diversity of program types offered also increases). The Commission itself has documented the extensive programming and service offerings of cable and DBS system operators. *See, e.g.*, *Twelfth Annual Report* at ¶¶ 21-22; 166-67 (in 2005, FCC identified 531 satellite delivered national programming networks and 96 regional networks).

[64] J. Levy, M. Ford-Livene, and A. Levine, OPP Working Paper Series #37, *Broadcast Television: Survivor in a Sea of Competition* at ii (Sept. 2002) ("*OPP Video Study*").

earn both ad revenues and subscriber fees.[65] And these competitive challenges will only increase as other video programming alternatives -- including DVDs, computer and video games, video on demand, Internet video streaming and downloading, and video on iPods and mobile phones -- grow in accessibility and popularity. *See supra* Section II.B. Clearly, the ability of local broadcasters to continue to compete in this digital, multichannel, on-demand video marketplace is being challenged as never before.

Radio broadcasters today are also facing new multichannel competitors that enjoy dual revenue streams from advertising and fees from millions of subscribers.[66] And beyond facing competition from providers that can offer hundreds of channels in every market in the country, local radio stations compete for listeners with other forms of audio delivery offering an almost unlimited array of content. IPods and other MP3 players, music download services, podcasting and the Internet streaming of U.S. and foreign radio stations literally provide content from around the world to listeners in each local radio market in America. *See supra* Section II.B.

In such a competitive environment, where television and radio broadcasters face continuing audience fragmentation, a loss of viewers and listeners to newer media, and pressure on their advertising revenues (*see* Section III.B. below), the retention of a bundle of *broadcast-*

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[65] *See 2002 Biennial Review Order* at ¶ 62 ("the subscription model of cable television and DBS offer[s] an additional competitive advantage over advertising-only broadcast television stations").

[66] *See* Press Release, *XM Satellite Radio Announces Subscriber Additions for the Third Quarter 2006* (Oct. 4, 2006) (XM announced that it had more than 7.185 million subscribers, and projected that it would end 2006 with total subscribers between 7.7 million and 8.2 million); Press Release, *SIRIUS Satellite Radio Passes 5.1 Million Subscribers* (Oct. 4, 2006) (SIRIUS ended third quarter of 2006 with more than 5.119 million subscribers, and projected 6.3 million subscribers by the end of the year). Forrester Research has estimated that, by 2010, 20.1 million U.S. households will listen to satellite radio. Press Release, *Forrester Research Defines the Future of Digital Audio—New Report Forecasts Growth of Satellite Radio and Podcasting* (April 12, 2005).

only local ownership restrictions is increasingly outmoded and unjustified – and, ultimately, harmful to the continued ability of broadcasters to provide programming to serve local audiences. Indeed, the development and rapid growth of alternative video and audio delivery systems require the Commission to consider whether broadcast-only ownership restrictions continue to serve its competition goals, or whether these rules actually inhibit broadcasters from competing vigorously with their multichannel competitors in local markets. For example, the newspaper/broadcast cross-ownership rule prohibits the owner of a single radio station from having an attributable interest in a daily newspaper in the same market, while a cable system operator with a dominant position in the local MVPD market faces no restrictions in acquiring a daily newspaper in the same market. Similarly, a cable system operator – who controls the distribution of dozens or even hundreds of video programming channels, as well as the "essential pathway" into consumers' homes[67] – is able to acquire a broadcast television station in the same market, unlike the owner of a single broadcast television station who cannot, under the television duopoly rule, acquire control of a license for a second broadcast channel in most markets. Certainly in the current multichannel environment dominated by highly consolidated cable and satellite system operators, the ability of local broadcasters to "obtain[] and exercis[e] market power" is deeply constrained, thereby undercutting any competition rationale for broadcast-only local ownership rules.[68]

[67] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 656 (1994).

[68] *Report and Order* in MM Docket Nos. 91-221 and 87-8, 14 FCC Rcd 12903, 12916 (1999) ("*Local TV Ownership Order*") ("the Commission's structural ownership rules and policies have been aimed at precluding broadcasters from obtaining and exercising market power"). *See also* Attachment E, NAB, *Percentage of Industry Revenues Earned by Top 10 Firms in the Sector* (showing radio and television broadcasting to be much less consolidated than other media sectors, including cable, DBS, satellite radio, movie studios and outdoor).

The retention of unique ownership restrictions on local broadcasters appears particularly inequitable, given the consolidation of broadcasters' multichannel competitors. Local radio stations must compete against consolidated satellite radio providers that each offers over a hundred channels of audio programming in every local market. In 2005, the four largest MVPDs served 63% of all MVPD subscribers, up from 58% in 2004. *Twelfth Annual Report* at ¶ 9. The Commission has explicitly recognized that "cable horizontal concentration and regional clustering" have significantly increased in recent years.[69] And the cable industry's national and regional concentration will only increase, given the recent acquisition of Adelphia Communications by Comcast Corporation and Time Warner.[70] Rather than "obtaining and exercising market power," *Local TV Ownership Order*, 14 FCC Rcd at 12916, local broadcasters today are fighting to maintain their competitive position against these increasingly consolidated multichannel providers.[71]

To best achieve its goal of enhancing competition as a means of benefiting consumers and promoting the public interest, the Commission should now structure its local media ownership rules so that traditional broadcasters and newer programming distributors can all vigorously compete on an equitable playing field. Modification or elimination of broadcast-only

[69] Second Further Notice of Proposed Rulemaking, *The Commission's Cable Horizontal and Vertical Ownership Limits*, 20 FCC Rcd 9374, 9403 (2005). *See also Twelfth Annual Report* at ¶ 154 ("Cable operators continue to pursue a regional strategy of 'clustering' their systems," which, according to other video providers, increases their ability to "gain exclusive contracts with unaffiliated cable networks").

[70] *See Memorandum Opinion and Order* in MB Docket No. 05-192, FCC 06-105 (rel. July 21, 2006) (granting, with conditions, the applications of Comcast and Time Warner to acquire Adelphia).

[71] NAB also has previously pointed out that local broadcast stations must deal in the marketplace with powerful, regionally concentrated cable operators in retransmission consent negotiations for the carriage of their analog and digital signals, including multicast programming streams. *See* NAB Reply Comments in MM Docket No. 92-264 (filed Sept. 23, 2005).

ownership restrictions that are unnecessary or even counter-productive in a digital, multichannel media environment will help ensure the continued ability of broadcasters to survive – and even thrive – in the 21st century media marketplace. Promoting a vibrant broadcast industry will benefit consumers both by enhancing competition in local media markets, and by enabling broadcasters to offer new, innovative and more targeted services to the public, including digital multicast and high definition services.[72] And, as discussed in detail below, only by permitting the broadcast industry to remain competitively viable can the Commission ensure that local stations continue to serve the public interest and effectively contribute to diversity and localism.

B. The Proliferation of Multichannel and Internet Outlets Has Resulted in a Vastly More Competitive Advertising Market

Beyond facing unprecedented competition for the eyes and ears of viewers and listeners, broadcasters today must fight even harder for advertising dollars, their sole source of revenue. Local and national advertisers are being lured by new competitors, including cable and the Internet, and away from traditional media such as broadcasters and newspapers.

Cable television's share of local television advertising revenues has grown substantially in recent years. *See Twelfth Annual Report* at Table 4 (cable industry's local advertising revenues increased 12.2% from 2003-2004 and 12.0% from 2004-2005). In 2006, local/regional cable television advertising is forecast to increase another 12.8%.[73] A major factor in this rapid increase in spending on local/regional cable advertising has been the creation of "interconnects" – multiple cable systems combined together for the purpose of placing advertisements. These

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[72] *See 2002 Biennial Review Order* at ¶¶ 71-72 (concluding that consumer welfare is enhanced when "the Commission permits broadcast market structures that encourage innovation," such as new "digital services by broadcasters").

[73] Jack Myers Media Business Report, *2006 Marketing and Advertising Spending Forecast* (Sept. 2005), available at http://www.mediavillage.com/jmr/2005/09/08/buzz-09-08-05/. ("*Jack Myers 2006 Advertising Forecast*").

interconnects offer media buyers a "one-stop shop" in which to place ads across an entire region, and have helped "cable operators gain parity with local broadcasters" in the television advertising market.[74]

A closer examination of the dramatic growth in local cable advertising demonstrates the extent to which cable operators are making gains in local advertising markets at the expense of television broadcasters. Overall, from 1999 to 2004, the compound annual growth of local cable system advertising revenue was 10%, compared to only 2% for local television stations.[75] In the top 10 DMAs, the average share of local television advertising earned by local cable nearly doubled from 1999-2004, growing from approximately 9.6% of local market television ad revenues to 18.3% (or about $1.3 billion in total cable ad revenues in these 10 markets). This average of $130 million per market in local cable advertising revenues represents the equivalent of more than two additional broadcast television stations in each market, based on 2004 average station advertising revenues in these markets. *Local Television Market Revenue Statistics* at 4. Similarly, in DMAs 11-25, local cable systems' average share of all television advertising revenue rose from 9.4% in 1999 to 16.6% in 2004. Local cable advertising annual revenues of about $44 million per market in DMAs 11-25 represents the equivalent of an additional 1.5 television broadcast stations in each of these markets, based on average annual station revenues. *Id*. at 5. Even in smaller markets (DMAs 26-50 and 51-100), cable's average share of local television advertising revenues grew by approximately 50% and 40%, respectively, from 1999-2004. *Id*.

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[74] Wayne Karrfalt, *Interconnects Changed Scene*, Television Week at 17 (May 23, 2005).

[75] Attachment F, NAB, *Local Television Market Revenue Statistics* at 6 (Aug. 2006).

This erosion of advertising market share from local broadcast stations to cable outlets presents a clear competitive challenge for local television stations, which, unlike cable systems, are almost solely dependent on advertising for revenues.[76] Given that local cable television advertising revenue now represents the competitive equivalent of multiple additional broadcast television stations in local markets, the Commission must reexamine its earlier analysis of the local television advertising market. The Commission's previous conclusion that "broadcast television advertising" is a separate "product market" because advertisers may not regard "cable networks or the advertising time sold by local cable operators to be good substitutes" for broadcast television advertising clearly defies marketplace reality. *2002 Biennial Review Order* at ¶ 152. This conclusion also appears contrary to the Commission's own earlier analysis of the local television advertising market.[77]

Moreover, beyond competing with local television stations, cable has now "emerg[ed] as a formidable foe for radio."[78] In fact, the Commission recognized as early as 1992 that cable

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[76] As just one example, a major network affiliated television station in Grand Rapids, MI has seen the percentage of its revenue from national advertisers drop from 50% in 1999 to 35% today. This dramatic drop occurred as advertisers have "drastically cut back on station spending," switching instead to cable advertising "that could better target consumers." Brooks Barnes, *Local Stations Struggle to Adapt as Web Grabs Viewers, Revenue*, Wall Street Journal at A1 (June 12, 2006).

[77] *See* Notice of Proposed Rulemaking, *2002 Biennial Regulatory Review*, 17 FCC Rcd 18503, 18532 (2002) ("At a minimum, we expect that local cable operators that can offer an advertising product comparable to that of local television stations should be included in our analysis [of the local television advertising market].). *See also OPP Video Study* at ii, 134-135 (noting in 2002 that cable operators were becoming serious competitors in local advertising markets).

[78] *Cable Advertising Emerging as Formidable Foe for Radio*, Radio Ink (May 17, 2006) (noting that cable advertising's compound annual growth rate since 2003 is 14%, compared to 6% for total advertising and 2% for radio). *Accord Cable TV Seen Taking Local Ads from Radio*, Communications Daily at 7 (June 2, 2006).

competes with radio for advertising dollars. *See 1992 Radio Ownership Order*, 7 FCC Rcd at 2756.[79]

Cable outlets are not the only competitive threat broadcasters face for advertising dollars. Television and radio stations, as well as newspapers, are seeing an erosion of ad revenue due to rapidly increasing competition from the Internet and other newer media, such as video games. Between 1999 and 2004, "traditional" media's share of total ad expenditures had dropped, and new media's share had grown, by over six percentage points. Spending on traditional media advertising is projected to lose almost 10 more share points to newer media (including cable, satellite, the Internet, video games and movie screens) by the end of 2009.[80] According to a 2004 estimate, marketers will spend more for advertising on cable ($27 billion) or the Internet ($22.5 billion) than on network television ($19.1 billion) by 2010.[81] In fact, more recent forecasts projected that online ad spending would total $14 billion this year, and should surpass broadcast network spending as early as 2007. *See Jack Myers 2006 Advertising Forecast*. Newspapers are also losing advertising share as "[c]lassified advertising is quickly moving online."[82] For the year ending July 31, 2006, traffic to online classified ads increased 47%.[83]

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[79] A 2002 advertising study similarly concluded that "changes in cable advertising prices lead to changes in radio advertising prices," demonstrating that "cable advertising" was a "substitute for radio advertising." Statement of Professor Jerry A. Hausman at 3, Exhibit 1 to Comments of Clear Channel Communications, Inc. in MB Docket No. 02-277 (filed Jan. 2, 2003).

[80] Veronis Suhler Stevenson, *Communications Industry Forecast 2005-2009* at 37-38 (2005). *See also Ad Buyers Shift to New Media*, Broadcasting & Cable TV Fax at 2 (Sept. 23, 2005) (reporting that advertisers are shifting as much as 20% of their media dollars away from traditional media and moving them to "emerging categories, such as the Internet or movie theater ads").

[81] Anthony Bianco, *The Vanishing Mass Market*, Business Week at 63 (July 12, 2004) (citing the Wall Street firm of Sanford C. Bernstein & Co.).

[82] *More Media, Less News*, The Economist at 52 (Aug. 26, 2006) (predicting that "a quarter of print classified ads will be lost to digital media in the next ten years").

Recent reports of the growth of online ad spending have demonstrated the significant presence of the Internet in today's advertising marketplace. According to Nielson Monitor Plus, which tracks ad spending across 15 media, "growth of the Internet far outpaced all other media, up 46.4%" in the first quarter of 2006 over the same period in 2005.[84] Estimates made last year that online advertising would increase 27% in 2006 may now prove overly conservative.[85] According to the Interactive Advertising Bureau, overall online advertising in the U.S. rose 37% in the first six months of 2006 compared with a year earlier, hitting a record of nearly $8 billion.[86]

Beyond the display-based and paid search online advertising, which today garner most online ad revenues, the specific audio and video Internet applications discussed in Section II.B. are also now attracting attention and money from advertisers. For example, the most successful podcasts have drawn major advertisers such as Dixie Paper, Sony Pictures, Shell Oil, Earthlink,

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[83] Mark Walsh, *Craigslist Traffic Surges*, MediaPost Publications (Sept. 6, 2006) (reporting that 37.4 million people now visit online classified sites).

[84] Compared to the same quarter in 2005, spot radio advertising rose only 0.9% in the first quarter of 2006, and network radio was down 6.6%. Katy Bachman and Ken Tucker, *Ad Spending Up Overall, but Not so Much at Radio*, Billboard Radio Monitor (July 17, 2006). Spot television in markets 101-210 rose only 0.6%; although local television advertising in the top 100 markets increased 4.8%, that still remained below the general 5.6% increase in overall ad spending. Katy Bachman, *Media Ad Revenue Up 5.6%, in 1Q*, Mediaweek.com (July 17, 2006).

[85] In September 2005, the *Jack Myers 2006 Advertising Forecast* projected that online ad spending would increase 27%, with other non-traditional media advertising increasing by comparable levels or even more (*e.g.*, video game advertising up 40% and movie screen advertising up 25%). At least one video game publisher has agreed with ad companies to stream live advertising into its games. *See* Mike Musgrove, *Coming to Video Games: Live Ads*, Washington Post at D05 (Sept. 1, 2006).

[86] Reuters, *U.S. Online Ad Revenue Surges 37%*, latimes.com (Sept. 26, 2006).

Warner Brothers, HP and HBO.[87] Triple-digit growth for both podcast and blog advertising have been forecast.[88]

Ad-supported Internet video is taking off as well. One report estimated that online video advertising would increase from $225 million in 2005 to $1.5 billion in 2009.[89] In August, the video-sharing site YouTube started to let advertisers create "channels" filled with clips they produce themselves and then in turn sell spots to other advertisers.[90] Last spring Google announced the introduction of "click-to-play" video ads, which many observers believe will lure advertisers, including "blue-chip" ones, away from local television and newspapers. These video ads can be targeted to specific sites and even geographically, to a city level. Such ads can therefore compete directly with local advertising platforms, such as local broadcast stations and newspapers.[91] Industry observers are now speculating on the role that the combined Google-YouTube will play in advertising markets.[92] Even mobile phones are becoming a platform for

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[87] Katy Bachman, *Nielsen: Advertisers Flock to Podcasts*, Mediaweek.com (July 20, 2006). *Accord* Kim Hart, *As Podcasts Spread, Advertisers Sniff Money*, Washington Post at F07 (July 23, 2006).

[88] PQ Media, *Triple-Digit Growth for Blog, Podcast and RSS Advertising*, MediaBuyerPlanner.com (April 12, 2006) (total spending on these user-generated online media forecast to grow at a compound annual rate of 106.1% from 2005 to 2010, reaching $757 million in 2010).

[89] Sean Callahan, *Media in Motion; Business Media Companies See Video Content as a Way to Attract Viewers—and Advertisers*, Media Business (March 1, 2006).

[90] Dawn Chmielewski and Chris Gaither, *Video Site to Add to Ads*, latimes.com (Aug. 22, 2006).

[91] *See* Carol Krol, *Google Unveils Online Video Ad Platform*, B to B (June 12, 2006). *See also* https://adwords.google.com/select/targeting.html for an explanation of how Google's AdWords system can be used to target ads to appear in specific geographic locations.

[92] *See, e.g.*, Claire Atkinson, *Say Hello to the Newest TV Powerhouse: Google*, Advertising Age (Oct. 16, 2006).

major advertisers from Pepsi to Nike, especially those companies trying to reach 18-34 year-olds.[93]

In sum, the combination of competition from cable, satellite, the Internet and other digital technologies is forcing broadcasters to fight even harder in the advertising marketplace. Given that local broadcast stations are almost solely dependent on advertising for their revenues, reforming the restrictions that prevent local broadcasters from forming efficient ownership structures better enabling them to compete for advertising dollars is paramount. Without such reform, the vibrancy of local stations – and their ability to serve local communities with unique programming and other services – will clearly be placed in jeopardy.

C. Consumers' Interests in Diversity Are Unquestionably Being Fulfilled Nationally and in Local Markets

In addition to competition concerns, the Commission has traditionally justified its broadcast ownership rules on diversity concerns.[94] As shown by numerous studies discussed in detail in Section II.A., recent decades have seen a proliferation of media outlets so that even small local markets are now served by a wide array of outlets controlled by a number of separate owners. And since surveys of media outlets in local markets have consistently underestimated the number of traditional outlets accessible by consumers (*see supra BIA Out-of-Market Voices Study*), and also failed to account for the virtually unlimited voices available via the Internet, the level of diversity available to consumers on a market basis has reached unprecedented heights. In light of these developments and as demonstrated below, the public's interest in diversity is

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[93] Paul Davidson, *Ad Campaigns for your Tiny Cellphone Screen Get Bigger*, USA Today (Aug. 9, 2006).

[94] *See, e.g., Further Notice of Proposed Rulemaking* in MM Docket Nos. 91-221 and 87-8, 10 FCC Rcd 3524, 3528 (1995) (local ownership rules are based on rationales of "diversification of service" and fostering competition in broadcasting).

clearly being met by this wide array of outlets that consumers may easily access and find increasingly substitutable for a variety of uses. As will be shown, moreover, concerns about the effect of recent ownership changes within sectors of the broadcast industry on diversity are unwarranted.

1. The Commission Has Long Recognized the Diversity Benefits of Common Ownership of Broadcast Outlets

Although the Commission initially regarded the "proper objective" of the ownership rules to be "the maximum diversity of ownership that technology permits in each area,"[95] it has since correctly concluded that such an approach worked better in theory than in practice. Under its original approach to ownership regulation, "60 different licensees" in a market were regarded as "more desirable than 50," and even 51 were thought to be "more desirable than 50," because "there is no optimum degree of diversification." *First R&O*, 22 FCC 2d at 311-12. Some observers recognized the flaws in this "maximization at all costs" philosophy at the time. As FCC Commissioner Robert Wells stated, "if the result of having 60" rather than 50 different licensees, "is a deterioration in the service of 20 outlets, we have hardly accomplished our goal." Dissenting Statement to *First R&O*, 22 FCC 2d at 337.

Since the 1970s, moreover, it has become clear that the Commission's "'more is better' and 'diversity at any cost' policies," were not viable or sustainable.[96] The Commission itself in

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[95] *First Report and Order* in Docket No. 18110, 22 FCC 2d 306, 311 (1970) ("*First R&O*") (adopting the radio/television cross-ownership, or one-to-a-market, rule preventing any single entity from owning more than one broadcast facility in the same market).

[96] David M. Hunsaker, *Duopoly Wars: Analysis and Case Studies of the FCC's Radio Contour Overlap Rules*, 2 CommLaw Conspectus 21, 22 (1994) (blaming the FCC's policies for the radio industry's serious economic trouble of the early 1990s). In fact, recent scholarship has suggested that "hyper-competition" or "ruinous competition" between increased numbers of outlets has negative effects on the quality and diversity of the media products produced. *See, e.g.*, Adam Jacobsson, Eva-Maria Jacobsson, C. Ann Hollifield, Tudor Vlad, and Lee Becker, *Examining the Suspected Adverse Effects of Competition on Media Performance*, Paper Presented at the

1989 made clear that it no longer believed that maximizing diversity of ownership was its primary objective. *See Second Report and Order* in MM Docket No. 87-7, 4 FCC Rcd 1741, 1742 (1989) (in relaxing the one-to-a-market prohibition, the Commission stated that "diversity of programming and viewpoints are not the only goals, and diversity of ownership is not the only consideration, in the licensing of broadcast stations in the public interest"). In the 1996 Act, Congress similarly demonstrated that it did not believe diversity of ownership should be the primary consideration governing broadcast ownership regulation.[97]

Indeed, in numerous ownership proceedings during the past decade, the Commission has expressly recognized the public interest benefits flowing from joint ownership of media entities in local markets. In rulemakings liberalizing the local radio and the radio/television cross-ownership rules, for example, the Commission determined that "combinatorial efficiencies derived from common ownership" of broadcast outlets "in local markets were presumptively beneficial and would strengthen the competitive standing of combined stations," which "would enhance the *quality of viewpoint diversity* by enabling such stations to invest additional resources in programming and other service benefits provided to the public."[98] Previous Commission decisions to loosen local ownership restrictions have relied on studies explicitly showing that

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International Communication Association Conference, Dresden, Germany (June 2006); Richard van der Wurff and Jan van Cuilenburg, *Impact of Moderate and Ruinous Competition on Diversity: The Dutch Television Market*, 14 J. Media Econ. 213 (2001).

[97] *See* H.R. Rep. No. 204, 104th Cong., 2d Sess. 55 (1996) (noting need "to depart from the traditional notions of broadcast regulation" and to eliminate "arbitrary limitations on broadcast ownership," which "are no longer necessary" in a competitive video market).

[98] *In re Golden West Broadcasters, Memorandum Opinion and Order*, 10 FCC Rcd 2081, 2084 (1995) (emphasis added). *See also Local TV Ownership Order*, 14 FCC Rcd at 12930 (allowing local television duopolies "can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station").

"group-owned stations spend a larger percentage of their budgets on news and overall programming than independent stations" and that group-owned stations may "air more informational programming than non-group-owned stations." *Second Report and Order*, 4 FCC Rcd at 1748. More recently, the Commission concluded that relaxation of the television duopoly rule would "facilitate efficiencies and likely result in the delivery of programming preferred by viewers," and that owners of same-market combinations often offer more local news and public affairs programming. *2002 Biennial Review Order* at ¶¶ 150, 164.

In sum, previous studies and FCC decisions have established that "programming and other" public interest benefits flow from the "efficiencies derived from common ownership of radio and television stations in local broadcast markets." *Golden West*, 10 FCC Rcd at 2084. Thus, in addition to affecting the "competitive standing" of broadcast outlets, the retention of strict broadcast-only local ownership rules will adversely impact the "quality of viewpoint diversity" in local markets. *Id*.

2. Modern Media Markets Offer a Wide Range of Programming that Serves the Needs of Diverse Audiences in Local Communities

As described above, the proliferation of broadcast outlets and the rise of multichannel video and audio programming distributors and the Internet have produced an exponential increase in programming and service choices available to viewers and listeners. In such an environment, NAB reemphasizes that it is neither necessary nor economically efficient for every broadcast station to be "all things to all people," so long as wide varieties of programming are available to consumers on a market basis.[99] In considering whether the public's interest in

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[99] *See, e.g., Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 355-56 (D.C. Cir. 1998) (it is "understandable why the Commission would seek station to station differences," but a "goal of making a single station all things to all people makes no sense" and "clashes with the reality of the radio market"); *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d

receiving a diversity of programming and services is being met, the Commission therefore should focus on the variety of programming offered across markets as a whole.[100]

Moreover, as economists have predicted for decades, the recent ownership changes within local broadcast markets (especially among radio stations) has only enhanced diversity of programming.[101] Numerous studies have now shown that the post-1996 ownership changes in the radio industry has indeed significantly enhanced programming diversity in local radio markets, and enabled radio broadcasters to better serve the needs of diverse audiences. An

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1413, 1434 (D.C. Cir. 1983) (audiences "benefit by the increased diversity of programs" offered by the growing number of outlets "across the market"); Benjamin J. Bates and Todd Chambers, *The Economic Basis for Radio Deregulation*, 12 J. Media Econ. 19, 28 (1999) (observing the "expansion of the number of all-news/all-talk format stations," and noting that such expansion "tend[ed] to support the arguments of deregulation that the public's interest in news and public-affairs programming is being served, if not by every station, at least by stations in many markets").

[100] *See, e.g.*, Report and Order, *Deregulation of Radio,* 84 FCC 2d 968, 977-79 (1981), *recon. granted in part and denied in part*, 87 FCC 2d 797 (1981), *aff'd in part and remanded in part, Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. 1983) ("*Radio Deregulation Order*") (due to the growth of radio and other informational and entertainment services, it is no longer necessary for the government to require "every radio station to broadcast a wide variety of different types of programming" because a "full complement of programming services" will be available through "the totality of stations" in a market); Report and Order, *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, 98 FCC 2d 1076, 1088 (1984), *recon. denied*, 104 FCC 2d 358 (1986), *rev'd in part, ACT v. FCC*, 821 F.2d 741 (D.C. Cir. 1987) ("*Television Deregulation Order*") (requiring television stations to "present programming in all categories" is "unnecessary and burdensome in light of overall market performance").

[101] *See, e.g.*, Peter Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. Econ. 194 (1952) (demonstrating that a single owner of multiple radio stations within a market may be more likely to air minority taste programming than if stations in the market were separately owned); Adam Candeub, *The First Amendment and Measuring Media Diversity: Constitutional Principles and Regulatory Challenges*, 33 N.Ky. L. Rev. 201, 203 (2005) ("a significant body of economic theory suggests" that "concentrated ownership produces greater diversity in programming content"). *See also 1992 Radio Ownership Order*, 7 FCC Rcd at 2757 (Commission itself envisioned that group ownership would promote "program service diversity and the development of new broadcast services" when it initially liberalized radio ownership rules in 1992).

independent 1999 study concluded that, "[b]etween 1993 and 1997 ownership concentration and the programming variety available in local radio markets both increased substantially," consequently "suggest[ing] that the increased concentration has been good for listeners."[102] This study also found that "increased concentration *caused* an increase in available programming variety." Berry and Waldfogel, *Mergers* at 25 (emphasis added). A number of other empirical studies similarly concluded that the post-1996 ownership changes in the radio industry have resulted in the offering of more diverse types of programming to audiences.[103] One of these studies expressly found that radio programming diversity increased the greatest amounts in markets with the highest levels of group ownership. *See* BIA, *Has Format Diversity Continued to Increase?* at 13-15.

A new study by BIA has further confirmed that the multiple ownership of radio stations in local markets has enabled group owners to offer more varied and more targeted programming to listeners. Since 1996, the number of general and specific types of programming offered by stations in the average Arbitron market has increased by 16% and 36.4%, respectively.[104] This study has confirmed that these increases in the types of programming aired by radio stations has

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[102] Steven Berry and Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting,* National Bureau of Economic Research, Working Paper 7080 at 25-26 (April 1999). *Accord* Steven Berry and Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q. J. Econ. 1009 (Aug. 2001).

[103] *See* Comments of NAB in MM Docket No. 99-25, Attachment B, *Format Availability After Consolidation* (filed Aug. 2, 1999); Statement of Professor Jerry A. Hausman at 2-3, 11-14, Exhibit 3 to Comments of Clear Channel Communications, Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002); BIA Financial Network, *Has Format Diversity Continued to Increase?,* Attachment A to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002); Bear Stearns Equity Research, *Format Diversity: More from Less?* (Nov. 2002).

[104] Attachment G, BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences* at 5, 7 (Oct. 23, 2006) ("*Over-the-Air Radio Service Study*").

been continuous since 1996, with significant increases coming after 2001.[105] The diversity of programming types available in local markets today is truly impressive. For example, on average in the ten largest Arbitron markets, radio stations air 45.4 specific programming formats per market, which obviously serve a wide range of audiences with differing tastes and interests. *Over-the-Air Radio Service Study* at 7. This new BIA study also demonstrated the growth in the level of programming provided to diverse demographic groups and niche audiences in local radio markets. *See id*. at 8-12; *see also infra* Section IV.A.2. Clearly, radio broadcasters since 1996 have responded to increased competition from multichannel and other competitors offering niche or even personalized audio services by increasing the diversity of their own programming to attract new and more diverse audiences.

In sum, consumers today have access to more diverse radio programming than ever before, including programming targeted to serve the needs of niche audiences, such as minority groups. Empirical studies demonstrate that the joint ownership of radio outlets does not have a deleterious effect on programming diversity in local media markets, but actually enhances the ability of broadcasters to serve the needs and interests of diverse audiences by offering more varied programming. Commentators focusing on other media sectors have similarly asserted that local group ownership may actually foster the Commission's diversity goals.[106] In light of this empirical evidence, the Commission's review of the continuing validity of ownership restrictions

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[105] *Over-the-Air-Radio Service Study* at 5, 7 (the average Arbitron market has seen a 7.5% increase in general programming formats and a 22.2% increase in specific types of programming since 2001).

[106] *See, e.g.*, David Haddock and Daniel Polsby, *Bright Lines, The Federal Communications Commission's Duopoly Rule, and the Diversity of Voices*, 42 Fed. Comm. L.J. 331, 333 (1990) (arguing that rule preventing local television duopolies "may actually frustrate" FCC's diversity and competition goals); Pritchard, *Longitudinal Study of Local Media Outlets* at 22 (finding that the rate of increase in the number of media outlets available in five local communities rose after passage of 1996 Act).

on local broadcasters must take into account how the needs and interests of diverse audiences are in fact met by group owners with the increased ability to serve small, niche audiences.

3. Concerns About Viewpoint Diversity Do Not Warrant Restrictive Broadcast-Only Ownership Rules

The Commission has, in the past, cited a need for "viewpoint diversity" as a justification for strict broadcast-only ownership regulations. In the current media environment, however, the Commission cannot properly rely on that rationale. NAB submits that common ownership of local broadcast stations in our digital environment would not adversely impact the level of viewpoint diversity in local markets. Given the growth of multichannel video and audio outlets and consumers' ability to access content as "diverse as human thought" via the Internet, *Reno*, 521 U.S. at 870, the assumption, for example, that allowing a television broadcaster to own one additional television station in its community could somehow substantially reduce the diversity of ideas and views available to consumers is not sustainable.

Merely assuming such harm to justify regulation is particularly troubling because the connection between ownership and viewpoint or content diversity remains unproven. One early survey of the literature examined arguments that "unconcentrated media ownership" lead to "the expression of a wider range of political viewpoints," but concluded that the evidence to support such a claim "is virtually nonexistent."[107] The authors of this survey expressed surprise about the "paucity of empirical analysis directed to the question of whether" the Commission's ownership rules actually "contribute to or compromise attainment" of the agency's long-standing diversity goals. Besen and Johnson, *Regulation of Media Ownership* at 31.

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[107] Stanley M. Besen and Leland L. Johnson, *Regulation of Media Ownership by the Federal Communications Commission: An Assessment* at 52 (Dec. 1984).

More recent surveys have reconfirmed the lack of empirical evidence establishing a link between ownership and diversity of viewpoint or content. One researcher, after reviewing the history of FCC ownership regulation and the related scholarly literature, simply concluded that "[t]here is no evidence" that the Commission's ownership policies have "in fact resulted in greater (or less) diversity of content" within the commercial sectors of the U.S. broadcasting industry.[108] Another study focusing on the television duopoly rule, after reviewing the existing economic literature on the effect of local market structure on diversity, found that "[m]ultiplicity of ownership is a blunt instrument, and . . . possibly a counterproductive one" for ensuring that "many points of view are heard." Haddock and Polsby, *Bright Lines* at 348-49 (also expressing doubt as to whether "diversity of ownership" had any "appreciable relationship to citizens' awareness of important public affairs"). The most recent studies have similarly concluded that structural regulation of the broadcast industry "is ineffective in producing diversity."[109]

Because the actual correlation between ownership of broadcast stations and the local availability of diverse ideas and viewpoints remains unclear, the Commission cannot assume that increased group ownership of local broadcast outlets has already, or will in the future, result in a decline in viewpoint diversity. To the contrary, both older and more recent studies indicate that commonly owned media do in fact provide a meaningful diversity of viewpoints on issues of public concern, thereby calling into question the traditional presumption that separate owners necessarily provide "a wider array of viewpoints." *2002 Biennial Review Order* at ¶ 27.

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[108] Benjamin Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 Cardozo Arts & Ent. L.J. 755, 763 (1995). *Accord* Benjamin Compaine, *The Media Monopoly Myth: How New Competition Is Expanding our Sources of Information and Entertainment*, at 7-11 (2005).

[109] Mara Einstein, *The Financial Interest and Syndication Rules and Changes in Program Diversity*, 17 J. Media Econ. 1, 16 (2004) (analysis of television industry found that "consolidation" was "not having an effect on the diversity of content").

For example, one study compared the content of six newspapers in contrasting ownership situations to determine "whether significant differences in content would be found" in "joint ownership" arrangements.[110] The authors hypothesized that "in cities where the same publisher owned both the morning and afternoon papers, there would be a significant overlap or duplication in content (for both news and editorial content) -- more so than in the city having different owners." Hicks and Featherston, *Duplication of Newspaper Content* at 551. To their surprise, however, they found "absolutely *no* duplication in opinion content in any of the three cities," as "[e]ach of the six newspapers published separate editorials, political columns and editorial cartoons" and "no duplication of letters to the editor occurred." *Id*. (emphasis added). This study also noted that, "[i]n all three cities studied, readers of the two papers published get two distinct products in terms of appearance and non-duplicated content," and that the "type of ownership would seem to make little difference." *Id*. at 553. Thus, the authors concluded that it was possible "to have real competition in a local, jointly owned situation." *Id*.

A more recent study examined the product differentiation and the amount of content variety available in 207 newspaper markets between 1993 and 1999, a period of "sharp increase in newspaper mergers and acquisitions."[111] Using this data on topical reporting beats, this study

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[110] Ronald Hicks and James Featherston, *Duplication of Newspaper Content in Contrasting Ownership Situations*, 55 Journalism Q. 549, 550 (1978). This study examined (i) a morning and an afternoon newspaper commonly owned by a small local chain in Baton Rouge, Louisiana; (ii) a morning and an afternoon newspaper commonly owned by a large national chain in New Orleans, Louisiana; and (iii) separately owned morning and afternoon newspapers in Shreveport, Louisiana.

[111] Lisa George, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets*, 29th TPRC Conference 2001, Report No. TPRC-2001-097 at 2 (2001). As indicators of content variety and product differentiation, the author used "newspaper-level information on the assignment of reporters and editors to approximately 150 different topical reporting beats" (*e.g*., agriculture, technology, banking and finance, fitness and health, religion, consumer affairs, music, opinion and commentary, and, of course, foreign, local, national and regional news). *Id*. at 2, 35-36.

measured the "degree of differentiation in coverage among papers in each market" in 1993 and 1999, finding that a "decrease in the number of owners in a market lead[] to an increase in separation between products." George, *What's Fit to Print* at 2. In addition, "the number of topical reporting beats covered per market also increase[d] with ownership concentration." *Id*. at 2-3. Thus, this study concluded that "concentration appears to increase total content variety," providing "evidence that newspaper consolidation can benefit readers." *Id*. at 28. As a result, "government intervention to increase the number" of "media owners within markets may be unnecessary." *Id*. at 33.

Two additional studies specifically examining the diversity of information and viewpoints expressed by commonly owned newspaper/broadcast combinations regarding the 2000 Presidential campaign similarly concluded that commonly owned outlets do not speak with a single voice about important political matters. The first, more narrow study "found substantial diversity in the news and commentary offered by each of the three newspaper/broadcast combinations" under consideration, and saw "no evidence of ownership influence on, or control of, news coverage" of the Presidential campaign by the cross-owned media properties in the three markets.[112] Specifically, the "slant" of the campaign coverage aired by each company's radio and television stations "tended to differ from the slant of news published by the company's newspaper." Pritchard, *A Tale of Three Cities* at 49.

A broader study by the same author that examined coverage of the 2000 Presidential campaign by cross-owned newspaper/television combinations in ten different cities concluded that common ownership of a newspaper and a television station in a community did "not result in

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[112] David Pritchard, *A Tale of Three Cities: "Diverse and Antagonistic" Information in Situations of Local Newspaper/Broadcast Cross-Ownership*, 54 Fed. Comm. L.J. 31 (2001).

a predictable pattern of news coverage and commentary on important political events between the commonly-owned outlets."[113] More specifically, this study found that in five of the ten newspaper/television combinations examined, "the overall slant of the coverage broadcast by a company's television station was noticeably different from the overall slant of the coverage provided by the same company's newspaper, and often contradicted the newspaper's endorsement of a candidate." In the other five combinations studied, "the overall slant of newspaper coverage of the 2000 campaign was not significantly different from the overall slant of the local television coverage." *Viewpoint Diversity Study*, Results Section. The author emphasized that the data did not support any conclusions as to why the overall slants in those five cases were similar – in other words, the data cast no light on whether it was common ownership or other factors that resulted in a similar slant on campaign coverage in half of the newspaper/television combinations. In sum, this study concluded that "cross-owned newspapers and broadcast stations covered the campaign in the way that mainstream American news organizations typically cover political campaigns." *Id*., Discussion Section.

Moreover, NAB observes that concerns about diversity can be directly addressed in ways beyond the imposition of restrictive broadcast-only local ownership rules. For example, Congress authorized leased access for unaffiliated programmers to reach viewers via cable systems, so as to "promot[e] diversity of programming available to cable consumers."[114] However, the FCC's processes have not facilitated the use of leased access by unaffiliated

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[113] David Pritchard, *Viewpoint Diversity in Cross-Owned Newspapers and Television Stations: A Study of News Coverage of the 2000 Presidential Campaign* (Sept. 2002) ("*Viewpoint Diversity Study*").

[114] Statement of Commissioner Jonathan S. Adelstein, Approving in Part & Dissenting in Part, *Memorandum Opinion and Order* in MB Docket No. 05-192, FCC 06-105 (rel. July 21, 2006) ("*Adelstein Comcast/TW/Adelphia Statement*").

program providers. Improvement of the leased access regime would clearly serve the FCC's goal of ensuring that programming from a variety of independent sources can reach consumers by cable systems that have the "incentive and ability to prefer their own programming." *Adelstein Comcast/TW/Adelphia Statement* at 2.

As the Commission has explicitly recognized, "diversity of ownership *per se* is not an end in itself," but merely "a means to achieve the public interest goal of promoting" viewpoint diversity. *Second Report and Order*, 4 FCC Rcd at 1743. It is therefore incumbent upon the Commission -- if its intends to justify retention of broadcast-only local ownership restrictions based on viewpoint diversity concerns -- to establish a link between its local ownership rules and the local availability of diverse ideas and viewpoints.[115] As discussed in Section I, the Commission now has the burden to demonstrate empirically this connection between its decades-old rules and viewpoint diversity.[116] Plainly, at this juncture, assumptions or "unverified predictions" about diversity can no longer justify retention of the broadcast ownership rules in their current form. *Bechtel II*, 10 F.3d at 880.[117] Particularly when directly regulating media entities – an area replete with First Amendment implications – the Commission cannot simply assume a link between ownership restrictions and diversity so as to justify intrusive regulations. "[L]aws that single out the press, or certain elements thereof, for special treatment pose a

[115] *See 2002 Biennial Review Order* at ¶ 27 (FCC stated it did not have "conclusive empirical evidence" to support proposition that a "larger number of independent owners will tend to generate a wider array of viewpoints in the media than would a comparatively smaller number of owners").

[116] *See, e.g. Bechtel II*, 10 F.3d at 880; *Lamprecht v. FCC*, 958 F.2d 382 (D.C. Cir. 1992) (gender-based preference in broadcast comparative licensing process was invalidated when FCC introduced no evidence supporting a link between female ownership and programming of any particular kind).

[117] *See also Geller*, 610 F.2d at 980 ("the Commission is statutorily bound to determine whether" the "vital link" between its "regulations and the public interest" exists).

particular danger of abuse," and "so are always subject to at least some degree of heightened First Amendment scrutiny."[118]

And, in fact, in the context of the newspaper/broadcast cross-ownership rule, the Commission has expressly found that "commonly-owned newspapers and broadcast stations do not necessarily speak with a single, monolithic voice." *2002 Biennial Review Order* at ¶ 361. The Third Circuit noted the "conflicting evidence in the record on whether ownership influences viewpoint," and found 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 cross-ownership ban." *Prometheus*, 373 F.3d at 399-400. In light of these previous conclusions by the Commission and the Court, and the available evidence discussed above, NAB doubts that the requisite empirical link between any of the local ownership restrictions and viewpoint diversity can be demonstrated. Simply put, "the joint ownership of two or more media outlets in the same market does not necessarily lead to a commonality of viewpoints by those outlets." *Second Report and Order*, 4 FCC Rcd at 1744.[119] The ability of consumers to access a wide range of media outlets to obtain diverse programming and viewpoints is, moreover, significantly enhanced by the growing level of substitutability between media for both entertainment and informational purposes.

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[118] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 640-41 (1994).

[119] And NAB again stresses that the degree of common ownership in local markets should not be overstated. The 2002 *FCC Media Outlet Study* showed a considerable *increase* in the number of separate owners in local markets between 1960 and 2000, and the 2006 *BIA Media Outlets Survey* showed the substantial numbers of separate owners of television and radio stations in DMAs of varying size. NAB's new study focusing on radio ownership further illustrates the large number of commercial radio stations that either remain "standalones," or are part of local duopolies, in their respective markets. *See Independent Radio Voices Study* at 1-2. Overall, "[n]inety-nine percent of the nearly 119,000 media firms in the U.S. are classified as small by the federal government." Anne Hoag and Sangho Seo, *Media Entrepreneurship: Definition, Theory and Context*, Paper Presented at NCTA Academic Seminar at 2 (April 2005).

4. The Significant Substitution Between Media Outlets by Consumers Further Reduces Any Diversity Concerns

Given the Commission's traditional concerns about "the impact of concentration on diversity in the marketplace of ideas," NAB cautions that it must be careful in defining the market so as not to "overestimate the degree of concentration."[120] In an "era of rapidly converging media technologies, and the equally rapid development and diffusion of alternatives to mainstream media," it is "increasingly important to consider the presence and impact of substitutes" to traditional media such as broadcast outlets. Bates, *Concentration in Local Television Markets* at 17. Over two decades ago, the Commission found that "the information market relevant to diversity concerns includes not only TV and radio outlets, but cable, other video media, and numerous print media" (such as newspapers, magazines and periodicals) "as well." *Report and Order* in Gen. Docket No. 83-1009, 100 FCC 2d 17, 25 (1984) (specifically finding that "these other media compete with broadcast outlets for the time that citizens devote to acquiring the information they desire" and "are substitutes in the provision of such information"). Today, with the more recent emergence of, *inter alia*, the Internet and video and radio satellite services, the information market relevant to diversity concerns is broader and more varied than ever before. Indeed, in the *2002 Biennial Review Order* (at ¶¶ 171, 365), the Commission specifically found, and the Third Circuit agreed, that media other than broadcast

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[120] Benjamin J. Bates, *Concentration in Local Television Markets*, J. Media Econ. 3, 17 (Fall 1993) (arguing that using the "same market definition to consider the impact" of "concentration on the price of advertising" to also consider "the impact of concentration on diversity in the marketplace of ideas" would "be to seriously overestimate the degree of concentration" in the marketplace of ideas). *Accord* Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 Mich. St. DCL L. Rev. 671, 696 (Fall 2003) (explaining in detail why "markets for ideas are much broader than corresponding economic markets").

media, including cable and the Internet, contributed to viewpoint diversity in local markets. *See Prometheus*, 373 F.3d at 400.

Studies previously conducted for the FCC and academic work support the view that media other than broadcast outlets contribute to diversity in local markets, and that consumers do substitute between these media for both informational and entertainment purposes. For example, one study examining the extent to which consumers regard different types of media as substitutable for both news and entertainment found clear evidence of substitution between the Internet and broadcast television, both overall and for news specifically; between daily and weekly newspapers; and between daily newspapers and broadcast television news. Some evidence of substitutability was also found between cable and daily newspapers, both overall and for news consumption; between radio and broadcast television for news consumption; and between the Internet and daily newspapers for news consumption. Joel Waldfogel, *Consumer Substitution Among Media* at 3, 39 (Sept. 2002).

A survey conducted for the Commission by Nielsen Media Research similarly showed that consumers use a variety of sources to obtain news and information and these sources are, at least to a considerable extent, substitutable.[121] First of all, this study demonstrated that consumers use a variety of media – including television, newspapers, radio, the Internet and magazines – to access both local and national news. *See Nielsen Consumer Survey* at Tables 097 and 098. This survey also clearly demonstrated the emergence of cable television as a significant source of news and information. A considerably higher number of households currently subscribe to cable television than to a daily newspaper (*see Nielsen Consumer Survey* at Table 079), and, for consumers who receive their national news from television, a slightly higher

[121] *See* Nielsen Media Research, *Consumer Survey on Media Usage* (Sept. 2002) ("*Nielsen Consumer Survey*").

number reported watching national news on cable or satellite, rather than broadcast, channels in the past week. *See id.* at Table 016. Cable has even emerged as a significant source of local news. *See id.* at Table 008. The Nielsen survey also demonstrated that many (although not all) consumers viewed broadcast television, cable and satellite news channels, daily newspapers and radio all as substitutes for each other in obtaining local or national news. *See* Tables 021, 024, 026, 027, 030, 032, 045, 046, 050, 057 and 061.

A more recent academic study has confirmed this substitutability between the Internet and traditional media as sources for news and information. Based on a survey of consumers in Ohio, this study found that the Internet has had a "significant displacement effect" on "broadcast television" for daily news and that "Internet news had displaced some newspaper usage" as well.[122] This Ohio study concluded that the growing popularity of the Internet "has resulted in changes in use of traditional media" in the "daily news domain." Dimmick, *et al*., *Competition Between the Internet and Traditional News Media* at 19.

Indeed, growing competition from the Internet, cable and other news sources has clearly been the primary cause of the drop in viewership levels for news on broadcast television, especially among younger viewers. According to very recent research, regular viewership of local television news has fallen from 77% in 1993 to only 54% in 2006.[123] Between 1997 and 2003, early-evening local news programs lost 16% of their share of the available audience, and

[122] John Dimmick, Yan Chen and Zhan Li, *Competition Between the Internet and Traditional News Media: The Gratification-Opportunities Niche Dimension*, 17 J. Media Econ. 19, 31 (2004).

[123] Pew Research Center for the People & the Press, *2006 News Consumption and Believability Study* at 1, 12 (July 30, 2006) ("*2006 Pew News Study*") (also showing that only 42% of viewers ages 18-29 regularly watch local television news).

these audience losses continued through 2005, although at a slower rate.[124] Medium and small market television stations have experienced substantial declines in the viewing shares of their late-night local newscasts over the past ten years.[125]

Newspapers have also seen their audience decline significantly in recent years. According to the *2006 Pew News Study*, only 40% of consumers reported reading a newspaper "yesterday," while this figure was 58% in 1994 and 71% in 1965. *2006 Pew News Study* at 1, 19. Daily newspaper circulation has been declining since 1988, and these declines have accelerated since 2004. The "key factor driving the circulation losses" is the "movement of readers, especially young ones, to online alternatives – a pressure that is likely only to increase."[126] Among people under the ago of 30, only 24% read a newspaper on a typical day. *2006 Pew News Study* at 11. As one observer has stated, the "average age for heavy consumers of print and broadcast news is now less than 10 years short of Social Security eligibility," while "[y]oung people are turning away from mainstream journalism in all of its forms except one—the Internet."[127]

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[124] Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Local TV/Audience* at 2-3 (2006) (also showing declines in audience shares for local news in other dayparts).

[125] *See* Attachment H, BIA Financial Network, *Economic Viability of Local Television Stations in Duopolies* at 8-9 (Oct. 23, 2006) (major network affiliates in DMAs 51-210 saw 24% drop in viewing shares for late-night local news from 1995-2005).

[126] Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Newspaper/Audience* at 1-3 (2006). Daily circulation fell 6.5% between 1984 and 1994, another 7.9% between 1994 and 2004, and the decline continued to accelerate in 2005. Robert MacMillan, *Newspapers Weigh Choices in Struggling Market*, Reuters.com (June 8, 2006); Julia Angwin and Joseph Hallinan, *Newspaper Circulation Continues Decline, Forcing Tough Decisions*, Wall Street Journal at A1 (May 2, 2005).

[127] Jon Ziomek, *Journalism Transparency and the Public Trust*, A Report of the Eighth Annual Aspen Institute Conference on Journalism and Society at 3 (2005).

These media usage trends extend beyond just news and information. Recent reports strongly indicate that the Internet now generally competes with traditional media, especially television, for consumers' time and attention. According to the 2005 Internet study by the Center for the Digital Future, non-users of the Internet watched an "average of 6.2 hours more television per week than Internet users."[128] And this replacement of Internet use for television viewing will only grow in the future, as younger viewers are turning away from television. A recent McKinsey & Co. study on advertising reported that teens spend 600% more time than adults on-line and less than half as much time watching television as typical adults.[129]

Evidence is growing that the Internet and related digital technologies now substitute for the use of other traditional media, including print and radio. For example, according to Arbitron/Edison Media Research, about 30% of online consumers say they are spending less time with magazines and newspapers because of the time they are spending on the Internet, and 19% report spending less time listening to terrestrial radio because of the Internet. Rose and Lenski, *Internet and Multimedia 2006* at 12. Early adopters of new technologies, such as podcasting, may also spend less time with traditional mass media. For instance, 38% of podcast

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[128] *See 2005 Digital Future Report Highlights* at 13. Other studies have confirmed that Internet users watch less television. For example, the 2006 survey of consumer technology adoption by Forrester Research reported that 18-26 year olds "spend more time online than watching television," and are integrating technology into their daily lives at a faster rate than any other generation. *See* http://www.tmcnet.com/usubmit/2006/07/31/1754551.htm.

[129] Abbey Klaassen, *McKinsey Study Predicts Continuing Decline in TV Selling Power*, Advertising Age (Aug. 6, 2006).

users report listening to the radio less because of the time spent listening to podcasts,[130] and consumers also attribute their reduced use of radio to MP3 use.[131]

From the above discussion and the FCC's own studies, it is now increasingly difficult to justify broadcast ownership regulation as necessary to ensure that consumers have access to diverse content and viewpoints.[132] Rather, the recent growth in the significance of nonbroadcast media, particularly cable and the Internet, in the information marketplace shows that continued reliance on a diversity rationale for maintaining ownership restrictions uniquely applicable to local free, over-the-air broadcasters is arbitrary and capricious.

5. For Diversity Purposes, the Paramount Concern Is Consumers' Access to Alternative Media Outlets and the Content They Offer

In light of the growing substitutability among the wide range of available media outlets, NAB stresses that, for the Commission's diversity purposes, the paramount concern must be consumers' access to these outlets and the content they offer. It is the availability of content from multiple outlets that matters – not the fact that some ideas, viewpoints or content may be more or less popular than other content at any particular time.[133]

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[130] Kim Hart, *As Podcasts Spread, Advertisers Sniff Money*, Washington Post at F07 (July 23, 2006).

[131] Bridge Ratings, *Bridge Ratings Audience Erosion Study 2006-Q2 Update* (April 2006) (reporting that about 75 million MP3 players have been sold and that "MP3 device usage can consume as much as 80% of a radio user's audio entertainment during initial ownership weeks and months").

[132] *See* Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Overview/Introduction* at 1 (2006) (describing the "seismic transformation in what and how people learn about the world around them").

[133] See generally Bruce M. Owen, *Confusing Success with Access: "Correctly" Measuring Concentration of Ownership and Control in Mass Media and Online Services*, Progress and Freedom Foundation, Release 12.11 (July 2005).

Accordingly, in examining the level of diversity available in local markets, the Commission cannot base its analysis on the current popularity or mainstream acceptance of the content or ideas offered by various outlets. Instead, the Commission should focus on the number of alternative outlets offering information and entertainment to consumers. Just because certain ideas are unpopular or certain content less appealing to consumers does not make that content any less significant from a First Amendment point of view.[134] Indeed, it would be antithetical to our First Amendment values for a government agency to suggest that outlets offering less "mainstream" content should not count at all, or should be discounted substantially, in any media diversity analysis. Outlets offering new or different or radical content – even if that content is not immediately popular or widely acclaimed – may ultimately be offering the content most valuable or innovative in the long term.[135] "To discount media that are available to all, but that garner small audiences because consumers prefer other content, would understate the level of diversity" very significantly.[136]

The Commission should further reject arguments that supposed broadcaster "control" over their audiences restricts consumer choice. Broadcasters have no special power to prevent their viewers and listeners from using other media. Because consumers may freely access any

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[134] *See, e.g., NAACP v. Button*, 371 U.S. 415, 445 (1963) (Constitution protects expression without regard "to the truth, popularity, or social utility of the ideas and beliefs which are offered"); *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 689 (1959) (First Amendment guarantees are "not confined to the expression of ideas that are conventional or shared by a majority," and they protect "expression which is eloquent no less than that which is unconvincing").

[135] *See Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("time has upset many fighting faiths," and the "best test of truth is the power of the thought to get itself accepted in the competition of the market").

[136] Bruce M. Owen, *Regulatory Reform: The Telecommunications Act of 1996 and the FCC Media Ownership Rules*, 2003 Mich. St. DCL L. Rev. 671, 692 (Fall 2003).

number of competing media providers, the current audience size of a broadcast or other media outlet does not necessarily measure that outlet's importance in the marketplace of ideas. Each outlet in a market constitutes a potential source of ideas and viewpoints.[137] Thus, any diversity metric that only counts an outlet if that outlet offers content or ideas that reach an arbitrarily-defined level of popularity or acceptance would literally stand the First Amendment on its head.[138]

NAB also wants to stress that the "range of choices" relevant to diversity goes beyond traditional newscasts and, particularly, beyond just local news.[139] Although local broadcasters certainly agree that local news is one of the most important services they provide to viewers and listeners, the provision of local news is not the sole way to judge an outlet's contribution to diversity.

As an initial mater, many of the most important and controversial issues facing Americans today, such as terrorism, the war in Iraq, energy prices and the economy, are national or even international in scope, rather than local. And the Commission has already indicated that the "diversity of viewpoints" on national issues is great, "due to the vast array of national news sources available" to consumers. *2002 Biennial Review Order* at ¶ 35.

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[137] For example, a political journal with a very small total circulation could have considerable importance in the marketplace of ideas, especially if the journal's audience included a number of government officials, political leaders or influential scholars.

[138] *See Button*, 371 U.S. at 445; *Kingsley*, 360 U.S. at 689. Judges have recognized that, because they are "chosen from the mainstream of their communities," they "share many views which are popular with their contemporaries," and thus tend to "equat[e] the agreeable with the valuable and the unpopular with the unimportant." *South Boston Allied War Veterans Council v. City of Boston*, 875 F. Supp. 891, 913-14 (D. Mass. 1995). The Commissioners of the FCC should not fall into the trap of "equating" the "unpopular with the unimportant" when considering the level of diverse ideas and viewpoints in local markets. *Id*. at 914.

[139] *2002 Biennial Review Order* at ¶ 394 ("what ultimately matters here is the range of choices *available* to the public") (emphasis added).

Moreover, programming other than traditional newscasts, including news magazines and even entertainment programming, "address matters of public concern" and "contribute[] to a national dialogue on important social issues." *Id*. at ¶ 33. Certainly local programming of various types, including entertainment, religious, consumer and other community-oriented programming, contribute to local communities and the diversity of ideas in those communities.

Simply put, the traditional local newscasts of television and radio stations cannot be regarded as the sole source of all the ideas available across local markets – especially in light of numerous competing media outlets and the Internet, which can directly connect citizens and news makers, such as political leaders and government officials. *See supra* Section II.B. (also discussing the "citizen journalist" movement, which further demonstrates the fallacy of assuming that broadcasters are "gatekeepers over what the public knows").[140] Thus, while some parties may want the Commission to assume that the broadcast media somehow control which ideas and viewpoints ultimately gain widespread public acceptance, when acting in an area so infused with First Amendment concerns, the agency may not properly rely on that highly questionable assumption to justify restrictive regulation.

D. Localism Is Best Preserved by Permitting Broadcasters to Compete Effectively in the Digital Multichannel Marketplace

The Commission must also reject any assumption that restrictive broadcast-only regulations are needed to promote localism. In light of the extensive competition documented

[140] Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Overview/Introduction* at 1 (2006). But even for decades before the Internet, mass communications scholars have pointed out that most citizens relied for their opinions not on the media directly but on "opinion leaders" (including friends, colleagues and family members) who may themselves rely more directly on media. This interpersonal communication with friends, family and co-workers greatly influences the diffusion and acceptance of ideas. *See* Elihu Katz and Paul F. Lazarsfeld, *Personal Influence: The Part Played by People in the Flow of Mass Communications* (1955).

above, the real threat to locally-oriented services is not the joint ownership of broadcast stations, but the stations' inability to maintain their economic vibrancy in the face of multichannel and other competitors. Thus, the capability of local broadcasters to continue operating profitably in financially sustainable ownership structures must be a central concern of this proceeding. Only competitively viable broadcast stations sustained by adequate advertising revenues can serve the public interest effectively and provide a significant local presence. As the Commission found nearly 15 years ago, the broadcast "industry's ability to function in the 'public interest, convenience and necessity' is fundamentally premised on its economic viability." *1992 Radio Ownership Order*, 7 FCC Rcd at 2760.

In the *2002 Biennial Review Order*, the Commission stated it would measure localism in broadcasting by two standards – "the selection of programming responsive to local needs and interests, and local news quantity and quality." *Id*. at ¶ 78. As discussed below, the record in the Commission's localism proceeding, combined with broadcasters' community service, demonstrates that radio and television broadcasters focus their resources and commitment on maintaining their competitive advantage -- the uniquely local nature of their services in today's media marketplace. In the localism proceeding, parties representing at least 2,254 radio licensees and 637 television licensees submitted detailed information on the amount and variety of news and other locally-relevant programming local stations deliver, the valuable coverage that broadcasters devote to politics and civic discourse, and broadcasters' efforts to ascertain the needs and interests of their local communities.[141]

[141] *See* Reply Comments of NAB in MB Docket No. 04-233 at 2 (filed Jan. 3, 2005) ("NAB Localism Reply Comments").

1. Broadcasters Provide a Wealth of Local News, Including Emergency Information, and Other Locally Produced Programming

As Belo has aptly stated: "local news, in essence, is the broadcaster's franchise."[142] In the Commission's localism proceeding, parties representing more than 1,773 radio licensees and 454 television licensees detailed their local news operations. *See* NAB Localism Reply Comments at 5. Of these, large numbers of stations also specified the various categories of local news they provide, such as weather and weather emergencies, investigative and consumer advocacy issues, crime, and coverage regarding politics, family matters, local sports, community events, and others. *Id.* Local broadcasters use high-profile news anchors and journalists to explore, investigate and analyze local public interest stories better than any other electronic media outlets.

Many of the broadcasters who participated in the localism proceeding also detailed the number of hours of local news they air on a weekly basis. Of the 454 or more television stations commenting in this area, approximately 139 discussed how many hours they devote to news. Of these, approximately 120 television stations reported airing at least 20 hours of news per week, with the majority of these airing between 25 to 40 hours of news per week. *Id*. These stations typically broadcast multiple blocks of half-hour or hour-long newscasts throughout the day and evening, plus numerous "news breaks" that appear in between regularly scheduled programming, as well as periodic news specials.[143] Local radio stations – not including the hundreds of stations

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[142] Comments of Belo, Inc., in MB Docket No. 04-233 at 18 (filed Nov. 1, 2004).

[143] *See also* FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Dr. William F. Duhamel at 2 (May 26, 2004) (nearly 40% of each weekday schedule on our South Dakota, Nebraska and Wyoming television stations is devoted to news and public affairs programming, and these stations carry over seven hours a day of network news and public affairs and about two and a half hours each weekday of local news and public affairs programs); FCC Localism Hearing, San Antonio, TX, Statement of Robert G. McGann, President and General Manager

with an all-news or news/talk format – broadcast many newscasts of shorter length that focus primarily on local events. For example, WMAL-AM (Washington, DC) stated that its morning news program is broadcast from 5:00AM to 9:00AM weekdays, 6:00AM to 9:00AM on Saturdays, and 8:00AM to 9:00AM on Sundays, but that it also airs at least four minutes of local news each hour, 24 hours a day, 7 days a week, along with traffic and weather reports and breaking local news segments.[144]

Local news is not only a broadcaster's franchise, it is (along with other local non-entertainment programming) a significant source of revenue for stations. Broadcasters receive a larger percentage of the advertising revenue from local newscasts and other locally produced programming because they own the copyright for such material. According to a recent Radio Television News Directors Association/Ball State University survey, in 2004 news accounted for 42.8% of television station revenues on average across all markets.[145] Although RTNDA has not tracked news profitability for radio stations, local news coverage remains a vital part of commercial radio operations. As Roger Utnehmer, President of Nicolet Broadcasting has noted: "I made a determination a few years ago that the survival strategy for radio to compete with XM

KENS-TV at 2 (Jan. 28, 2004) (KENS aired 39 hours of non-entertainment programming during one surveyed week, amounting to 23.2% of its total weekly broadcast program hours).

[144] Comments of the Walt Disney Company in MB Docket 04-233, at Attachment C (filed Nov. 1, 2004). *See also* FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Alan Harris at 2 (May 26, 2004) (three Wyoming radio stations broadcast 72 local newscasts every week, about 40 sportscasts, and a daily public affairs interview program); FCC Broadcast Localism Hearing, Monterey, CA, Statement of Chuck Tweedle at 3 (July 21, 2004) (three Bonneville radio stations in Bay area broadcast more than four hours of locally produced newscasts every week); FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Jerry T. Hanszen at 2 (Jan. 28, 2004) (on a typical day, two small market Texas radio stations broadcast five local newscasts).

[145] *See* Bob Papper, *News, Staffing and Profitability Survey*, Communicator at 36 (Oct. 2005).

and Sirius and iPod is to increase the commitment to local news."[146] Certainly other radio stations have shown that by improving their newsgathering operations and showcasing local talk talent and programming, stations can substantially increase their audience share. For example, KFI-AM in Los Angeles, California recently jumped from fifth to first in the market on the strength of its local news, talk and sports, thereby accomplishing something no other AM station in Southern California had done in two decades – finish first in the overall ratings.[147]

Beyond local news programming, local radio and television stations provide a variety of other locally produced programming that serves the needs and interests of their audiences, including sports, religious, arts and other community-oriented programming.[148] Indeed, local production of television programming is said to be enjoying a "renaissance," with stations producing, for example, local talent series, reality programming, home and garden shows, consumer awareness programming, travel shows and community "magazine" shows.[149]

In addition to weather and emergency information provided within regularly scheduled newscasts, broadcasters provide a wealth of emergency information to their local communities. Through live coverage and the Emergency Alert System ("EAS"), broadcasters have invested millions of dollars in state-of-the art equipment to ensure that their local communities have timely access to critical, and often life-saving, information. For example, during Hurricane

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[146] Craig Johnston, *Station Sites Function Like Newspaper*, Radio World (April 2005).

[147] *See* Martin Miller, *AM Still Sends Out a Strong Signal to Rivals*, latimes.com (July 25, 2006).

[148] *See, e.g.*, FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Robert G. McGann, President and General Manager, KENS-TV at 3-4 (Jan. 28, 2004); FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Alan Harris at 2 (May 26, 2004); FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Jerry T. Hanszen at 3 (Jan. 28, 2004).

[149] Charley Daniels, *Local Production Enjoying a Renaissance Among Stations*, Television Week at 22-23 (July 25, 2005).

Katrina broadcasters made extraordinary efforts to air live news coverage and disseminate relief supplies in affected areas, even as the waters rose and station facilities were deluged. Though many stations suffered major damage, through the pooling of resources, planning and pre-positioning of key supplies, stations were able to resume broadcasting as quickly as possible to serve the public. Radio stations aired critical news, weather updates and shelter information, as well as on-air counseling services.[150] Television stations turned to webcasting and allowed their signals to be carried by other stations in the region to keep the evacuated New Orleans population informed of important information. Broadcasters have also supported many of the Commission's initiatives to improve EAS, such as extending EAS requirements to digital television and digital radio, ensuring a secure warning system, adoption of a Common Alerting Protocol, and the integration of enhanced public warning features into radio and television receivers to ensure all Americans, including those persons with disabilities and non-English speaking persons, have timely access to emergency information.[151]

Broadcasters additionally pioneered the *AMBER PLAN: America's Missing: Broadcast Emergency Response.* Named after nine-year-old Amber Hagerman, who was kidnapped and brutally murdered in Arlington, Texas, it was created in 1996 by the Association of Radio

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[150] *See, e.g.*, Oral Testimony of Steve Davis, Senior Vice President Engineering, Clear Channel Radio, Inc., Before the FCC's Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Tr. at 76-86 (Jan. 30, 2006) (*Online available* at http://www.fcc.gov/eb/hkip/transc1.pdf); Scott Fybush, *Call 'em crazy, call 'em heroes – they kept radio going during Hurricane Katrina*, Inside Radio (Aug. 30, 2005).

[151] *See Review of the Emergency Alert System*, Joint Comments of NAB and the Association of Maximum Service Television, EB Docket No. 04-296 (filed Oct. 29, 2004). Many broadcasters further detailed their radio and television stations' provision of vital emergency information at the FCC's localism hearings.

Managers with the assistance of law enforcement agencies across the Dallas/Ft. Worth area. Today, with 116 state, local and regional plans, over 300 children have been recovered.[152]

2. Broadcasters Serve Their Communities by Providing a Wealth of Locally-Responsive Programming and Other Unique Services

In addition to providing local news and emergency information, the strength of broadcasters' commitment to localism can be measured by their locally relevant public affairs programming. Commenters in the Commission's localism proceeding, representing at least 1,904 radio licensees and 287 television licensees, specifically stated that they broadcast local public affairs programming. Many of these stations also noted what type of public affairs issues they typically addressed, including education (95 television stations, 49 radio stations); minority issues (45 television, 278 radio); and health matters (65 television, 22 radio), among numerous other categories. Examples include:

- WLWC-TV (Providence) airs *The Real Deal*, an alternative public affairs program hosted by political consultant Guy Default, who aims to help viewers understand how the political process affects their lives. Each episode consists of a discussion between high-profile, local guests, a debate between Democrat and Republican representatives, a discussion featuring a Rhode Island "local hero, " and Mr. Default's commentary on current local news events.[153]

- In addition to weekly public affairs programming, most broadcasters air public affairs segments within local newscasts. For example, KTVT-TV (Dallas) provides an extensive list of local public affairs issues that are routinely covered within its newscasts, including segments entitled *Ask The Experts* which focuses on health issues, and *Connect With Kids*, which covers character building topics featuring children and teens.[154]

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[152] *Online available* at http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=991.

[153] Comments of Viacom in MB Docket No. 04-233, at Attachment 1 (filed Nov. 1, 2004).

[154] Comments of Viacom in MB Docket No. 04-233, at Attachment 1 (filed Nov. 1, 2004).

- WTLV-TV (Jacksonville) also specifically mentions its broadcast of public affairs segments within local newscasts. Routine segments cover gun violence, education, diversity, obesity and others.[155]

- WHBQ-TV (Memphis) airs several public affairs features within regularly scheduled newscasts, including *Building Better Minds*, a weekly feature that highlights positive stories of success in education, and *Fight the Blight*, an ongoing series of reports about abandoned property that threaten neighborhoods.[156]

- Seven Clear Channel stations in Albany, New York air *Clear View*, a weekly half-hour public affairs program every Sunday. This program is designed to highlight community organizations and their positive impact on the Albany community.[157]

Broadcasters also provide substantial on-air political coverage to educate and inform their local communities. In the pending localism proceeding, parties representing at least 1472 radio stations and 255 television stations specifically discussed their coverage of political issues. *See* NAB Localism Reply Comments at 14-16 (summarizing the comments submitted by broadcasters describing their political programming). More recent examples of broadcasters' political coverage include:

- On July 15, 2006, WLJA-FM, Ellijay, GA hosted a debate between 6th District Republican congressional primary candidates;

- On July 24, 2006, KRAI-AM, Craig, CO, hosted and broadcast a candidate Town Hall forum with two candidates for county sheriff, three candidates for county commissioner and Republican candidate for Congress Scott Tipton (incumbent Congressman John Salazar turned down the offer to participate);

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[155] Comments of Gannett Broadcasting in MB Docket No. 04-233 at 68 (filed Nov. 1, 2004).

[156] Comments of WHBQ-TV (Memphis) in MB Docket No. 04-233 at 2 (filed Nov. 1, 2004).

[157] Comments of Clear Channel in MB Docket No. 04-233 at 11 (filed Nov. 1, 2004). *See also* FCC Broadcast Localism Hearing, Monterey, CA, Statement of Joseph W. Heston, President and General Manager KSBW-TV at 2 (July 21, 2004) (describing KSBW's local, state and national public affairs programming); FCC Broadcast Localism Hearing, Monterey, CA, Statement of Chuck Tweedle at 2-3 (July 21, 2004) (describing radio stations' three weekly local public affairs programs); FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Steve Giust, KWEX-TV at 1-2 (Jan. 28, 2004) (discussing weekly community and political affairs shows).

- On August 11, 2006, the Nebraska Broadcasters Association produced and broadcast a live one-hour debate between Senate candidates incumbent Ben Nelson (D) and challenger Pete Ricketts (R);

- WPDE-TV, Myrtle Beach/Florence, SC is airing seven live debates among state and local candidates this election season;

- KLTF-AM, Little Falls, MN is airing numerous debates between state political candidates and sponsoring town hall meetings, including one featuring seven candidates for county commissioner;

- During the 2006 election season, Post-Newsweek television stations are dedicating at least 10 minutes per weekday to locally produced political news coverage. For its sixth election cycle, Belo Corp. has instituted "It's Your Time," where candidates receive five minutes of free air time from Belo television stations – four minutes to tell viewers why they should be elected and one minute to answer a question specific to the candidate's individual race.[158]

Just a few weeks ago, NAB detailed many additional examples of local television stations providing coverage of the 2006 elections, including coverage of candidate debates and forums and the provision of free air time to candidates.[159] Indeed, local stations in several markets very

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[158] For these and numerous other examples, *see* NAB, *At Your Service*, Vol. 9, Issue 5 (August/September 2006) (*Online available* at http://www.nab.org/AM/AMTemplate.cfm?template=/CM/ContentDisplay.cfm&ContentID=7053.) and NAB, *Free Air Times* (Oct. 2006) (*Online available* at http://www.nab.org/AM/AMTemplate.cfm?template=/CM/ContentDisplay.cfm&ContentID=7047.) *See also* FCC Broadcast Localism Hearing, Charlotte, NC, Statement of James M. Keelor at 2 (Oct. 22, 2003) (discussing free air time devoted to covering local politics, including candidate debates, interviews and profiles, by Liberty Corporation's stations); FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Dr. William F. Duhamel at 2 (May 26, 2004) (describing extensive political debates and voter PSAs carried by television stations).

[159] *See* Attachment L, Letter from Dennis Wharton, Executive Vice President, Media Relations, NAB (Oct. 11, 2006) (describing political coverage of local stations in Detroit, MI; Columbus, OH; Milwaukee, WI; Lansing, MI; Cleveland, OH; Madison, WI; Las Vegas, NV; Rapid City, SD; Fairway, KS; Greenville, SC; Louisville, KY; Panama City, FL; Scranton, PA; New Bedford, MA; Memphis, TN; Johnstown-Altoona, PA; and Houston, Dallas, Austin and San Antonio, TX).

recently preempted network programming to air gubernatorial debates.[160] Local broadcasters are also increasingly using the Internet to supplement their election coverage. For example, WHO-TV in Des Moines offers special Internet coverage of the 2006 state and congressional elections, "Iowa Votes," on WHOtv.com.

Broadcasters' commitment to localism can be further measured by their community service. As detailed in NAB's nationwide survey,[161] and based on the responses of broadcasters representing a total of 652 television stations and 4,502 radio stations, the *2006 Broadcast Community Service Report* reveals the following results for calendar year 2005:

- Broadcasters provided over $10.3 billon in community service.
- More than 19 out of 20 television and radio stations (98%) reported helping charities, charitable causes or needy individuals by raising funds or offering other support.
- Local radio and television broadcasters raised a projected $1.3 billion for victims of disasters, including the Gulf Coast hurricanes, tornadoes, wildfires and flooding. More than 19 out of 20 television and radio stations (96% of each) reported involvement in on-air or off-air disaster relief campaigns.
- 61% of Public Service Announcements ("PSAs") aired by the average radio station were about local issues. For the average television station, the figure was 55%.
- 63% of television stations and 71% of radio stations reported airing local public affairs programming of at least 30 minutes in length every week during the year.
- Broadcasters supported and organized community events such as blood drives, charity walks and relays, community cleanups, town hall meetings, cake auctions, health fairs, etc.
- Awareness campaigns organized and promoted by local broadcasters covered the full range of issues confronting American communities today, including: alcohol abuse,

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[160] John Eggerton, *Preempting Grey's for Reds and Blues*, Broadcasting and Cable (Oct. 13, 2006) (reporting that on October 6, multiple stations in Texas, Wisconsin and Hawaii all preempted *Grey's Anatomy* to air their respective gubernatorial debates).

[161] National Association of Broadcasters, *National Report on Broadcasters' Community Service* (June 2006) (*Online available* at http://www.nab.org/publicservice) ("*2006 Broadcast Community Service Report*").

education and literacy, violence prevention, women's health, drug abuse, and hunger, poverty and homelessness.[162]

Additionally, broadcasters provide a unique community service – when a radio or television station partners with a charitable or community organization, the station not only provides dollars (like other corporate partners), but also a public voice for those organizations. A broadcaster can help an organization make its case directly to local citizens, to raise its public profile and to cement connections within local communities. As a trusted source, a broadcaster can help an organization better leverage its fund raising resources and expertise, its public awareness and its educational efforts.[163]

Beyond assisting local organizations, broadcasters can mobilize relief efforts on a wide scale. For example, in the aftermath of Hurricane Katrina, television and radio stations throughout the country participated in extensive fundraising for hurricane relief. *See 2006 Broadcast Community Service Report* at 5. Many stations gave up valuable airtime to broadcast telethons and encouraged listeners and viewers to donate money and disaster relief supplies such as food, clothing, and water. Broadcasters and AmeriCorps launched a new radio public service campaign aimed at recruiting AmeriCorps members to assist mobilization of volunteers in the

[162] The $10.3 billion figure does not include the wide variety of off-air community service of broadcasters, such as the time value of station personnel's participation in community events, or the investments that stations make in producing PSAs, radiothons and telethons, the production costs of news and public affairs programming, or the value of airtime donated for coverage of breaking emergencies.

[163] *See*, *e.g*., FCC Broadcast Localism Hearing, San Antonio, TX, Statement of Jerry T. Hanszen at 3 (Jan. 28, 2004) ("[T]he most important contributions that broadcasters make to their community has very little to do with money. We raise the level of awareness, discussion, and education in our communities. And we give a voice to local organizations, groups and individual citizens."). Many broadcasters at the FCC's localism hearings described their community service efforts in detail.

hurricane-ravaged region.[164] And on behalf of its members, NAB undertook several relief partnership projects. For example, NAB partnered with the Louisiana and Mississippi State Broadcasters to distribute 1,300 battery-operated handheld television sets to public safety officials assisting with Hurricane Katrina relief efforts. NAB also partnered with the Salvation Army and American Red Cross to distribute 10,000 battery-operated handheld radios to residents displaced by Hurricane Katrina.[165] Day in and day out, broadcasters' unparalleled service to their communities underscores their strong commitment to localism.

3. Programming Need Not Be Locally Produced to Serve the Public Interest

To the extent that parties in this proceeding may contend that localism means stations must air some defined amount of locally produced programming, NAB notes that the Commission has never concluded that programming must be locally produced to serve local needs and interests. In fact, the Commission has expressly noted that programming "that addresses local concerns need not be produced or originated locally to qualify as 'issue-responsive' in connection with a licensee's program service obligations."[166] And when rejecting

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[164] *See* National Association of Broadcasters, *New Hurricane Katrina Radio PSAs Help Recruit AmeriCorps Members* (*Online available* at http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=5135.)

[165] *See* National Association of Broadcasters, *Broadcasters Offer Portable TVs To First Responders In Hurricane Katrina Relief Efforts* (*Online available* at http://www.nab.org/AM/Template.cfm?Section=Press_Releases1&CONTENTID=5132&TEMPLATE=/CM/ContentDisplay.cfm.)

[166] Notice of Inquiry, *Broadcast Localism*, 19 FCC Rcd 12425, 12431 (July 1, 2004) ("*Broadcast Localism NOI*"). *See also Radio Deregulation Order*, 84 FCC 2d at 999 (in maintaining quarterly Issues/Programs lists, the airing of non-locally-produced programming is "not preclude[d]" in addressing issues of importance to the local community).

claims that the Communications Act requires "licensees to provide locally-produced programming," the courts have agreed with the Commission's determinations.[167]

NAB stresses that nothing inherent in the local *production* of programming means that such programming serves local needs and interests better than programming produced regionally or nationally. As previously explained in detail, programming need not be locally produced to be relevant to a broadcaster's community of license. *See* NAB Comments in MB Docket No. 04-233 at 24-25 (filed Nov. 1, 2004). News and public affairs programming of importance to the entire nation can also be important to the citizens of a particular community, especially concerning such issues as national security, the Iraq war, or the economy. As noted at the Commission's localism hearing in Rapid City, South Dakota, a station "should get credit for programming produced somewhere else, especially if the subject is really local, like interviewing our Congressman in Washington or carrying an away sports game back to the home team audience."[168] Programming and public service campaigns focusing on a range of issues, such as AIDS, anti-smoking, drug abuse, breast cancer awareness or crime prevention, can be responsive to the needs of local communities, even if the programming is not locally produced.[169] For these reasons, any generic claims that a particular station or group owner is not airing "enough" locally

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[167] *Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413, 1430 n.54 (D.C. Cir. 1983) (Section 307(b) of Act is satisfied so "long as the Commission requires licensees to provide programming – *whatever its source* – that is responsive to their communities") (emphasis added).

[168] FCC Broadcast Localism Hearing, Rapid City, SD, Statement of Eleanor St. John, KQEG, La Crosse, WI (May 26, 2004).

[169] *See Broadcast Localism NOI*, 19 FCC Rcd at 12431 ("A program, for example, that discusses teenage drinking generally may be highly relevant to a particular community even though it is not produced specifically for that community or tailored to its particular problems in this area.").

produced or originated programming say nothing relevant about whether that station or station group is in fact serving the public interest.[170]

4. Both the Commission and the Third Circuit Recognize that Joint Ownership May Promote Localism

Both the Commission and the Third Circuit have recognized that the current broadcast ownership restrictions may hinder stations' ability to serve their local communities. In modifying its ownership rules in 2003, the Commission found evidence indicating that the existing cross-ownership rules inhibit broadcasters' ability to provide local news and informational programming, and that the "efficiencies and cost savings realized from joint ownership may allow radio and television stations to offer *more news reporting generally, and more local news reporting specifically*, than otherwise may be possible." *2002 Biennial Review Order* at ¶¶ 342, 383 (emphasis added). The Commission also concluded that the newspaper cross-ownership ban undermined localism by preventing efficient combinations that would allow for the production of high-quality local news. *See id.* at ¶¶ 343-44. The Third Circuit subsequently upheld these determinations. *See Prometheus*, 373 F.3d at 399 (finding that the Commission reasonably concluded that the cross-ownership ban undermined localism).

With respect to the television duopoly restrictions, the Commission previously properly concluded that owners/operators of same-market television stations have the "ability and incentive to offer more programming responsive to the needs and interests of their communities, and that in many cases, that is what they do. Thus, modifications to the rule that will allow for

[170] In September, the FCC included a 2004 draft study on localism in the record of this proceeding. The data underlying this draft study were not included, and thus NAB is not in a position to give a full response to the conclusions at this time. NAB notes, however, that the relevance of this study to the instant proceeding is highly questionable on its face because, *inter alia*, the authors use a highly subjective approach to measuring "localism" that does not track with the FCC's own definition; exclude local weather and sports, programming that local viewers clearly value; and limit the hours of programming even considered.

greater common ownership are *likely to advance our localism goal*." *2002 Biennial Review Order* at ¶ 164 (emphasis added). The Commission also specifically stated that the local television ownership rule is "hindering our efforts to promote localism." *Id.* at ¶ 169. Again, the Third Circuit affirmed the Commission's conclusion that allowing for common ownership of local television stations can lead to improved local programming. *See Prometheus*, 373 F.3d at 415-16. Thus, allowing for marketplace efficiencies through flexible ownership structures, the Commission can ensure that stations remain economically able to serve their local communities, even in the face of competition from other media outlets, including nationally and regionally consolidated MVPDs. Simply stated, a financially stable broadcast industry will ensure that localism is sustained.

IV. Consistent With The Public Interest, The Commission Should Permit Local Broadcasters To Adopt More Competitively Viable Ownership Structures

Given the unprecedented levels of competition and diversity in today's media marketplace, retaining unique ownership restrictions on local broadcasters does not promote the public interest, but instead hinders stations' abilities to provide programming and other valuable services to their audiences. Allowing broadcasters to adopt more efficient ownership structures will help stations attract additional advertising dollars and investment capital, thereby ensuring the long-term vibrancy of local broadcast stations and promoting competition, diversity and localism.

A. The Commission Should Ensure that the Radio Ownership Rules Allow Local Stations to Maintain Their Competitive Viability and Their Ability to Serve Diverse Audiences and Local Communities Effectively

The ownership changes that have occurred in the radio industry since 1996 have enabled the industry to regain its economic viability, as Congress intended when it passed the 1996 Act. As the Commission recognized, the radio industry experienced severe financial difficulties in the early 1990s. More than half of all commercial radio stations were losing money, and hundreds of stations had ceased broadcasting. *1992 Radio Ownership Order*, 7 FCC Rcd at 2760. The outlook for small stations was "particularly bleak." *Id*. In fact, the Commission had concluded in 1992 that economic stress "substantially threatened" the industry's ability to serve the public interest, and determined that relaxing the then very strict radio ownership restrictions would help improve radio stations' "competitive standing" and "ability to function in the public interest." *Id*. at 2760-61. The Commission expressly recognized that its rule prohibiting the common ownership of two same-service radio stations whose signals contours overlapped constituted an "artificial constraint[] that prevent[ed] valuable efficiencies from being realized" by station owners. *Id*. at 2760. Thus, the Commission somewhat relaxed its local radio rule, generally permitting common ownership of up to three stations in markets with 14 stations or fewer, and up to four stations in larger markets.[171]

In 1996, Congress appropriately further reformed the limits on local radio ownership so as "to preserve and to promote the competitiveness of over-the-air broadcast stations."[172] Section 202(b)(1) of the 1996 Act, entitled "Local Radio Diversity," established the number of radio stations that could be commonly owned in local markets of varying size.[173] As Congress intended, and as the Commission has recognized, the changes in ownership structures made

[171] *See Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 91-140, 7 FCC Rcd 6387, 6388 (1992).

[172] H.R. Rep. No. 204, 104th Cong., 2d Sess. at 48 (1995). Congress found that "significant changes" in the "audio and video marketplace" called for a "substantial reform of Congressional and Commission oversight of the way the broadcasting industry develops and competes." *Id*. at 54-55.

[173] This section allows the common ownership of eight stations in the largest radio markets (*i.e.*, those with 45 or more stations), seven stations in markets with between 30 and 44 stations, six stations in markets with between 15 and 29 stations, and five stations in markets with 14 or fewer stations, except that no one can own more than 50% of the stations in such small markets.

possible by the 1996 Act have "enable[d] radio owners to achieve significant efficiencies" and have "brought financial stability" to the "radio industry." *2002 Biennial Review Order* at ¶ 293.

The Commission must resist any attempts in this proceeding to now further restrict the ownership levels in local radio markets. Competition, diversity and localism are flourishing in local radio markets due to the proliferation of traditional radio stations and the development of satellite radio and Internet technologies. Given the increased competition that has developed in local radio markets since Congress adopted the existing numerical station limits in 1996, no justification could exist today to cut back on the ownership levels specifically permitted by Congress over a decade ago in a less competitive radio marketplace. In fact, as changes in ownership structure have enhanced local stations' abilities to serve diverse audiences and their communities, without resulting in the exercise of market power by radio groups, the Commission must consider whether a further liberalization of the radio ownership restrictions will serve the public interest.

1. Competition Concerns Cannot Justify Calls to Cut Back on Existing Ownership Levels in Local Radio Markets

The available empirical evidence provides no competition-related justifications for reducing the levels of local radio ownership set by Congress in a less competitive and less diverse marketplace over a decade ago. Not only is today's radio marketplace characterized by growing competition from new outlets and technologies, the available empirical evidence does not reveal any competitive or other tangible harms from the post-1996 changes in radio station ownership. As summarized below, there is no evidence indicating that radio groups exercise undue market power in today's media marketplace. Quite the contrary, they are being forced to compete against an ever increasing array of new audio competitors for listeners and vital advertising dollars.[174]

Today's radio marketplace clearly presents competitive challenges to terrestrial radio broadcasters. Due to the growing numbers of audio outlets and increasing audience fragmentation, even market leading stations must continually find new ways to earn audience share.[175] From 2000 to 2005, the time adults spend per day listening to radio declined 6.7%, and listening by younger consumers has declined more.[176] This trend presents a real concern for today's radio industry. As BIA Financial Network recently concluded, radio is facing an "increasingly diversely competitive marketplace," in which stations are "combating non-terrestrial radio and all forms of digital media" for "listeners and resulting advertising revenues."[177]

While some commenters undoubtedly will contend that radio station groups exercise anti-competitive market power, empirical evidence presents a different story. One study specifically

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[174] *See* Sections II.B. and III.B. above, describing new Internet applications and devices now competing with traditional local radio stations, including streaming, podcasting and iPods.

[175] *See* Attachment D, NAB, *Aggregate Shares of Top Five Stations in Top 100 Arbitron Markets: Spring 2006 vs. Spring 2001 and Spring 1996* at 3 (showing that the aggregate share of the top five stations in the 100 largest Arbitron markets declined an average of 5.9% from 2001 to 2006, and declined an average of 14.7% from 1996 to 2006). The Commission, four years ago, documented that the average number of listeners to radio had begun to fall. George Williams and Scott Roberts, *Radio Industry Review 2002: Trends in Ownership, Format, and Finance* at 19 (Sept. 2002) ("*FCC Radio Trends Report*").

[176] *See* Media Dynamics, Inc., *Radio Dimensions 2005* at 37 (2005). According to the Radio Advertising Bureau, the time per day teenagers spend listening to the radio declined by 25% from 1992 to 2006. *Accord* Edison Media Research, *Follow-Up Edison Media Research Study on 12-24 Radio Listening Shows Sharp Decreases in TSL and Usage*, available at http://www.edisonresearch.com/home/archives/2006/09/followup_edison.php.

[177] BIA Financial Network, *State of the Radio Industry, Radio Station Transactions 2005: When Is It Going To Get Better?* at 12 (Sept. 26, 2005) ("*BIA State of the Radio Industry*").

examining market power in radio found that increased group ownership had *not* lead to collusive conduct and market power in the industry.[178] This study of profits and concentration in the radio industry concluded that "radio station groups achieve efficiencies relative to stand-alone stations," and that "[t]hese efficiencies are achieved through group ownership *without* a corresponding increase in market power" of radio broadcasters generally. Ekelund, *et al.*, *Market Power in Radio Markets* at 181 (emphasis added). In expressly examining "whether concentration leads to economic efficiency or to market power," this study clearly found that "group ownership" did "increase efficiency" rather than market power. *Id.* at 157, 159.

The conclusion that group ownership has lead to economic efficiency in the radio industry, rather than market power, is also supported by earlier studies submitted to the Commission. One study of over 3000 radio stations concluded that "high levels of market concentration among local radio stations do not result in higher [advertising] prices," but "actually results in *lower* prices for advertisers, most likely because of substantial efficiencies from local multi-station ownership."[179] Another study using actual advertising data provided by 121 participating stations in 37 Arbitron markets concluded that radio ownership consolidation did not lead to higher advertising prices, but found that the average change in radio advertising

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[178] R.B. Ekelund, Jr., G.S. Ford and T. Koutsky, *Market Power in Radio Markets: An Empirical Analysis of Local and National Concentration*, 43 J. Law & Econ. 157 (2000).

[179] Stephen Stockum, *The Pricing of Radio Advertising: Does Market Concentration Matter?* at 3, Attachment B to Comments of Cumulus Media in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002). Because the actual prices of radio advertisements are generally not publicly available, this study used, as a proxy for the price paid for radio advertising, a measure of radio station revenue per rating point calculated from BIA revenue reports and Arbitron ratings. As the author explained, this proxy "is closely related to what is known in the radio industry as 'cost-per-point,' *i.e.*, the cost of a radio ad per Arbitron share point," which is "the relevant measure of price" from an "advertisers' perspective." *Id.* at 3-4.

prices was lower in markets with greater increases in concentration between 1995 and 2001.[180] Professor Hausman later extended this study by collecting advertising rate data charged by stations in additional radio markets that had experienced significant ownership changes. He again "conclude[d] that there is no evidence that the increases in consolidation that occurred between 1995 and 2001 led to increases in the price of radio advertising."[181]

Furthermore, if group ownership had lead to the gain of significant market power by radio groups, one would expect that radio stations' revenue growth and the prices paid for stations in acquisitions would have increased, or at least remained constant, over the past few years. Instead, the "radio industry has trailed other media (e.g., local cable systems, Internet) as well as the overall economy in growth," and "overall prices" paid for acquired radio stations "have been trending down for several years." *BIA State of the Radio Industry* at 7, 11.

Perhaps most significantly, two separate empirical studies have concluded that the potential exercise of market power by radio groups can be countered by the ability of other stations, including smaller groups and standalone stations, to gain substantial increases in listening share through programming changes. A 2002 study by BIA Financial Network demonstrated that the volatility of ratings and audience share in the radio industry provides a very significant check on the market power of even the leading stations or groups in local markets. This study found that the audience shares earned by radio stations are quite volatile, and that stations are able to make very significant gains in their shares over short periods of time

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[180] Statement of Professor Jerry A. Hausman at 2-7, attached as Exhibit 3 to Comments of Clear Channel Communications, Inc. in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002).

[181] Statement of Professor Jerry A. Hausman at 2, 8, Exhibit 1 to Comments of Clear Channel Communications, Inc. in MB Docket No. 02-277 (filed Jan. 2, 2003).

by altering their formats.[182] The BIA study examined whether greater levels of common ownership in local markets made it more difficult for stations to increase their audience shares after changing formats. It "found no evidence that an increase in local ownership concentration negatively affects the ability of stations to increase their local audience share" through a format change. *Volatility in Radio Market Shares* at 17. Such ratings volatility necessarily reduces the ability of even market leading stations or groups to exercise market power or, indeed, to even retain their market leading position over time.

A 2005 study on format changes, ratings volatility and ownership has strongly confirmed the findings of this BIA Financial Network study.[183] This recent study found that "format changes often do produce substantial and significant improvements in listening shares" of radio stations. Romeo and Dick, *Effect of Format Changes* at 375. Significantly, this study found that "opportunities to gain" listening shares by changing programming formats "are not beyond the reach of smaller radio groups." *Id*. at 354. Indeed, the study concluded that "being part of a

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[182] *See* BIA Financial Network, *Volatility in Radio Market Shares*, Attachment C to NAB Comments in MM Docket Nos. 01-317 and 00-244 (filed March 27, 2002). For example, between the Fall 2000 and Spring 2001 ratings periods, nearly one-quarter (23.1%) of all reportable stations in Arbitron surveyed markets saw their audience shares increase by 25% or more. A virtually identical percentage of stations (23.0%) saw their audience shares increase by 25% or more over a longer period (between Spring 2000 and Spring 2001). Large numbers of stations also saw their audience shares drop by 25% or more during these same periods, and many other stations experienced smaller increases or decreases in their audience shares. *Id*. at 4-6. When specifically examining the over 300 stations in Arbitron markets that changed their formats between Fall 2000 and Spring 2001, these stations increased their share, on average, by 30.8% between these two ratings periods. *Id.* at 7. Over longer periods of times (*e.g.*, between Spring 2000 and Spring 2001 and between Spring 1999 and Spring 2001), stations that changed formats made even more impressive share gains (38.5% and 35.6%, respectively). *Id*. at 9-11.

[183] Charles Romeo and Andrew Dick, *The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes*, 27 Review of Industrial Organization 351 (2005). Charles Romeo is a Research Economist with the Department of Justice. Andrew Dick is a Vice President with CRA International, and was formerly Acting Chief of the Competition Policy Section of the Department of Justice. A copy of their study is included as Attachment I.

larger group, whether local or national, does not provide a station with any incremental boost relative to smaller radio groups" in gaining listening shares from programming changes. *Id*. In light of these findings, the authors opined that "antitrust agencies may be able to look to format changes by smaller radio groups or individual stations to counter or defeat the potential exercise of market power by a radio group that acquires a substantial share of a particular audience demographic through merger." *Id*. Given the results of these two studies, the Commission should be highly skeptical of claims that radio station groups -- even those that currently lead the market in audience share -- are capable of maintaining and exercising any undue market power over time.[184] Moreover, the ability of even smaller radio groups and individual stations to gain significant improvements in their listening shares through programming changes shows that radio stations outside of large groups can "remain viable" in today's radio marketplace.[185]

In sum, given the lack of evidence in this and prior proceedings that increased group ownership has caused tangible competitive harms in the marketplace, there is no basis upon which to impose further restrictions on radio ownership in local markets. Rather, as discussed below, the proper course is to provide greater ownership flexibility to local radio broadcasters. Radio is the *least* consolidated media sector and is facing increasing competition from new outlets and technologies.[186] Under such marketplace conditions, more restrictive regulation would be arbitrary and capricious.

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[184] *See 2002 Biennial Review Order* at ¶ 299 (citing concerns by some commenters that "dominant radio station groups can exercise market power").

[185] *2002 Biennial Review Order* at ¶ 299 (Commission stated that it "seek[s] to ensure" that small radio firms "can remain viable and, beyond that, can prosper").

[186] *See* Attachment E, NAB, *Percentage of Industry Revenues Earned by Top 10 Firms in the Sector* (the top ten owners in the radio industry earn only 44% of the industry's revenues, making radio much less consolidated than other media sectors, including cable, DBS and satellite radio, which are highly consolidated). *See also Independent Radio Voices Study* at 1-2

2. No Diversity-Related Concerns Would Warrant Reregulation of Local Radio Markets

The available empirical evidence similarly shows no diversity-related harms that would warrant any attempts to cut back on the levels of "Local Radio Diversity" set by Congress in Section 202(b)(1) of the 1996 Act. As discussed above, consumers today have access to more varied audio programming than ever before, and this diversity of programming has only been enhanced by the post-1996 changes within local radio markets. *See supra* Section III.C.2 (detailing numerous studies of radio programming in local markets). Indeed, the number of general and specific types of programming offered by radio stations in the average Arbitron market has increased by 16% and 36.4%, respectively, since 1996. *See Over-the-Air Radio Service Study* at 5, 7.

The FCC's previous study on playlist diversity additionally "suggest[ed] that diversity has grown significantly among stations *within* the same format and within the same city," and stated that stations with the *same* "formats competing within the same market appear to differentiate themselves to appeal to their listeners."[187] Thus, "listeners in local radio markets may have experienced increasing song diversity" since 1996. *FCC Music Diversity Study* at 18. NAB stresses the significance of this conclusion that song diversity has increased within local radio markets because diversity within markets is the type of diversity most important to radio listeners. Consumers in local markets have much less interest in the diversity of songs played on stations in other markets than in the diversity of songs played by stations in their locality. Even if a station in Portland, Maine had a similar playlist to a station in Portland, Oregon, the

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(illustrating the substantial number of commercial radio stations that either remain standalones, or are part of local duopolies, in their respective markets).

[187] FCC, George Williams, Keith Brown and Peter Alexander, *Radio Market Structure and Music Diversity* at 16 (Sept. 2002) ("*FCC Music Diversity Study*") (emphasis added).

individual listeners in either market would be unaffected. This diversity of radio programming is also demonstrated by the fact that listeners, including members of minority groups, report using broadcast radio stations more than other sources to find out about new music.[188]

Clearly, the common ownership of radio stations in local markets has enabled station owners to better serve their local communities with a wider array of programming. And there is no reason to believe that the radio industry will not continue to increase the diversity of its offerings in the future. Currently there are over 1000 HD radio stations broadcasting across the country. In August 2006, 352 stations were multicasting additional programming streams, and these stations are able to offer programming that serves the needs of a wider range of demographic groups.[189] For example, in Minneapolis, the HD multicast channels of local radio stations are offering a broad range of programming, including classical, classic country, new or young country, blues, alternative, dance, smooth jazz and 80s hits.[190] Five new Seattle HD radio stations launched in August, offering roots and blues, world music, all-comedy, live rock and

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[188] According to a 2006 poll by Ipsos Public Affairs for AP and Rolling Stone, 55% of respondents said they find out about new music from radio. *R&R Today* at 2 (Feb. 6, 2002). A June 2006 survey from Bridge Ratings reported that 45% of the 12-54 year-olds surveyed preferred terrestrial radio as their source of new music, beating out Internet radio and P2P and on-line networks. An impressive 61% of 35-54 year-olds reported that broadcast radio was their primary source of new music. *Bridge Ratings Industry Update—New Music Discovery* at 1 (July 21, 2006). Fully "73% of Hispanic radio listeners find out about new music by tuning" to radio, well ahead of any other sources. Jackie Madrigal and Darnella Durham, *What Latinos Want from Rhythm Radio*, R&R (Oct. 13, 2006).

[189] *See Inside Radio* at 4 (Oct. 26, 2005) (many multicasting stations provide "content that is not otherwise available on the radio in their markets"); Susan Visakowitz and Jeffrey Yorke, *Billboard Radio Monitor* (Aug. 15, 2006) (reporting an additional 18 markets to begin offering HD2 multicasts).

[190] Tony Sanders, *Twin Cities Has Two HD3s on Air*, Billboard Radio Monitor (July 14, 2006).

urban adult contemporary.[191] *See also Over-the-Air Radio Service Study* at 17 (listing dozens of unique and niche formats currently offered on HD multicast stations). Obviously, radio broadcasters are currently and will increasingly in the future use the multicast capabilities of HD radio to better serve the diverse audiences in their local communities with specialized and niche programming.

The post-1996 growth in programming diversity has included an expansion in the number of stations focusing on news, talk or other informational programming. According to BIA, as of September 2006, there are 1636 news/talk radio stations in the country, up from 1357 such stations in 2000. Nearly 71% of the population in Arbitron metro markets today receive over-the-air at least four news/talk stations, and 55.5% of the population in these markets are served by at least six news/talk stations. *Over-the-Air Radio Service Study* at 13-14. In 2004, more listeners reported listening to news/talk than to any of the other leading radio formats.[192] NAB also notes the recent creation of GreenStone Media, which plans to create women-oriented talk radio programming to air on FM stations. *See* J. Brady, *Women Go FM*, Forbes.com (Aug. 24, 2006).

Also significantly, more stations than ever are offering programming specifically designed to appeal to the diverse minority and ethnic groups in their local communities.

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[191] *Five More Seattle HD Radio Stations Launched*, Puget Sound Business Journal (Aug. 22, 2006).

[192] Project for Excellence in Journalism, *The State of the Media: An Annual Report on American Journalism, Radio/Audience* at 5 (2006). *See also* Waldfogel, *Consumer Substitution Among Media* at 29 (among persons in consumer survey who reported listening to at least one radio format, news/talk/information was reported to be the most popular).

Indeed, African-American oriented urban formats and ethnic formats have been the "radio industry's growth engine" in recent years.[193] According to BIA, as of September 2006, 796 stations are Spanish language, a 45.5% increase since 2000. Today, 50.4% of the Hispanic population in Arbitron metro markets receive over-the-air ten or more Spanish-language radio stations, with nearly 80% receiving six or more of these stations. *Over-the-Air Radio Service Study* at 9-10. Hispanic-oriented programming has not only increased in quantity but also in depth and quality. Entirely new types of music programming, such as reggaeton, a Puerto Rico based Latino hip hop offshoot, have emerged.[194] HD radio has recently resulted in an explosion of new Hispanic-oriented channels, including new channels devoted to romantica, tejano, tropical and talk. *See Over-the-Air Radio Service Study* at 17. Spanish language radio disc jockeys, such as Renan Almendarez Coello, known as *El Cucuy,* are taking a "lead role in politics" by urging listeners to vote and to attend public rallies on immigration.[195]

Radio stations have increased the programming they offer to serve other diverse groups. Over 52% of African Americans living in Arbitron metro markets have over-the-air access to four or more stations specifically targeting those listeners, with 72.1% receiving three or more such stations in 2006 (up from only 61.9% in 2000). *Over-the-Air Radio Service Study* at 11-12. Asian-language stations have emerged in Arbitron markets with significant Asian populations. *See id*. at 10-11. And radio stations focusing on even more narrow niche programming, ranging

[193] Paul Fahri, *Rock, Rolling Over,* Washington Post at C1 (Jan. 18, 2005). *See also* Tony Sanders, *Street's Cluster 'Eye' on L.A., Chicago*, Billboard Radio Monitor (July 19, 2006) (reporting that Hispanic targeted radio is gaining listening shares in major markets).

[194] Kelefa Sanneh, *Reggaeton's Rise on Radio Shows that Corporate Control and Format Change Aren't All Bad*, New York Times at E1, 7 (June 30, 2005) (observing that media corporations "are often adept at identifying emerging markets").

[195] Martin Kasindorf, *Immigrant Groups' Aim: Turn Marchers to Voters*, USA Today (July 12, 2006).

from folk to polka to Portuguese, today serve audiences throughout the country. *See id.* at 14-15. Stations have even created entirely new programming approaches for listeners who prefer a very broad, eclectic range of programming, rather than narrowly focused niche programming. For example, the "Jack" format, likened to an iPod set on shuffle, offers a broad range of music and the playing of artists from completely different decades and genres back to back.[196] Without doubt, programming designed to serve the needs and interests of diverse ethnic, linguistic and other groups has expanded exponentially in recent years. As a result, such programming is now widely available, not only in large markets, but also in smaller communities throughout the country.[197]

The Commission accordingly has no cause for concern that listeners today lack access to diverse entertainment and informational radio programming in local markets. Not only can consumers access a wide variety of programming from stations located within their local markets, listeners also routinely access radio programming originating from outside their local markets.[198] Moreover, via the Internet, listeners anywhere can easily access music and informational programming from radio stations throughout the country and the world. Traditional concerns about consumers' ability to obtain programming from a number of independently owned media outlets would thus seem to be satisfied. However, to the extent that

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[196] According to Arbitron, this new approach has been successful for the vast majority of stations adopting it, and has lead to similarly named formats such as "Bob" and "Charlie." *See Adult Hits 2006: Keeping Track of Jack, Bob, and Pals,* Arbitron/Edison Media Research (2006).

[197] Commenters in earlier proceedings specifically attested that group ownership has permitted radio owners to program stations to appeal to modestly-sized minority communities in medium and small markets such as Charleston, WV and Omaha, NE. *See, e.g.,* Comments of West Virginia Radio Corp. and Journal Broadcast Corp. in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001).

[198] *See BIA Out-of-Market Voices Study* at 5-7 (on average, nearly one-third of the listening in Arbitron markets is attributable to out-of-market radio stations).

the number of independent owners located within local markets remains a concern, the available evidence shows that large numbers of separate owners of media outlets exist in local markets.[199] For all these reasons, no conceivable diversity-related rationale could justify the Commission further cutting back on the levels of multiple ownership permitted under the 1996 Act.[200]

3. In Light of Current Marketplace Conditions, the Commission Should Provide Greater Ownership Flexibility to Local Radio Broadcasters

Congress established the existing numerical station ownership limits a decade ago in a significantly less competitive and diverse radio marketplace. The numerical caps were chosen by Congress as the appropriate ownership levels in an era before the development of satellite radio, Internet radio streaming, on-line music sites, music file-sharing and downloading, and iPods and other MP3 devices. *See supra* Section II.A.&B, discussing the development of these new technologies. XM and Sirius alone now put hundreds of channels of music, news, talk and sports programming into every local radio market in the United States. These satellite radio providers, like cable and satellite television providers, also enjoy dual revenue streams consisting

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[199] *See, e.g., FCC Media Outlet Study* at Table 1 (showing that the number of independent owners of media outlets in local markets increased significantly between 1960 and 2000); *Independent Radio Voices Study* at 2 (showing that in 2006 considerable numbers of commercial radio stations either remained "standalones," or are part of local duopolies, in their respective markets); *BIA Media Outlets Survey* at 4, 6 (on average in 25 DMAs of varying size, there were 11.7 full power television stations owned by 8.8 different owners and 73.0 radio stations owned by 37.6 separate owners, along with additional separately owned low power television and radio stations and daily and weekly newspapers).

[200] The FCC "has not emphasized localism as one of the justifications for the local radio ownership rule" and did "not adopt[] a different view" in its previous ownership review. *2002 Biennial Review Order* at ¶ 304 ("we see little to indicate that the local radio ownership rule significantly advances our interest in localism"). NAB nonetheless notes that the above discussion clearly shows that radio broadcasters serve their local communities by offering programming that fulfills the needs and interests of the diverse audiences within these communities. *See also* Section III.D. (demonstrating how broadcast stations serve their local communities more broadly).

of both advertising revenues and subscription fees.[201] And, ultimately, in the Internet age, every radio station is potentially competing against thousands of radio stations from around the globe, not just the relatively small number of local terrestrial stations within one local market.

In today's competitive radio environment,[202] NAB supports the continuing relaxation of the radio ownership rules. Ownership regulations dating from 1996 appear increasingly outdated and unfairly restrictive on terrestrial broadcasters, who now face competition from providers unrestricted by comparable limitations. At the very least, the existing numerical caps must be reviewed. For example, under the current rules, one entity can own eight stations in a market with 45 total stations. However, in a market with 60 or 75 (or even more) stations, one entity can still only own eight stations. In light of ever-growing competition from other sources of audio programming, the strict maintenance of ownership limits sets in 1996 appears increasingly unjustified.

The challenge facing the radio industry becomes apparent when one considers the significant changes in the radio marketplace not just since 1996, but since the Commission last examined the radio listening market in 2002. As noted above, continuing fragmentation of the listening audience has eroded stations' listening shares,[203] and the time per day adults (and especially teenagers) spend listening to the radio has also dropped in recent years. *See supra* Section IV.A.1. Satellite radio in particular has burgeoned since the Commission last looked at

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[201] The Commission has expressly recognized that this business model "offer[s] an additional competitive advantage over advertising-only broadcast" stations. *2002 Biennial Review Order* at ¶ 62.

[202] *See supra* Section III.B. (detailing dramatic growth of Internet and new media advertising, at expense of traditional media, including broadcast radio); *BIA State of the Radio Industry* at 12.

[203] *See, e.g., BIA Out-of-Market Voices Study* at 5-8 (documenting a 4.5-5.0% decrease in the percentage of listening to local in-market commercial radio stations since the late 1990s, as listeners access other outlets, including out-of-market radio stations).

its ownership caps. *See 2002 Biennial Review Order* at ¶ 245. Satellite radio had fewer than 600,000 subscribers at that time, but, as of September 2006, XM and Sirius claim more than 12.3 million subscribers and have been projected to reach 20.1 million subscribers by 2010.[204] The weekly Internet radio audience has increased 50% in the past year alone, and the estimated monthly audience for Internet radio is more than 52 million. One-third of weekly online radio listeners have also purchased music from an online music download store.[205] Other Internet-based competitors to terrestrial radio stations, such as podcasting, are additionally beginning to substitute for usage of traditional broadcast radio. *See supra* Section III.C.4. Locally-oriented podcasts providing local music, sports and information in particular offer competition to local radio stations. *See supra* Section II.B. Digital music players such as iPods and other devices, including mobile phones capable of streaming music from the Internet, enable listeners to take their music with them into automobiles. *See 2002 Biennial Review Order* at ¶ 245 (noting that a significant portion of audio listening occurs while driving).[206]

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[204] *See supra* Section III.A. Satellite is also likely to increase as a competitor in the radio advertising marketplace. In August, Google announced a deal with XM to make available commercial advertising inventory on XM's non-music channels through Google's dMarc Broadcasting division. The dMarc platform was first developed to allow advertisers to schedule and track ad campaigns on terrestrial radio; this deal will expand the system to satellite. Google's AdWords technology will automatically schedule and insert advertising across XM's non-music commercial channels. *Google/dMarc Broadcasting Strikes Deal with XM*, Radio Ink (Aug. 2, 2006).

[205] Rose and Lenski, *Internet and Multimedia 2006* at 24-25, 33. Twelve percent of Americans age 12 and older have listened to Internet radio in the last week, a 50% increase over the 2005 estimate of 8%, while nearly 20% of 18-to-34-year-olds listened to Internet radio in the last week. Twenty-one percent of the U.S. population age 12 and older have listened to Internet radio in the past month. One in four teens have purchased downloadable music, and about 20% of 18- to 34-year-olds have also bought downloadable music online.

[206] *See also Sprint Radio Launches with More than 50 Channels*, Radio Ink (Sept. 1, 2006) (Sprint announced launching of subscription radio service featuring over 50 channels of streaming radio and video, stating that "[m]ore people than ever before are enjoying music on their mobile phones").

As shown above, the available evidence demonstrates that flexible regulation enhances local stations' ability to serve diverse audiences and their communities, without resulting in the exercise of undue market power by radio groups. In light of this evidence and the increasing competitiveness of the marketplace for audio programming, the Commission's trend should follow the market trend and move toward continuing relaxation of the decade-old radio ownership restrictions.

B. Reforming the Television Duopoly Rule to Allow Duopolies in All Markets Is Consistent with the Public Interest

In light of the growing competition from MVPDs and other outlets and the declining financial position of medium and small market television stations, the Commission should reform the television duopoly rule to allow more freely the formation of duopolies in all markets. Such reform would ensure the competitive viability of free over-the-air local television stations and, consequently, their ability to maintain a significant local presence and serve their local communities with responsive programming. Reforming the duopoly rule would also promote competition in the video marketplace by enabling television broadcasters to compete more effectively against multichannel outlets and other video providers.

As adopted in 1999, the television duopoly rule allows an entity to own two television stations in the same DMA only if 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 and noncommercial full power television stations would remain in the DMA after the combination (the "top four/eight voices" test). *Notice* at ¶ 11. In 2002, the U.S. Court of Appeals for the District of Columbia Circuit found that the Commission had failed to justify its exclusion of nonbroadcast media, including cable television, from the duopoly rule's eight voice threshold. *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 165 (D.C. Cir. 2002). The D.C. Circuit consequently held that the limitation of "voices" in the duopoly rule to broadcast television stations was arbitrary and capricious, and remanded the rule to the Commission for further consideration. *Id.* at 169.

In its subsequent review, the Commission found that "media other than broadcast television stations contribute to viewpoint diversity" and that the top four/eight voices standard did "not promote, and may even hinder, program diversity and localism." *2002 Biennial Ownership Order* at ¶ 133. Nonetheless, the Commission retained a duopoly rule with the top-four restriction to "promote competition." *Id*.[207] On review, the Third Circuit upheld the Commission's conclusion that media other than broadcast television contributed to viewpoint diversity in local markets, and agreed that common ownership of television stations "can improve local programming." *Prometheus*, 373 F.3d at 414-415. The Court upheld the Commission's decision to retain the top four restriction, but remanded the specific numerical limits for further consideration. *Id*. at 416, 418. As a result of the Third Circuit's decision, the Commission's top four/eight voices duopoly standard remains in force, even though the D.C. Circuit Court of Appeals found that rule arbitrary and capricious over four years ago. In this proceeding, the Commission urgently needs to reform this arbitrary and capricious restriction on local television broadcasters.

[207] Under the Commission's revised duopoly rule, an entity could have an attributable interest in two television broadcast stations in markets with 17 or fewer stations, and up to three stations in markets with 18 or more television stations, subject to the top-four restriction. *See 2002 Biennial Review Order* at ¶ 134.

1. Television Stations in Medium and Small Markets Are Experiencing Severe Economic Stresses

In addressing the need for reform of the duopoly rule, NAB, as an initial matter, reemphasizes that the "economics of station ownership" differs "depending on market size." *2002 Biennial Review Order* at ¶ 201. Specifically, NAB urges the Commission to reconfirm its previous conclusion that "the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets." *Id*.

As shown by an analysis of television market revenues, medium and small market stations compete for disproportionately smaller revenues than stations in large markets.[208] For example, the New York DMA has 15 commercial broadcast television stations that earned $1.544 billion in total advertising revenue in 2005 – an average per station of $102,407,000 in revenue. In contrast, Louisville, the 50th ranked DMA, has seven commercial stations, but total market television advertising revenues of only $93 million – an average of $13,257,000 per station (about one-eighth the level of revenue as the average New York station). The financial disparity in smaller markets is even more stark. For example, Evansville, the 100th ranked DMA, has five commercial stations, but total market television advertising revenues of only $36 million. Thus, the average station in Evansville earns advertising revenue of $7,280,000 – in comparison to $102,407,000 in New York (about one-fourteenth the level of revenue as the average New York station). *See Local Television Market Revenue Statistics* at 2. NAB's point here is that stations in smaller markets compete for far smaller total revenues than do stations in

[208] *See* Attachment F, NAB, *Local Television Market Revenue Statistics* at 2 (Aug. 2006).

larger markets, and thus face more economic hardship from new competition for viewers and advertisers. *See supra* Sections III.A. & B.[209]

Not only are the "economics" of "mid-to-small TV markets" much "poorer" generally,[210] other factors – including the cost of the digital television ("DTV") transition, the decline in the compensation payments made by networks to affiliated stations, and the growth of new competitors – have combined to further squeeze local broadcasters' profits. Substantial evidence clearly demonstrates the declining financial position of medium and small market television broadcasters, and the particularly perilous financial situation of the lower-rated stations in these markets. These unprecedented financial pressures will threaten the long-term viability of lower-rated smaller market stations as independent entities, and pose particular threat to the continued viability of many local news operations, especially in medium and small markets.[211]

The Commission must consider the costs of the DTV transition as a factor when addressing the need to permit competitively viable ownership structures in local television markets. The estimates of the transition costs "vary but they range between $1 million for a

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[209] This same effect can be illustrated by examining revenues per household in different markets. For example, the New York DMA has nearly 7.4 million television households and total television advertising revenues of $1.544 billion in 2005 (an average revenue per household of $208). In contrast, in Louisville, the average revenues per television household in 2005 were only $144, and in Evansville only $126. Not only are smaller television markets less valuable to advertisers than larger markets simply because they have fewer viewers, but the viewers they do have are valued less by advertisers on a per household basis than those in larger markets. *See Local Television Market Revenue Statistics* at 2-3.

[210] Bear Stearns, *Ex Parte* in MB Docket No. 02-277, *More Duopoly Relief Needed in Small to Mid-Sized TV Markets* at 1 (filed May 28, 2003).

[211] The financial and trade press have been reporting on the financial struggles of local television stations, especially in smaller markets, for several years. *See, e.g.*, Brooks Barnes, *Local Stations Struggle to Adapt as Web Grabs Viewers, Revenue*, Wall Street Journal at A1, A11 (June 12, 2006); John Higgins, *Taking Stock of the Year Ahead; Lessons from 2005*, Broadcasting & Cable at 10 (Jan. 2, 2006); Steve McClellan, *Small Towns, Big Problems*, Broadcasting & Cable at 20 (Aug. 6, 2001).

station to simply retransmit just network programming to as much as $20 million for a station with extensive news operations."[212] Other estimates have placed the "average costs" of "building DTV" as between $2-$3 million per station. *GAO Digital Report* at 17. More recent reports have confirmed this wide range in the costs of the digital transition. Stations have reported spending $3-$4 million on digital transmitters and towers, and even greater amounts on replacing production equipment and other infrastructure.[213]

While these digital costs represent substantial outlays for all broadcasters, they are "overwhelming" for "many mid sized and small market stations and lower revenue stations in larger markets." *BIA TV Industry Report* at 9. Indeed, for stations with annual revenues below $2 million (which tend to be in the smallest 100 DMAs), transition expenses average a staggering *242%* of annual revenues, but these expenses represent only 11% of annual revenues

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[212] These costs included "investing in a considerable amount of new equipment including a new transmitter and antenna, and possibly a new tower." BIA Financial Network, Inc., *State of the Television Industry 2001, Ownership Report: What Is Owned by Whom and Where* at 7 (2001) ("*BIA TV Industry Report*"). Broadcasters have also replaced studio equipment, obtained digital programming, and "incur[red] the costs of running two stations [*i.e.*, an analog and a digital] during the transition period." General Accounting Office, Report 02-466, *Many Broadcasters Will Not Meet May 2002 DTV Deadline* at 9 (April 2002) ("*GAO Digital Report*").

[213] *See, e.g.*, Prentiss Findlay, *HDTV Coming to Stations*, The Post and Courier (Feb. 23, 2003) (Charleston, SC station reported spending nearly $4 million on the conversion): Timothy C. Barmann, *Providence, R.I., TV Leader Discusses the Digital Age*, Providence Journal (Oct. 25, 2003) (LIN Television estimated it must spend about $3 million per station for new transmitters and towers); Bob Mercer, *Future of Rural TV Full of Static*, Aberdeen American News (Aug. 17, 2004) (South Dakota station reported spending $4.4 million for towers, and estimated that the cost of production equipment conversion would be considerably greater); Tania Panczyk-Collins, *Costs, Equipment Make Transition to HD News Slow*, Communications Daily (April 8, 2005) (reporting that Raleigh, NC station pioneering local HD news coverage spent $26 million to convert, replacing 30 field units, editing suites and entire infrastructure).

for large market stations that were required to be transmitting in digital prior to May 2002. *GAO Digital Report* at 18.[214]

Local broadcasters are also facing a decline in overall revenues as a result of reductions in network compensation payments to affiliated stations. In recent years, the broadcast networks have cut the compensation fees that they traditionally paid to stations that carry their programming. A new study on the finances of television stations in medium and small markets specifically showed that network compensation to affiliated stations in DMAs ranked 51-175 declined substantially from 1997 to 2003.[215] Since 2003, the networks have further reduced or eliminated these payments entirely, or even instituted reverse compensation where local stations pay networks for programming.[216] Stations in smaller markets, which have thinner profit margins than stations in larger markets, have been disproportionately adversely affected by the reductions or elimination of network compensation.

A new report on the financial position of television stations in medium and small markets clearly demonstrates the perilous financial situation of stations, especially lower-rated ones, in

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[214] *See also BIA TV Industry Report* at 8 (for medium and small market stations, DTV costs "in many cases equal[] a large percentage of the present fair market value of the existing stations without any strong indication that the digital transmission would generate immediate additional revenues"); David Lieberman, *Small TV Stations Reel Under Order to go Digital*, USA Today at 1B (July 17, 2002) (industry analysts agree that small market stations have serious problems with financing digital transition, as small station owners are "lucky" to make "$300,000 a year in free cash flow," and "[i]t can cost $3 million to convert to digital").

[215] *See* Attachment J, NAB, *The Declining Financial Position of Television Stations in Medium and Small Markets* at 5-9 (Aug. 2006) ("*TV Financial Report*") (showing average declines of 50.7%, 41.5%, 36.8%, 41.4%, and 54.2%, respectively, in market groupings 51-75, 76-100, 101-125, 126-150 and 151-175). NAB expects to update this network compensation data with 2005 data later this year.

[216] *See, e.g.*, *CBS Affiliation Deal Ends Cash Payday*, Broadcasting & Cable TV Fax at 2-3 (Dec. 2, 2005); Barnes, *Local Stations Struggle to Adapt* at A11; Higgins, *Taking Stock of the Year Ahead* at 10.

many of these markets. *See* Attachment J, *TV Financial Report*. This report examined the profitability of ABC, CBS, Fox and NBC affiliated television stations in DMAs ranked from 51-175 in 1997, 2001 and 2003.[217] The report in particular compared the cash flow and pre-tax profits of the average high-rated affiliated station in these markets to the cash flow and profits of the average low-rated affiliate. The low-rated stations not only generally showed *declining* profitability from 1997 to 2003, but, as of 2003, a number of low-rated stations in markets 51-175 showed *negative* profitability. *See TV Financial Report* at 5-9. The low-rated stations in markets 126-150 and markets 151-175 have seen their profits decline by 679.0% and 147.9%, respectively, since 1997, and, not surprisingly, have suffered actual losses in both 2001 and 2003.[218] Indeed, even the *highest-rated* network affiliates in many medium and small markets are experiencing flat or declining profits. *See id.* at 5, 7-8 (showing flat or declining pre-tax profits for the average high-rated station in markets 51-75, 101-125 and 126-150).[219] This report also unequivocally demonstrates the financial differences between the average high-rated and low-rated network affiliates in these mid-sized and small markets. For example, in markets 151-

[217] None of these years involved a national election or the Summer Olympics to avoid the sometimes inconsistent impact of advertising associated with these events. The data for 2005 is still being reported by stations; NAB expects to update this financial report with 2005 data later this year.

[218] In markets 51-75 and 101-125, the average low-rated stations saw their profits decline by 66.3% and 27.8% between 1997 and 2003. *TV Financial Report* at 5, 7.

[219] And certainly if many of the highest-rated stations in these smaller markets are struggling, the mid-rated television stations must be experiencing financial difficulties as well. NAB's study, moreover, only examined the major network affiliates in these mid-sized and small markets, which are generally the strongest stations. Independent stations or stations affiliated with emerging networks are very likely to be experiencing even greater financial challenges than the major network affiliated stations. In 2003, NAB submitted information concerning the financial position of stations not affiliated with ABC, CBS, FOX or NBC, which showed that, on average, these independent stations in markets 26-50, 51-75, 76-100, and 101-150 were suffering actual losses. *See* NAB *Ex Parte* in MB Docket No. 02-277 at 3-4 (filed April 30, 2003).

175, the average high-rated station had a cash flow more than 700 times greater than the average low-rated station. And in markets 51-75, the average high-rated affiliate earned more than 13 times the level of profits earned by the average low-rated affiliate. *See TV Financial Report* at 5, 9. The Commission must consider these financial circumstances of smaller market stations when reviewing whether the public interest in served by the current duopoly rule.

2. The Deteriorating Financial Condition of Many Television Stations Threatens the Economic Viability of Their Local Operations, Including News

Even assuming that many television stations in medium and small markets will, through cost cutting and other means, maintain their viability as independent entities, these stations (and not just the lowest-rated ones) may very likely be forced to reduce their local presence, including cutting back or eliminating their local news operations. A number of stations – some specifically citing such factors as the expenses of digital conversion, reductions in network compensation, and declining advertising revenue – have already eliminated or cut back their local news operations, even in larger markets, such as Charlotte, Detroit, Minneapolis, Orlando and St. Louis.[220] And as the financial situation of stations, especially lower-rated ones in medium and small markets, continues to worsen, many of these stations may have no choice but to cease their local news operations.[221]

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[220] Media General *Ex Parte* in MB Docket Nos. 06-121 and 02-277 (July 26, 2006) (listing dozens of examples of curtailments in local television newscasts since 1998); Associated Press, *Fox Affiliate to Stop Producing 10 o'clock News* (Jan. 12, 2006) (Fox affiliate in Pittsburgh ceased producing own 10:00 p.m. local news); *TV News: Down the Tube*, Columbia Journalism Review at 8 (Sept./Oct. 2002) (identifying eight television stations in markets such as Kingsport, TN, Evansville, IN and Marquette, MI that "have scrapped their locally produced newscasts" due to a slumping economy, a drop in network compensation, and digital transition costs).

[221] *See, e.g.*, McClellan, *Small Towns, Big Problems* at 20-21 (network compensation has been the "sole source of funding for key services like local news operations" in small markets, and the owner of stations in Glendive and Billings, MT and Alpena, MI stated that the loss of

An earlier study by the media research and consulting firm of Smith Geiger demonstrated the likelihood that a number of smaller market stations may eliminate their local news operations. According to Smith Geiger, "the continuing profitability of a local television news operation is now highly uncertain."[222] Due to increases in the number of local broadcast television news providers in the 1980s and 1990s and the growth of cable and satellite, "it has never been more difficult for a local television station to attract an audience," and "[t]his lack of audience leads to lower Nielsen ratings and lower advertising rates, bringing the station reduced revenues overall." *Newsroom Report* at 2. And "while revenue is more and more difficult to come by," the "costs of starting up and maintaining a local television news operation in medium and small markets continue to increase," particularly due to increased salary and benefits costs for news personnel. *Id*. at 2, 13, 15.

Moreover, acquiring alternative programming (such as syndicated programming) "represents a much lower cost than news production," and, consequently, the "average profit from acquired programming is likely to be slightly higher than that from news operations" for average stations in both medium and small markets. *Newsroom Report* at 13-14 (estimating that a local station in a medium and in a small market would earn, respectively, 5% and 30% higher profits annually from syndicated programming than from local news programming even though the advertising revenue from syndicated programming is lower than from news, due to the lesser expense of the acquired programming). For these reasons, "local stations may look to exit the

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compensation "would force him to reconsider the viability of continuing his local news operations").

[222] Smith Geiger, *Newsroom Budgets in Midsize (51-100) and Small Markets (101-210)* at 2 (Dec. 2002) ("*Newsroom Report*"), attached to NAB Comments in MB Docket No. 02-277 (filed Jan. 2, 2003).

local news business in favor of lower costs propositions," such as syndicated programming. *Id*. at 13.

Recent developments have only confirmed Smith Geiger's earlier analysis. The costs associated with local news operations have continued to grow. From 1997 to 2003, the average news costs of network affiliated stations in DMAs 51-176 increased 16%, 27.1%, 25.1%, 12.9% and 27.3%, respectively, in market groupings 51-75, 76-100, 101-125, 126-150, and 151-175. *TV Financial Report* at 5-9. And during this same 1997-2003 period of rising news costs, early-evening local news programs lost 16% of their share of the available audience.[223] In DMAs 51-210 specifically, ABC, CBS and NBC affiliates have seen the viewing shares for their late-night local news drop by over 24% from 1995 to 2005.[224]

As a result of rising costs and falling audience shares, news profitability (*i.e.*, news operations that operated at a profit) has reached an all-time low. The Radio-Television News Directors Association's most recent survey of news staffing and profitability showed that only 44.5% of all television news operations showed a profit, down from 62-63% as recently as the late 1990s.[225] Given these financial pressures, it is hardly surprising that news directors strongly believe that budget constraints adversely affect the quality of their stations' newscasts. According to the Radio-Television News Directors Foundation, 40.2% of news directors feel that

[223] Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Local TV/Audience* at 2-3 (2006) (also noting that audience losses for early evening news have continued in 2004 and 2005).

[224] Attachment H, BIA Financial Network, *Economic Viability of Local Television Stations in Duopolies* at 8-9 (Oct. 23, 2006) ("*Local TV Duopoly Study*").

[225] Bob Papper, *News, Staffing and Profitability Survey*, Communicator at 36 (Oct. 2005). The profitability of a station's news operation is extremely important for the overall viability of the station itself. RTNDA reports that, on average for all market sizes, 42.8% of television station revenues are produced by news, and that percentage is higher in smaller markets. For instance, in markets 101-150, 47.1% of station revenues were produced by news. *Id.*

budget constraints have a "severe" or "serious" impact on news quality, and another 39.5% believe that such constraints have a "moderate" impact.[226]

Given these trends on news costs and audiences, one can only expect that more and more television stations in smaller markets – especially lower-rated stations that are struggling to make *any* profits today – will "choose to forego their news" for the "cheaper, less financially risky, and often more profitable option of acquired programming." *Newsroom Report* at 15. At the very least, budget constraints, particularly in smaller markets, will lead to cut backs and reduced quality of local news. *See* RTNDF, *Local Television News Study* at 39. It also seems highly unlikely that any station in these smaller markets, which currently does not offer local news, would commence a news operation, due to the considerable start-up costs associated with news operations and the financial challenges currently facing smaller market broadcasters generally.[227]

Thus, the need to reform the television duopoly rule to allow duopolies in all markets is clear. Smaller market television broadcasters (especially those who are not the ratings leader in their markets) are experiencing serious financial distress, which is not expected to improve in the future. These financial problems are sufficiently severe to threaten the long-term viability of lower-rated stations, and will, at the least, threaten the continued viability of the local news operations of many smaller market stations, even those not among the lowest-rated. Permitting common ownership of two stations in medium and small markets will provide greatly needed

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[226] RTNDF, *2003 Local Television News Study of News Directors and the American Public* at 39 (2003).

[227] *See Newsroom Report* at 15. *Accord* Testimony of Royce Yudkoff, Managing Partner of Abry Partners, Inc., Transcript of FCC En Banc Hearing on Local Broadcast Ownership at 93 (Feb. 12, 1999) (in small markets, television station owners cannot afford to make the capital investments necessary "before turning the lights on" a local news operation, due to the high costs of "get[ting] the news on the air").

financial relief to stations in these markets, and will ensure these stations can maintain effective local operations, including news.

3. Allowing Duopolies More Freely Will Preserve and Even Enhance Television Broadcasters' Ability to Serve Diverse Audiences and Local Communities in Markets of All Sizes

The current duopoly rule, with its eight-voice test, prevents the formation of even a single duopoly in many DMAs, and offers no means to ameliorate the deteriorating financial condition of television broadcasters in the majority of markets. To preserve the economic viability of television stations and their local operations, especially those in smaller markets, the Commission must reform this arbitrary and capricious duopoly standard. *See Sinclair*, 284 F.3d at 169. But beyond preserving local free over-the-air broadcast stations in markets where they are imminently threatened, allowing broadcasters to form more efficient ownership structures will enhance local stations' ability to serve their viewers and communities in markets of all sizes.

The Commission previously recognized that common ownership of television stations can result in "consumer welfare enhancing efficiencies." *2002 Biennial Review Order* at ¶ 147. Empirical evidence has demonstrated that stations that are part of a commonly-owned local station group or same-market LMA are "significantly more likely to carry local news than other stations, even controlling for other factors." *Id.* at ¶ 159. Another study examining duopolies and LMAs found that stations in these ownership arrangements significantly increased both their audience share and advertising revenues after entering into the duopoly/LMA and that they outperformed similarly situated stand-alone stations in comparably-sized markets. *Id*. at ¶ 150 & nt. 295. This increase in audience share is particularly significant, as it shows that the duopoly or LMA allowed the stations to improve their programming services to the public, thereby attracting more viewers. Moreover, the benefits to viewers documented in this study occurred in a range of markets, including a number of top-50 markets, such as Hartford, Grand Rapids, and Norfolk.[228]

The record already before the Commission also includes "persuasive anecdotal evidence" that "same-market combinations have resulted in efficiencies that produce public interest benefits" in markets of all sizes, including large markets such as Seattle and Cleveland. *2002 Biennial Review Order* at ¶¶ 160-161. These benefits have included the commencement of local news operations at stations formerly without any locally produced news; the improvement of existing newscasts; the expansion of public affairs programming; the airing of local college and high school sports programming and other local programming; the airing of additional programming focusing on minority communities and younger viewers; and the upgrading of stations' plant, equipment and newsgathering capabilities, such as investing in satellite news vans and Doppler weather radar.[229] In sum, the Commission correctly concluded in its previous biennial review that the eight voice duopoly rule "pose[d] a potential threat to local programming," and that modification of the rule would enable local television stations "to acquire content desired by their local audiences" and would "enhance program diversity." *Id.* at ¶¶ 156, 182. The Commission specifically found that reforming the current rule would "allow broadcasters to invest in new local news and public affairs programming, or at least to maintain existing local programming." *Id.* at ¶ 169.

More recent information has only confirmed that permitting duopolies will enhance local stations' abilities to serve their audiences with valuable and diverse programming. BIA

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[228] See BIA Financial Network, *Television Local Marketing Agreements and Local Duopolies: Do They Generate New Competition and Diversity?*, Attachment A to Comments of Coalition Broadcasters in MB Docket No. 02-277 (filed Jan. 2, 2003).

[229] *See 2002 Biennial Review Order* at ¶¶160-161; Reply Comments of NAB in MB Docket No. 02-277 at 50-52 (filed Feb. 3, 2003).

Financial Network examined duopolies in markets 51+, and found that the lower-rated station in these combinations demonstrably improved their performance after being acquired. Specifically, these stations experienced an 11.0% increase in audience share and a 15.4% increase in revenue share following their acquisition. Attachment H, *Local TV Duopoly Study* at i, 6. Joining with another in-market station enabled these stations to offer programming more attractive to viewers, to improve their financial position, and to offer more effective competition to other video outlets in their local markets. Moreover, the formation of duopolies in markets 51+ has enabled stations to add or expand local news programming specifically. *See id*. at 9.

The efficiencies permitted by duopolies clearly encourage the provision of news and the local production of other programming in all-sized markets, including large ones. For example, since Meredith Corporation acquired a duopoly in Kansas City, MO about a year ago, local news has been added to its second station KSMO-TV, which previously did not offer news. As part of a duopoly, KSMO has also added two weekly public affairs programs, increased the number of PSAs aired, enhanced its coverage of local weather emergencies, and increased local sports coverage.[230] Belo's duopoly in Seattle allows more programming "freedom" and "local productions" on both stations, including local talent shows, gardening shows, and a long-running evening magazine show.[231] Similarly, non-news local programming has grown on the two CBS-owned stations in San Francisco, and now includes an outdoor/travel show and a consumer awareness show. Daniels, *Local Production Enjoying a Renaissance* at 23.

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[230] The formation of several duopolies has also enhanced competition in the Kansas City market. *See* Allison Romano, *Where Duopolies Abound; Consolidation Makes for Intense Competition*, Broadcasting and Cable at 15 (Nov. 14, 2005) (describing the competition between several local duopolies and their local news programs as a "slugfest" in "[e]very time slot," where "anyone can win").

[231] Charley Daniels, *Local Production Enjoying a Renaissance Among Stations*, Television Week at 22-23 (July 25, 2005).

Moreover, a further analysis of the Commission's own data about station ownership and the provision of local news and public affairs programming reveals the direct link between the financial viability of stations and their provision of such programming.[232] This study confirmed the FCC's earlier findings that network affiliated television stations commonly owned with newspapers provide more local news programming than other network affiliated stations.[233] However, when examining other factors affecting the provision of local news programming, such as market size, this paper found that "stations in larger markets tend to provide more local news programming than stations in smaller markets," likely due to the "greater revenue potential for stations in larger markets." *Napoli Paper*, Conclusion Section. When focusing exclusively on local public affairs programming, "only station revenue emerge[d] as an important explanatory factor." *Id*. Simply put, "stations in better financial standing are more inclined to incur the expense of providing local public affairs programming." *Id*.

This recent paper reconfirms earlier studies establishing the connection between station revenue and the provision of non-entertainment and local programming. Earlier surveys of the research on media performance and ownership similarly concluded that factors such as market size, audience size and station revenues were more significant than "ownership effects" in affecting station performance.[234] Thus, if the Commission wishes to promote the provision of

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[232] *See* Philip Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data*, Paper Presented at the Annual Meeting of the International Communication Association (May 2003) ("*Napoli Paper*").

[233] *See* FCC, Thomas C. Spavins, Loretta Denison, Scott Roberts and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs* (2002).

[234] Walter S. Baer, Henry Geller, Joseph A. Grundfest, Karen B. Possner, *Concentration of Mass Media Ownership: Assessing the State of Current Knowledge* at 121, 127 (Sept. 1974) (citing previous study showing that the amount of non-entertainment and local programming aired by television stations depended on station revenues).

public affairs and news programming, it should permit local television broadcasters, especially struggling ones, to improve their financial position by forming more competitively viable ownership structures. The available empirical evidence clearly shows that allowing duopolies will preserve and even enhance local stations' abilities to serve their viewers and communities in markets of all sizes.

4. The Current Restrictive Duopoly Rule Is Unwarranted Because It Fails to Account for MVPD Competition and Prevents Local Stations from Forming Viable Ownership Structures More Attractive to Advertisers

NAB urges the Commission to reconsider the current duopoly rule, including the top-four restriction, because under Section 202(h) it is "not necessary in the public interest as the result of competition." Such a restrictive rule can only be justified if one ignores, or at least substantially underplays, the role of MVPDs in local television markets as increasingly dominant competitors for viewers and advertising revenues. The restriction further prevents local broadcasters, including clearly financially struggling stations, from forming viable ownership structures that would enable them to better attract advertisers and compete effectively in today's digital, multichannel marketplace.[235] Due to the judicial elimination of the cable/broadcast cross-ownership rule, a cable system operator with a dominant position in the local MVPD market can acquire a top-four rated local television broadcast station. In contrast, the owner of a single television station faces serious restrictions in acquiring control of a license for a second broadcast channel. The top-four restriction prevents the formation of duopolies in markets with fewer than five television stations, and severely restricts the formation of duopolies in markets

[235] *See* Haddock and Polsby, *Bright Lines* at 332 (calling on FCC to allow broadcast television duopolies to "intensify the pressure on cable systems from over-the-air competition").

with only five or six stations.[236] Even in the largest markets with a dozen or more television stations, the top-four restriction places limits on local broadcasters that are not placed on dominant MVPDs that compete with broadcasters for viewers and advertisers. This situation unfairly and inequitably constrains broadcasters from competing in today's multichannel media marketplace.

The various justifications previously cited by the Commission for the top-four restriction do not withstand scrutiny on a variety of bases. There is not, for example, a natural "break point" between the audience shares of the top four-ranked stations and the audience shares of other stations in most markets. *See 2002 Biennial Review Order* at ¶ 195. For instance, in mid-sized and small markets, one or two stations often have a significant ratings lead, and a very substantial audience share drop-off occurs after the first- or second-ranked station.[237] In fact, the audience share disparity between the first- or second-ranked stations and all other stations in most smaller markets is so great that, if the third- and fourth-ranked stations were allowed to combine, these stations' combined viewing shares would still be *less* than or equal to the

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[236] And, of course, it is precisely these smaller markets where many local broadcasters are financially struggling. *See supra* Section IV.B.1.

[237] *See* Attachment K, NAB, *Duopoly Analysis Report* (total day viewing share data for commercial stations in all DMAs, averaged over four ratings periods). An examination of DMAs 51-175 shows that, in the considerable majority of these markets, one or two stations are clear leaders in terms of audience share. *See* DMAs 51, 54, 56, 58, 59, 61, 63, 64, 65, 66, 68, 70, 73, 74, 77, 80, 81, 83, 84, 87, 88, 90, 91, 92, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 107, 108, 109, 110, 111, 113, 114, 115, 116, 117, 119, 120, 121, 122, 124, 125, 127, 128, 129, 131, 132, 134, 135, 136, 139, 140, 143, 145, 146, 147, 148, 149, 150, 151, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, and 175. And even in markets where audience shares are more evenly distributed among multiple stations, there are generally only three (not four) truly competitive stations, and there is a significant drop-off in ratings between the third- and fourth-ranked stations. *See* DMAs 52, 55, 57, 60, 67, 71, 75, 76, 78, 79, 82, 85, 86, 89, 93, 94, 105, 112, 118, 123, 126, 130, 133, 137, 138, 141, 142, 144, 152 and 163. (Markets 176-210 more often have only one, two or three stations, so these comparisons cannot be reliably made in the smallest markets).

audience share of the top-ranked station in about 80% of these markets.[238] Allowing such combinations between two low-rated stations (even if among the top-four in a market) would clearly enhance competition by creating a more viable competitor to the leading broadcast station and to other video programming outlets.

But beyond these smaller markets, even a number of markets in the top 50 do not demonstrate this supposedly natural break point after the fourth-ranked station.[239] In fact, in many of the largest markets, there is greater audience share "separation" between the top-ranked and second-ranked stations than between the fourth- and fifth-ranked stations.[240] An earlier Bear Stearns analysis of the top 150 markets found that the fourth-ranked television stations captured 34% less audience and 26% less revenue than did the third-ranked stations, and concluded that the top-four prohibition on forming duopolies should, at a minimum, be reformed to a top-three restriction.[241]

In addition, the Commission's assertion that the top-four stations can better afford the transition to digital television is certainly not representative of many markets. *See 2002 Biennial Review Order* at ¶ 199. As discussed above, even the *highest*-rated network affiliated stations in many medium and small markets experienced flat or declining profits from 1997-2003, and the

[238] In DMAs 51-175, there are 103 markets with at least four commercial stations. In 82 of these 103 markets, the combined audience share of the third- and fourth-ranked stations would be less than or equal to the audience share of the top-rated station. *See* Attachment K.

[239] Some of these large markets have one or two ratings leaders. *See* Attachment K, DMAs 3, 4, 9, 10, 11, 13, 17, 20, 21, 24, 25, 29, 30, 32, 37, 38, 40, 41, 43 and 48. Other top-50 markets show a more substantial drop-off in audience share after the third-ranked station, rather than the fourth. *See id.*, DMAs 5, 12, 18, 19, 22, 26, 28, 39, 42, 44, 45, 46, 47, and 49.

[240] *See* Attachment K, DMAs 1, 2, 3, 4, 9, 10, 13, 14, 17, 18, 19, 20, 21, 25, 27, 29, 37, 38, 40, 41, 43, and 44.

[241] Bear Stearns & Co., Inc., *Duopoly Relief Needed—4th Ranked Stations Significantly Trail 3rd-Ranked Stations* at 1-2 (May 29, 2003).

lower-rated major network affiliates are facing considerably more serious financial difficulties. *See TV Financial Report* at 8-9 (low-rated network affiliates in markets 126-150 and 151-175 suffered actual losses in 2001 and 2003).[242] Moreover, the evidence previously relied upon by the Commission to support its claim that the top-four ranked stations can easily afford the transition to digital broadcasting related only to the affiliates of ABC, CBS, Fox and NBC in the 25 largest DMAs. *See 2002 Biennial Review Order* at ¶ 199 and note 417. Thus, the top-four restriction on forming duopolies cannot be justified on grounds that the top-four ranked stations in the majority of markets are economically sound and can easily afford converting to digital.

It is also untrue that "top four-ranked stations already provide local news programming," so that a combination among top-four stations would be unlikely to result in new or enhanced local news offerings. *2002 Biennial Review Order* at ¶ 198. While the top-four ranked stations in large markets may generally offer local news programming, many smaller markets are not currently served by four separate local news operations. In fact, the 160 markets from 51-210 have, on average, only 2.49 newscasts per market. Thus, there are many markets below the top 50 that have only one, two or three newscasts.[243]

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[242] *See also Local Television Market Revenue Statistics* at 2-3 (demonstrating that medium and small market stations compete for disproportionately smaller revenues than stations in large markets).

[243] *Small-Market Angst*, Broadcasting and Cable at 35 (July 14, 2003). *See also* Nexstar Broadcasting Group, Petition for Reconsideration in MB Docket No. 02-277 at 9-10 (filed Sept. 4, 2003) (in markets below the top 50, 69 of the fourth-ranked stations do not produce their own news; in markets below the top 90, 44 of the third-ranked stations do not produce their own local news; and in DMAs 157 and below, 15 of the second-ranked stations do not produce local news); LIN Television Corp. and Raycom Media, Petition for Reconsideration in MB Docket No. 02-277 at 9-10 (filed Sept. 4, 2003) (even according to the study relied upon by the FCC in its biennial review, in only two of every five DMAs between markets 101-150 do all four of the top-ranked stations carry local news, and only *eight* markets between 151-210 are served by four local news operations).

NAB has further shown that, due to the growing expense of starting a new local news operation, the small and medium market stations currently without local newscasts are highly unlikely to initiate them, unless they are allowed to combine with stations that already have local news operations. *See Newsroom Report* at 2, 13-15; *TV Financial Report* at 5-9; *Local TV Duopoly Study* at 7-9. Given the increasing costs of merely maintaining local news operations, and the declining audiences and revenues earned by local news programming, it is far more likely that local stations in many markets, including larger ones, will cut back or eliminate existing news programming. *See supra* Section IV.B.2; Papper, *News, Staffing and Profitability Survey* at 36. Clearly, allowing more duopolies would not constrict the production of local news programming but would encourage increases in local news service. *See Local TV Duopoly Study* at 7-9. For all these reasons, the Commission should reconsider its top-four duopoly restriction.

Moreover, as discussed above, the failure to consider adequately the competitive effects of MVPDs in evaluating the television duopoly rule is arbitrary and capricious.[244] A new study by BIA clearly demonstrates how increases in cable and satellite viewing have affected the competitive position of local television stations. As of 2005, on average nationally only 44.0% of total television viewing was attributable to in-market broadcast television stations. This figure represents a 20% decrease in the total viewing shares earned by local in-market television stations just since 1997. *BIA Out-of-Market Voices Study* at 10-11. And in DMAs 101+, only 38.4% of total viewing was attributable to local broadcast stations. *Id*. at 11. In other words, 61.6% of the total viewing in these smaller markets went to the MVPD and out-of-market broadcast competitors of the local television stations – competitors completely ignored in the

[244] *See 2002 Biennial Review Order* at ¶ 196 and note 409 (in retaining top-four duopoly restriction, the FCC relied on a survey of broadcast station audience shares in ten markets that disregarded all viewing of out-of-market television stations, all noncommercial stations, and, most significantly, all cable channels/networks).

viewing share study relied upon by the Commission in its last ownership review. *See Biennial Review Order* at ¶ 196 and note 409. But even in the 25 largest markets, only about 52% of the total television viewing in 2005 was attributable to in-market broadcast television stations. The ten largest markets have in fact seen the percentage of in-market viewing decrease by nearly one third from 1997-2005. *BIA Out-of-Market Voices Study* at 11-12.

Beyond competing with local television stations for viewers, cable outlets are also increasingly strong competitors for advertising dollars in the local video advertising market. *See supra* Section III.B. Local cable operators' advertising revenue has grown more rapidly in recent years than local broadcast television stations' ad revenue, and cable's share of local television ad revenue nearly doubled from 1999-2004. *See Local Television Market Revenue Statistics* at 4-6. In sum, the Commission can no longer continue to support an overly restrictive top-four duopoly standard by underplaying MVPDs' competitive position in local viewing and advertising markets, and overestimating the level of viewership concentration in local video markets by focusing on broadcast television viewing separate and apart from the viewing of broadcasters' competitors.

The Commission previously drew a bright-line "distinction between television broadcast stations and non-broadcast DVP [delivered video programming] *outlets*" to justify formulating a duopoly rule solely focusing on the ownership of local broadcast stations. *2002 Biennial Review Order* at ¶ 191 (emphasis added). The Commission attempted to explain this distinction by pointing out that "cable *networks*" are almost exclusively national in orientation. *Id*. (emphasis added). But this explanation seems unconvincing in light of cable's unquestioned position as television broadcasters' leading competitor for viewers and advertising revenues in local television markets.

Moreover, the Commission's justification on its face confuses cable "networks" and cable "outlets." While many (but certainly not all) cable/satellite programming networks are offered nationally, cable outlets are franchised locally and compete with local television broadcasters for viewers and local advertising dollars. Contrary to the FCC's previous assumptions about cable networks, cable outlets do have "incentives to react" to competitive changes in local markets in order to maintain their subscriber levels and attract local advertisers. *Id*.[245] In any event, it is not true that "any possible competitive harms are more likely to arise from changes in the behavior of [television broadcast] stations" than of cable outlets. *2002 Biennial Review Order* at ¶ 191. After all, in approving Comcast's and Time Warner's acquisition of Adelphia's cable systems, the Commission felt obliged to impose conditions on these cable operators to "address[] the potential for anti-competitive behavior" for the "benefit of consumers."[246] And clearly, many believe that cable's dominant position in local television markets has lead to competitive and consumer harms in the form of ever-increasing cable

[245] For example, local cable operators competing against other video programming distributors have incentives to offer the programming, including local and regional sports or news channels, most appealing to their viewers in each market. *See, e.g.*, Thomas Maier, *Verizon's Good News May Be Bad for Cable*, Newsday.com (Aug. 21, 2006) (Chairman of Cablevision said its Long Island local cable news channel has been "key to fending off competition" from other video services). Cable outlets generally have reacted to competition from DBS (now more competitive to cable with local-into-local broadcast service) by adding more programming networks to their channel line-ups. *See Twelfth Annual Report* at ¶ 41. Cable outlets have also clearly reacted to the emergence of other competitors, such as the telephone companies, in local video markets by dropping their subscription rates. In three communities where Verizon has started selling its television services, including Keller, Texas, local cable operators "drop[ed] their rates to match or undercut Verizon's prices." Dennis Camire, *Cities Push for Cable TV Competitors*, floridatoday.com (March 4, 2006). In fact, it is well established that cable outlets substantially lower their rates in response to local competition from a wireline provider or overbuilder in local markets. *See Twelfth Annual Report* at ¶ 41 (citing two General Accounting Office reports).

[246] Statement of Chairman Kevin J. Martin, *Memorandum Opinion and Order* in MB Docket No. 05-192, FCC 06-105 (rel. July 21, 2006). *See* FCC, *Adelphia/Comcast/Time Warner License Transfer Review Conditioned Approval Fact Sheet* (July 13, 2006) (describing conditions involving programming to be imposed on Comcast and Time Warner for six years).

rates.[247] For all these reasons, the Commission cannot justify on competitive grounds a duopoly rule still unduly "focused on ownership of television broadcast stations" merely because cable *networks* tend to be national in orientation. *2002 Biennial Review Order* at ¶ 191.

Indeed, this approach focusing solely on the ownership of television broadcast stations not only ignores marketplace realities, it also appears in tension with the opinion of the D.C. Circuit Court of Appeals in *Sinclair*. *See Notice* at ¶ 18 (urging commenters to discuss consistency of duopoly proposals with the *Sinclair* decision). In that case, the Court found the FCC had acted arbitrarily and capriciously by disregarding "non-broadcast media," including cable systems, in its duopoly standard. *Sinclair*, 284 F.3d at 165. Although the Commission did address *Sinclair* in its *diversity* analysis of the duopoly rule (*see 2002 Biennial Review Order* at ¶ 170), the Commission, as shown above, did not adequately consider the implications of *Sinclair* in its *competition* analysis. In this proceeding, the Commission must fully consider the role of other video outlets, including MVPDs and Internet-based, in analyzing the competitive need for retention of the duopoly rule.[248]

As the Commission has recognized, broadcast stations must remain financially viable "to function in the 'public interest, convenience and necessity.'" *1992 Radio Ownership Order*, 7 FCC Rcd at 2760. The current duopoly rule "prevent[s] valuable efficiencies from being realized," and relaxing the rule will not only enable local television stations "to improve their competitive standing" in today's multichannel marketplace, the resulting efficiencies "may also

[247] *See, e.g.*, Camire, *Cities Push for Cable TV Competitors* ("cable rates increased an average of 86 percent during the decade that ended in 2004"); Testimony of Gene Kimmelman, Vice President, Federal and International Affairs, Consumers Union, U.S. Senate Committee on Commerce, Science and Transportation, Hearing regarding Video Franchising (Jan. 31, 2006) (cable rates have increased 64%, or two and a half times the rate of inflation, since 1996).

[248] *See Sinclair*, 284 F.3d at 164 (faulting the Commission for failing to explain why the "diversity *and competition*" offered by other media voices in the context of the radio/television cross-ownership rule "should not also be reflected in" the local television rule) (emphasis added).

play a significant part in improving the diversity of programming available to the public." *Id.* at 2760-61. If the Commission wishes to ensure consumers' access to local broadcast television – a goal the NAB strongly supports – then the Commission must reform the duopoly rule to permit local stations to remain competitively viable and capable of providing free, over-the-air service and locally-oriented programming to communities throughout the nation.

C. Permitting the Cross-Ownership of Radio Stations, Television Stations and Newspapers Is Consistent with the Public Interest

1. No Competition, Diversity or Localism Rationales Support Retention of the Newspaper/Broadcast Cross-Ownership Ban

Adopted in 1975 in a media marketplace with only a small number of analog broadcasters, the newspaper/broadcast cross-ownership rule prohibits the common ownership of a radio or television station and a daily newspaper in the same local market. The Commission undertook a thorough review of that ban in 2001 and again as part of its 2002 biennial review. In the *2002 Biennial Review Order,* the Commission concluded that (1) the rule cannot be sustained on competitive grounds; (2) the rule is not necessary to promote localism and may in fact harm localism; and (3) most media markets are diverse, obviating a need for a blanket ban on newspaper/broadcast combinations. *Id*. at ¶ 330. Accordingly, the Commission repealed the 1975 ban, replacing it with new cross-media limits.[249]

[249] Under these new limits, in DMAs with three or fewer television stations, no newspaper/broadcast or radio/television cross-ownership would be permitted. In DMAs with between four and eight television stations, a single entity could own one of the following types of combinations: (i) one daily newspaper, one television station and up to 50% of the radio stations permitted to be commonly owned under the applicable local radio limits; (ii) one newspaper and radio stations up to the applicable local radio limits; or (iii) television and radio stations up to the local limits for those services. In DMAs with nine or more television stations, any newspaper and broadcast cross-media combinations that comply with the local television and radio rules would be allowed. *See Notice* at ¶ 27.

The Third Circuit upheld the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership no longer served the public interest. *Prometheus*, 373 F.3d at 398. The Court concluded that "newspaper/broadcast combinations can promote localism," and agreed with the Commission that a "blanket prohibition on newspaper/broadcast combinations is not necessary to protect diversity." *Id*. at 398-99. In reaching this determination, the Court noted the "conflicting evidence in the record on whether ownership influences viewpoint," and agreed that "cable and the Internet contribute to viewpoint diversity." *Id*. at 399-400. And while the Court further upheld the Commission's decision to retain some cross-ownership limits to ensure diversity, the Court concluded that the Commission failed to provide reasoned analysis to support the specific cross-media limits that it chose. *Id*. at 401-402. As a result, the complete prohibition on newspaper/broadcast cross-ownership remains in force.

In light of the ever-increasing levels of competition and diversity in the 21st century media marketplace, NAB believes that the newspaper/broadcast cross-ownership rule – which NAB opposed as unnecessary even in the less competitive and diverse media market of the 1970s – should not be retained today. As NAB demonstrated in earlier comments,[250] the Commission's absolute prohibition on common ownership of newspapers and broadcast facilities in the same market has never been adequately justified. Despite several attempts commencing in the 1940s to identify actual abuses or concrete problems presented by newspaper ownership of broadcast outlets,[251] there had never been evidence of tangible harms arising from

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[250] *See* Comments of NAB in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001); Reply Comments of NAB in MM Docket Nos. 01-235 and 96-197 (filed Feb. 15, 2002).

[251] *See, e.g.*, Daniel W. Toohey, *Newspaper Ownership of Broadcast Facilities*, 20 Fed. Comm. B.J. 44 (1966) (describing FCC's major investigation in the 1940s of newspaper ownership of AM and FM stations).

newspaper/broadcast cross-ownership. Even in the order adopting the newspaper/broadcast cross-ownership rule, the Commission found no evidence of "specific non-competitive acts" by newspaper-owned stations and no evidence of an effect on advertising rates charged by television stations as a result of newspaper ownership.[252] The Commission also found no evidence that newspaper-owned stations had failed to serve the public interest or had performed less well than other stations. *Newspaper R&O*, 50 FCC 2d at 1073, 1075, 1078. To the contrary, the FCC's own study concluded that newspaper-owned television stations showed a "statistically significant superiority" over other television stations "in a number of program particulars." *Id*. at 1078 n. 26.[253] Faced with this lack of an evidentiary basis to justify a strict cross-ownership ban, the Commission, in adopting the rule in 1975, was forced to speculate about the entirely "*theoretical* increase in . . . diversity which *might* follow" from the rule's application. *Id*. at 1078, 1083 (also referring to the "*mere hoped for* gain in diversity" stemming from operation of the rule) (emphasis added).

Given the speculative and unsubstantiated nature of both the record and the FCC's diversity rationale for adopting the cross-ownership prohibition in 1975, NAB urges the Commission to reaffirm its repeal of the newspaper/broadcast ban. That decision was more than justified, given the numerous studies previously submitted to the Commission showing no competitive rationale for retaining the prohibition.[254] As demonstrated above, in today's highly

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[252] *Second Report and Order* in Docket No. 18110, 50 FCC 2d 1046, 1072-73 (1975) ("*Newspaper R&O*").

[253] Specifically, the Commission found that co-located newspaper-owned television stations programmed 6% more local news, 9% more local non-entertainment programming, and 12% more total local programming including entertainment than did other television stations. *Newspaper R&O*, 50 FCC 2d at 1094, Appendix C.

[254] *See, e.g.*, Kent Mikkelsen, Economists Incorporated, *Horizontal and Vertical Structural Issues and the Newspaper-Broadcast Cross-Ownership Ban* (Dec. 2001), attached as Appendix IV to

competitive and diverse media marketplace (*see supra* Sections II & III), with the vast array of viewing and listening options open to consumers,[255] including virtually unlimited access to content via a range of Internet-related technologies, there is no basis for retaining this ban. Recent studies have only reconfirmed earlier Commission studies showing that consumers are increasingly substituting between the Internet, broadcast stations, newspapers and other media as sources for news, information and entertainment.[256]

Not only do consumers today clearly rely less on daily newspapers and television stations for news and information than in 1975 (or in 2002), available studies indicate that

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Comments of Newspaper Association of America in MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001) (showing that the level of concentration of newspaper and broadcast advertising revenues had *decreased* about 40% from 1975 levels); Economists Incorporated, *Structural and Behavioral Analysis of the Newspaper-Broadcast Cross-Ownership Rules*, attached as Appendix B to Comments of Newspaper Association of America in MM Docket No. 98-35 (filed July 21, 1998) (study of over 1400 daily newspapers provided no indication that cross-owned newspapers charged higher advertising prices than other newspapers); Economists Incorporated, *Behavioral Analysis of Newspaper-Broadcast Cross-Ownership Rules in Medium and Small Markets* at 10-11 (Jan. 2002), attached to Reply Comments of Media General, Inc. in MM Docket Nos. 01-235 and 96-197 (filed Feb. 15, 2002) (concluding that cross-ownership of newspapers and broadcast stations had "no significant" effects on the price of advertising by the cross-owned newspapers "across markets of all sizes," and also finding that "cross-ownership has no effect on advertising" in smaller markets specifically); *Ex Parte* of Media General, Inc. in MM Docket Nos. 01-235 and 96-197 (filed May 31, 2002) (attaching memorandum summarizing existing empirical literature on the economic effects of cross-media ownership, which almost uniformly concludes "that cross-ownership has no effect on advertising prices or actually reduces them").

[255] The *FCC Media Outlet Study*, the *Hearst-Argyle Media Voices Survey*, the *BIA Media Outlets Survey*, and the *BIA Out-of-Market Voices Study* clearly demonstrate the wide array of broadcast and nonbroadcast outlets now available to consumers in local markets of all sizes. *See supra* Section II.A.

[256] *See* Dimmick, *et al*., *Competition Between the Internet and Traditional News Media* at 31 (finding that the Internet has had a "significant displacement effect" on "broadcast television" for daily news and has "displaced some newspaper usage" as well). *See also supra* Section III.C.4. (discussing Waldfogel, *Consumer Substitution Among Media*, the *Nielsen Consumer Survey*, the *2005 Digital Future Report* and other studies showing the growth of cable, Internet and other new media as substitutes for broadcast stations and newspapers in the provision of entertainment and information).

commonly owned media outlets are capable of providing diverse viewpoints on issues of public concern, including political and campaign issues. *See* Hicks and Featherston, *Duplication of Newspaper Content* at 551-53 (study found that jointly owned newspapers in the same local markets provided diverse and nonduplicated content and opinion). More recent studies of jointly owned newspapers and broadcast stations have specifically found that such common ownership did "not result in a predictable pattern of news coverage and commentary on important political events between the commonly-owned outlets." Pritchard, *Viewpoint Diversity Study,* Discussion Section. An empirical study examining content diversity in 207 markets during a period of newspaper mergers in the 1990s found that ownership "concentration appear[ed] to increase total content variety," thereby providing "evidence that newspaper consolidation can benefit readers."[257] As a result, this study concluded that "government intervention to increase the number" of "media owners within markets may be unnecessary." George, *What's Fit to Print* at 33. *See also* Section III.C.3.

In light of these studies and the proliferation of media outlets and products, the speculative diversity rationale previously cited by the Commission to warrant the cross-ownership rule can no longer be regarded as sufficient justification for retention of the ban.[258] This is especially true given the ban's inequitable application to only *broadcast* stations and

[257] George, *What's Fit to Print,* at 2-3, 28 (finding that a decrease in the number of owners in a market lead to "an increase in separation between" newspaper products and to an increase in the "number of topical reporting beats covered per market").

[258] *See 2002 Biennial Review Order* at ¶ 330; *Prometheus,* 373 F.3d at 399-400 (Court upheld FCC's determination that most media markets were diverse, obviating need for blanket ban on newspaper cross-ownership).

daily newspapers. Simply put, in the 21st century media market, the newspaper/broadcast ban is a "glacial remnant[] of a regulatory ice age."[259]

Moreover, as NAB and many other commenters explained in previous comments, newspaper/broadcast combinations would allow both newspapers and broadcasters – which are facing unprecedented competition in a digital, multimedia environment – to maintain their financial viability and to strengthen their operations, especially in smaller markets.[260] Even in the less competitive marketplace of the late 1990s, a study conducted for NAB concluded that allowing newspapers and broadcast stations to combine "would have a positive economic impact upon these businesses" by increasing "operating cash flow" between "9% and 22%" and "could have a significant impact on efficiency of operations in smaller markets, especially for marginally performing newspaper and television stations."[261] This study found that efficiency gains from joint ownership of newspaper and broadcast operation would be most significant in proportional terms to small market radio and television stations, "where even small cost savings can create a sharp increase in operating profits." *Bond & Pecaro Study* at 5.[262]

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[259] Testimony of Jeffrey A. Marcus, President and Chief Executive Officer, Chancellor Media Corporation, Transcript of FCC En Banc Hearing on Local Broadcast Ownership at 66 (Feb. 12, 1999).

[260] *See, e.g.*, Comments of West Virginia Media Holdings in MB Docket No.02-277 at 11-15 (filed Jan. 2, 2003); Bonneville International Corp. in MB Docket No. 02-277 at 8 (filed Jan. 2, 2003); Block Communications, Inc. in MB Docket No. 02-277 at 1-2 (filed Jan. 2, 2003) (all stressing need for regulatory relief to enable small market outlets both to compete and to sustain strong local news coverage).

[261] Bond & Pecaro, *A Study to Determine Certain Economic Implications of Broadcasting/Newspaper Cross-Ownership*, attached as Appendix B to NAB Comments in MM Docket No. 98-35 at 5, 26 (filed July 21, 1998).

[262] *Accord* Lorna Veraldi, *Carpooling on the Information Superhighway: The Case for Newspaper-Television Cross-Ownership*, 8 St. Thomas L. Rev. 349, 365-66, 369-70 (1996) (cost savings from allowing newspaper/broadcast combinations "could mean the difference between extinction and survival for some newspapers and television stations," and should "encourage

As set forth in detail in Section IV.B., television broadcasters in smaller markets (particularly those who are not the ratings leader in their markets) are currently facing unprecedented financial challenges. *See TV Financial Report* at 5-9. Some small and medium market television broadcasters have consequently already experienced difficulties in maintaining their local news operations, and many more are likely to struggle to retain these increasingly costly operations in the future, especially as they lose network compensation payments and bear the costs of completing the digital transition.[263]

Daily newspapers are facing similar competitive challenges in today's digital, multichannel marketplace. Newspapers are suffering from declining circulation, increasing printing and production costs, and advertising revenues that are stagnant at best, in large part due to the movement of advertising business (including classified ads) to other media, especially online competitors. *See supra* Section III.B. & III.C.4.[264] As a result of these pressures, a

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better local service by rewarding production of local news with increased revenue from multiple uses of the same production resources").

[263] *See TV Financial Report* at 5-9 (showing both very significant declines in network compensation payments and increases in stations' news expenses). *See also* RTNDF, *2003 Local Television News Study of News Directors and the American Public* at 39 (nearly 80% of news directors characterized the budget constraints on the quality of their newscasts as "severe," "serious," or at least "moderate"); Bob Papper, *News, Staffing and Profitability Survey*, Communicator (Oct. 2005) (RTNDA survey showed fewer television news operations were able to operate profitably); Media General *Ex Parte* in MB Docket Nos. 06-121 and 02-277 (July 26, 2006) (attaching a lengthy list of press accounts of curtailments in local television markets since 1998).

[264] *See also* Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism, Newspaper/Economics* at 2 (2006) (noting soft advertising growth due to "movement of ad business to online"); Joseph Epstein, *Are Newspaper Doomed?,* Commentary at 1 (Jan. 2006) (noting dropping circulation and "ferocious competition for classified ads from free online bulletin boards like craigslist.org"); Julia Angwin and Joseph Hallinan, *Newspaper Circulation Continues Decline, Forcing Tough Decisions*, Wall Street Journal at A1 (May 2, 2005) (describing declines in circulation and lack of growth in advertising revenue); Eric Deggans, *Information Age Finds Newspapers Unready*, St. Petersburg Times (Oct. 30, 2005) ("newspapers have a tough time satisfying readers who live in an on-demand

number of newspapers have cut substantial numbers of jobs, including newsroom staff.[265] One recent analysis went so far as to call newspapers "an endangered species," and predicted that "[o]ver the next few decades half the rich world's general papers may fold."[266] The repeal of the newspaper/broadcast cross-ownership rule would therefore help maintain the financial viability of broadcast and newspaper operations (especially in smaller markets), forestall likely cut backs in local newspaper and television news operations, and even encourage the development of new broadcast news services. The elimination of the cross-ownership ban would thus clearly enhance both diversity and localism.

Indeed, the Commission has already recognized the public interest benefits of permitting newspaper/broadcast cross-ownership. Commission studies have previously demonstrated that network affiliated television broadcast stations that are co-owned with newspapers offer substantially greater amounts of local news and public affairs programming.[267] These stations

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media world," and their revenues are now rising slower than costs, especially for newsprint); Robert MacMillan, *Newspapers Weigh Choices in Struggling Market*, Reuters.com ((June 8, 2006) (young readers are getting news from Internet, and online media networks such as Google and Yahoo are "gunning for newspapers' lifeblood of local advertising").

[265] *See, e.g.*, Frank Ahrens, *N.Y. Times, Philadelphia Papers Plan Job Cuts*, Washington Post at D01 (Sept. 21, 2005) (documenting job reductions at numerous major newspapers); Project for Excellence in Journalism, *The State of the News Media: An Annual Report on American Journalism*, *Newspaper/News Investment* at 1-2 (2006) (detailing extensive cuts in newsroom staffing).

[266] *Who Killed the Newspaper?*, The Economist at 9 (Aug. 26, 2006).

[267] *See 2002 Biennial Review Order* at ¶ 343 (discussing Thomas Spavins, Loretta Denison, Scott Roberts and Jane Frenette, *The Measurement of Local Television News and Public Affairs Programs*). Other studies of newspaper-owned television stations have shown similar results. *See, e.g.*, Busterna, *Television Station Ownership Effects* at 65 ("television stations co-owned with a daily newspaper in the same local market broadcast 41 minutes more of local programming" in the composite week examined "than television stations that were not cross-owned"); John C. Busterna, *Ownership, CATV and Expenditures for Local Television News*, 57 Journalism Quarterly 287, 289 (1980) (rather than adversely affecting the quality of television

also "appear to provide higher quality [news] programming, on average, at least as measured by ratings and industry awards." *2002 Biennial Review Order* at ¶ 344. Moreover, given the "decline in newspaper readership and broadcast viewership/listenership," the common ownership of newspaper and broadcast outlets can lead to efficiencies positively impacting these outlets' abilities to provide news and coverage of local issues. *Id*. at ¶ 360. As Chairman Martin has specifically recognized, "allowing cross-ownership may help to forestall the erosion in local news coverage by enabling companies to reduce duplicative costs and amortize their news products across multiple platforms."[268] As a result, the Commission has appropriately recognized that elimination of the cross-ownership ban would promote both diversity and localism.[269] This conclusion was further amply supported by the submissions of numerous commenters in the 2002 biennial review proceeding. *See 2002 Biennial Review Order* at ¶¶ 348-50 (citing many examples illustrating how efficiencies resulting from cross-ownership translated into better local service, including news).

In addition to precluding the efficiencies and the economic and public interest benefits that would flow from the joint ownership of traditional newspaper and broadcast outlets (*see Bond & Pecaro Study* at 5, 26), the cross-ownership rule inhibits broadcast and newspaper

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news programming, the cross-ownership of television stations and daily newspapers seemed to result in higher expenditures for television news programming).

[268] Remarks of FCC Chairman Kevin J. Martin, Newspaper Association of America, 2006 Annual Convention (April 4, 2006). As many scholars have explained, local news is a public good. Once the costs of collecting the news have been incurred, economic success depends on disseminating that information to as many customers as possible, across as many platforms as possible. Thus, "the greater return on investment made possible by cross-ownership may enable media outlets to provide more diverse programming." Christopher Yoo, *Architectural Censorship and the FCC*, 78 S. Cal. L. Rev. 669, 700 (2005).

[269] *See 2002 Biennial Review Order* at ¶¶ 342, 358-59 (concluding that newspaper cross-ownership ban "actually works to inhibit" broadcasters' provision of local news and informational programming, thereby harming both localism and diversity).

entities from pooling resources and expertise to create new innovative media services, especially on-line services that have features of both the electronic and print media or services using the capabilities of digital television. *See 2002 Biennial Review Order* at ¶ 72 (the Commission should seek to promote innovation through its broadcast ownership rules). A major study found by the Commission to be "persuasive," *id*. at ¶ 346, confirmed that, due to the development of new media such as the Internet, "the benefits of cooperation between traditional newspaper and broadcast operations" have increased.[270] Thus, the costs of the cross-ownership ban have correspondingly increased. *Besen and O'Brien Economic Study* at 1, 7 ("consumers of information may experience higher prices, less attractive product offerings, or slower innovation than if owners of broadcast stations and newspapers were free to operate under common ownership").[271] Clearly, the combined expertise and resources of newspaper and broadcast operations are needed in today's competitive digital marketplace to ensure the full development of new, innovative media services.

In sum, NAB urges the Commission to "repeal" the newspaper/broadcast cross-ownership prohibition because it is "no longer in the public interest." Section 202(h), 1996 Act. Regardless of the Commission's unsupported speculations about "mere hoped for" gains in diversity resulting from the rule, *Newspaper R&O*, 50 FCC 2d at 1078, the cross-ownership

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[270] Stanley Besen and Daniel O'Brien, Charles Rivers Associates, Inc., *An Economic Analysis of the Efficiency Benefits from Newspaper-Broadcast Station Cross-Ownership*, attached as Appendix B to Comments of Gannett Co., Inc. in MM Docket No. 98-35 (filed July 21, 1998) ("*Besen and O'Brien Economic Study*").

[271] *Accord* Veraldi, *Carpooling on the Information Superhighway* at 364-65 (the "societal benefits of encouraging local news outlets to pool resources and invest in innovations have come to outweigh the potential harm" of newspaper cross-ownership). *See also* Allison Romano, *Newspapers and Stations Try Cross-Pollination*, Broadcasting and Cable at 16 (July 25, 2005) (discussing how newspapers and television stations are "min[ing] new ventures" and "giving renewed attention to the Web" in attempts "to grow audience share – particularly with younger demographics – and expand ad sales").

prohibition, at the best, is anachronistic in today's digital environment.[272] And at the worst, the rule actually operates to harm diversity, localism and innovation by inhibiting the development of new media services and by precluding struggling broadcast and newspaper entities (particularly those in small markets) from joining together to improve, or at least maintain, existing local news operations in the current competitive marketplace.

2. In Light of Separate Local Ownership Restrictions on Television Stations and Radio Stations, the Radio/Television Cross-Ownership Rule Is Not Necessary in the Public Interest

The radio/television cross-ownership, or one-to-a-market, rule has always rested on a fragile foundation. A closely divided Commission first adopted the rule in 1970 in an effort to maximize the "diversity of ownership" in each local area. *First R&O*, 22 FCC 2d at 311 (adopting order essentially precluding any single entity from owning more than one broadcast station of any kind in the same local market). Dissenting Commissioners at the time strongly criticized the rule and this rationale for it,[273] and, in fact, the original rule was quickly amended on reconsideration to permit the ownership of AM-FM combinations. *See Memorandum Opinion and Order* in Docket No. 18110, 28 FCC 2d 662, 671 (1971).

By 1989, moreover, the Commission, as discussed in Section III.C.1., had explicitly rejected the position that "pursuing maximum ownership diversity" always served "the public

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[272] *See Geller*, 610 F.2d at 980 (as circumstances change, the Commission is required to determine whether the "vital link" between its "regulations and the public interest" still exists).

[273] *See* Dissenting Statement of Commissioner Robert Wells, 22 FCC 2d at 336-37 (stating that he had "no doubt" that the radio/television cross-ownership rule would "disserve the public interest," and that the majority had simply "posit[ed]" that "maximum diversity" of ownership was an appropriate goal "with very little analysis" and with "little appreciation of, or attention to, possible consequences" of this decision "on broadcast service to the public"). *See also* Concurring and Dissenting Statement of Chairman Dean Burch, 22 FCC 2d at 335 (complaining that Commission had adopted "a rule which applies to areas of ownership least needing attention, if at all").

interest," and consequently relaxed its prohibition against the common ownership of radio and television stations in the same market. *Second Report and Order*, 4 FCC Rcd at 1743. Congress in the 1996 Act directed the Commission to consider further relaxing the cross-ownership rule, and in 1999, the Commission amended the rule to the form that remains in force today. *See Local TV Ownership Order*, 14 FCC Rcd at 12908.[274] In its 2002 review, the Commission determined to eliminate the radio/television cross-ownership rule, but replaced it with a revised cross-media limit (which would prevent any radio/television cross-ownership in the smallest DMAs and continue limits on radio/television cross-ownership in conjunction with a newspaper in larger markets). *See Notice* at ¶ 27. The Third Circuit, however, remanded these new newspaper, radio and television cross-media limits as not supported by reasoned analysis; as a result, the 1999 version of the radio/television cross-ownership rule remains in force.

As NAB has previously urged, the Commission should repeal the radio/television cross-ownership rule, which, in its current form and under current market conditions, does nothing to advance the public interest.[275] Indeed, the radio/television cross-ownership rule today primarily serves to limit radio station ownership arbitrarily. For example, the rule does not permit – under any circumstances and even in the largest markets – the common ownership of the maximum

[274] The rule permits a party to own a television station (or two television stations if allowed under the television duopoly rule) and any of the following radio station combinations in the same market: (i) up to six radio stations in any market where at least 20 independent voices remain; (ii) up to four radio stations in any market where at least 10 independent voices remain; and (iii) one radio station regardless of the number of independent voices in the market. In addition, in those markets where the cross-ownership rule permits parties to own eight outlets in the form of two television stations and six radio stations, the Commission will allow them to own one television station and seven radio stations instead. For purposes of this rule, the Commission counts television stations, radio stations, daily newspapers and wired cable services as "voices." 47 C.F.R. § 73.3555(c).

[275] *See 2002 Biennial Review Order* at ¶¶ 371, 381, 383, 388 (concluding that radio/television cross-ownership rule is not necessary to promote competition, does not promote localism and may harm it, and is not necessary to ensure diversity).

number of radio stations allowed under the local radio ownership rule (eight) and even a single television station. The rule, however, already allows the common ownership of two television stations (the maximum number permitted under the television duopoly rule) and up to six radio stations. Repeal of the radio/television cross-ownership rule would, as a practical matter, only permit the common ownership of one or two additional radio stations, in conjunction with a television station, in the largest markets.

Given the very limited effect of a repeal of the cross-ownership rule, the Commission will find it difficult to contend that the rule's elimination will harm the public interest, especially in today's competitive mass media marketplace. In light of the growth of broadcast stations, multichannel audio and video outlets, and Internet-related media in all markets since the 1970s (*see supra* Section II), the Commission cannot reasonably contend that repeal of the rule will adversely affect the availability of diverse programming or viewpoints. NAB has described the expansion in the array of viewing and listening choices available to consumers as a result of the proliferation of all types of media outlets. *See supra* Section III.A. And as previously shown (*see* Section III.C.4.), consumers are not uniquely dependent on radio and broadcast television outlets for either entertainment or for informational purposes, but they utilize a wide variety of media (especially cable and satellite television and radio and the Internet) to obtain entertainment, news and information and regard these various sources as substitutable to a significant degree. The Commission can therefore no longer plausibly assert that the radio/television cross-ownership rule must be retained to ensure a diversity of entertainment and informational sources for consumers.

In addition, NAB emphasizes that the rule – like other broadcast-only restrictions – disadvantages local broadcasters in today's competitive multichannel environment. For example, the rule prohibits the owner of a single broadcast television station in a large market from also obtaining the maximum number of radio stations permitted under the local radio ownership rules (eight), but does not preclude a cable operator with a dominant position in the local MVPD market from acquiring up to eight radio stations in that market.[276] Moreover, XM or Sirius – both of which place more than a hundred channels of audio programming into every local market – would not be barred from acquiring up to eight radio stations in every local market of sufficient size. With television and radio broadcasters facing unprecedented competition from cable, DBS, satellite and Internet radio, and other video and audio programming sources, a cross-ownership rule applicable only to local broadcast television and radio stations is inequitable and outdated. *See supra* Section III.A. and B. (describing the growing competitive pressures on terrestrial broadcasters' levels of viewership and listenership, as well as on their advertising revenues). Indeed, the Commission previously concluded that the radio/television cross-ownership rule was outdated, and failed to take into account all of the other relevant media available to consumers in local markets. *See 2002 Biennial Review Order* at ¶ 388.

Accordingly, the Commission should eliminate the radio/television cross-ownership rule. It is no longer needed to ensure diversity, and primarily serves to limit radio station ownership arbitrarily and to handicap broadcasters in their efforts to compete in today's challenging digital marketplace. *See Bechtel I*, 957 F.2d at 881 (FCC has "duty to evaluate its policies over time," especially if "changes in factual and legal circumstances" occur); Section 202(h), *supra*. Assuming that the Commission decides to retain the local radio ownership rule and the television

[276] And as a result of the elimination of the cable/broadcast cross-ownership rule, a local cable monopolist can now acquire in the same market one or two broadcast television stations (depending on the size of the market) and multiple radio stations.

duopoly rule in some form, no plausible reason exists to also retain the cross-ownership rule, as any diversity or competition concerns can be addressed more directly by these other local rules. *See 2002 Biennial Review Order* at ¶ 371 (Commission expressly found that its diversity and competition goals would be adequately protected by the local ownership rules).

V. The Commission Should Consider A Variety Of Options To Promote New Entrants In Broadcasting, Including Minorities And Women

In response to the Commission's call for comment regarding proposals to foster ownership of broadcast outlets by minorities, women and small businesses (*see Notice* at ¶¶ 5-6), NAB reiterates its long held belief that the Commission should pursue constitutionally sustainable programs to further opportunities for such groups. NAB has previously described its own efforts to promote greater diversity at all levels of the broadcast industry, including employment, management and ownership.[277] NAB's programs encourage greater participation by diverse groups. The Commission should recognize these and similar efforts and perhaps sponsor forums to showcase opportunities that can lead to greater minority and female ownership of broadcast properties.

Programs such as the NAB's promote greater diversity by creating opportunities to gain experience and hands-on knowledge about the broadcast industry. As both the Commission and Congress have recognized, however, the primary impediment to entry into the broadcast industry for small businesses (particularly those owned by minorities and women) is access to and the cost of capital.[278] In this regard, NAB continues to urge the Commission to support efforts to

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[277] *See* NAB Comments in MB Docket No. 04-228 (filed Oct. 12, 2004). NAB and its education foundation, NABEF, administer and/or finance an array of programs aimed at encouraging greater diversity in the broadcast industry, including broadcast leadership training, career fairs, and fellowship and mentoring programs.

[278] *See* Report, *Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, 12 FCC Rcd 16802, 16824 (1997); H.R. Rep. No. 111, 103d Cong., 1st Sess. 254-55

reinstate a tax incentive program that would provide tax credits or other benefits when broadcast facilities are sold to minorities and women. NAB regards the former tax certificate programs as one of the most effective policies in promoting such ownership. And, while it is not within the Commission's power to reinstate that program as this time, NAB encourages the Commission to work with Congress to formulate a constitutionally sustainable program to establish incentives to promote greater ownership diversity.

NAB also urges the Commission to consider other ways to improve access to capital through proposals that would provide mutual benefits to small businesses/new entrants and existing broadcasters. In particular, NAB suggests that the Commission could consider:

- Allowing a group owner to retain ownership of broadcast licenses above the local ownership limits where the owner LMAs or JSAs stations to small businesses and/or grants such entities options to purchase stations.
- Eliminating or revising the Equity/Debt Plus ("EDP") attribution rule. The EDP rule could be revised to apply to program suppliers only or to exclude debt-only interests (as NAB suggested previously in comments in MB Docket No. 04-228). Alternatively, the FCC could revise the EDP rule to allow a group owner to acquire an interest in a small business that is above the EDP threshold, even where such interest would place the group owner above the local ownership limits in a given market, so as to avoid discouraging investments in small businesses.
- Modifying the auction rules to promote investments by group owners in small businesses (*e.g.*, allow a greater degree of investment by group owners in small businesses without stripping such businesses of "designated entity" status).
- Allowing a group owner to transfer grandfathered station combinations to a class of entities larger than the class of "eligible entities" defined by the FCC in the *2002 Biennial Review Order*.

NAB does not intend this to be a comprehensive list of options that the Commission might consider to promote greater ownership by minorities and women. Rather, NAB submits

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(1993); Small Business Credit and Business Opportunity Enhancement Act of 1992, Pub. L. No. 102-366, § 331(a)(3), 106 Stat. 986, 1007 (1992).

these suggestions as a starting point for discussion and looks forward to participating in efforts to develop a package of programs designed to further this important goal.

VI. Conclusion

Given the technological and marketplace developments that have dramatically altered the media landscape in which the broadcast ownership rules were adopted, the Commission in this quadrennial review must seriously consider whether its local broadcast ownership rules in their current form continue to serve the public interest. NAB believes that they do not. In a multichannel environment dominated by consolidated cable and satellite system operators, local broadcasters are certainly constrained in their ability to "obtain[] and exercise[e] market power," and must not be subject to a regulatory regime applicable only to them and not their competitors. *Local TV Ownership Order*, 14 FCC Rcd at 12916. Indeed, the primary concern in today's digital, multichannel marketplace is the ability of local broadcasters to compete effectively and continue to offer free, over-the-air entertainment and informational programming (including local programming) to consumers. To best achieve the Commission's goals of a competitive media marketplace that provides lower prices, better service and greater innovation to consumers, the Commission should now structure its local ownership rules so that traditional broadcasters and newer programming distributors can all compete on an equitable playing field.

Local stations provide a wealth of local news and public affairs programming, emergency information, other locally produced and responsive programming, and additional, unique community service. But given the relentless competition for audience and advertising shares from the vast array of other media outlets, including consolidated multichannel providers, broadcast stations' ability to maintain their economic viability is being challenged as never before – and, thus, their continued ability to provide the type of services their audiences have come to expect and deserve is under stress. Reforming the existing ownership rules to permit local broadcasters to form more efficient and competitively viable ownership structures will therefore serve local viewers and listeners.

For all the reasons set forth in detail above, the Commission should reform its local ownership rules to reflect the vast technological and marketplace changes that have already occurred and are only accelerating today. Ensuring that local broadcasters are not hampered by outmoded regulation in their efforts to compete and serve their audiences in today's digital, multichannel environment would clearly be in the public interest.

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