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

To: The Commission

COMMENTS OF KVMD LICENSEE CO., LLC

Barry A. Friedman
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, DC 20036
(202) 331-8800

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SUMMARY

In these Comments, KVMD Licensee Co., LLC, the permittee of Station KVMD-DT, Twentynine Palms, California, offers its support for the Commission's proposed triopoly rule permitting common ownership of three broadcast television stations in large markets with 18 or more television stations. Moderate consolidation in large markets would allow station owners to compete more effectively with cable and satellite and offer improved service to the public.

However, KVMD also recognizes the potential threat consolidation poses to independent broadcast television stations and the independent voices such stations offer local communities. KVMD therefore urges the Commission to supplement relaxed television ownership limits with updated localism policies to ensure that local independent broadcast television stations are helped rather than harmed by further media consolidation. More than any particular set of ownership limits, KVMD asserts that practical, localism-based policy changes are necessary to protect and promote diverse independent local programming. In these Comments, KVMD proposes an updated approach to local service in the must-carry/market modification context as an example of such a policy change.

Locally-owned, independent television stations like KVMD are the standard-bearers of the localism-based broadcasting that so many viewers, politicians and pundits fear could be lost in the wake of further media consolidation. Yet, without more robust must-carry rights and the access to local viewers such rights provide, local independent broadcast television may be sufficiently undone by existing policies and market conditions.

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KVMD Licensee Co., LLC ("KVMD"), the permittee of Station KVMD-DT, Twentynine Palms, California ("KVMD" or the "Station"), by its attorneys, hereby submits these Comments in the above-captioned, consolidated proceeding[1] in which the Commission seeks comment on how to respond to the U.S. Court of Appeals for the Third Circuit's decision in *Prometheus*

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

Radio Project, et al. v. FCC[2] and on whether the media ownership rules are "necessary in the public interest as the result of competition."[3] In *Prometheus*, the Third Circuit rejected various portions of the Commission's 2003 overhaul of its media ownership rules,[4] remanding certain rules for revision or further justification, among them the Commission's proposed local television ownership limits. While the *NPRM* seeks comment on all the rules remanded by the Third Circuit, KVMD confines its discussion to the local television ownership rule and related issues pertaining to local video markets. In support thereof, KVMD states as follows.

INTRODUCTION

Station KVMD, located in the Los Angeles Designated Market Area ("DMA"), is independently owned and operated and offers extensive local sports coverage, locally-produced Spanish-language programming and its own local news program to viewers in communities throughout the greater Los Angeles area. Since acquiring the Station in 2001, KVMD has devoted considerable resources to two fundamental objectives: operating the Station in digital-only format and providing unrivaled local service to viewers in the Los Angeles DMA. In 2003, KVMD became one of the first television stations to relinquish its analog spectrum and undertake exclusively digital operations.[5] And over the years, KVMD has dedicated itself to airing precisely the kind of locally-oriented programming Congress, the Commission, and the

[2] 373 F.3d 372 (3d Cir 2004), *stay modified on rehearing*, No. 03-3388 (Sept. 3, 2004), *cert. denied*, 73 U.S.L.W. 3466 (June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

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

[4] *See 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620 (2003) ("*Ownership Order*"), *aff'd in part and remanded in part, Prometheus, supra*.

[5] *See KVMD(TV), Twentynine Palms, CA,* DA 03-1481, released May 1, 2003.

viewing public have expressed an interest in cultivating and protecting – the kind of programming at the heart of the instant ownership proceeding.

As an independent local broadcast television station in one of the largest DMAs in the country, KVMD supports the Commission's proposed local television rule permitting triopolies in large markets, but believes that relaxing television ownership limits does not in and of itself satisfy the Commission 's public interest obligation to promote competition, diversity and localism. As the history of the instant proceeding all too clearly demonstrates, there is no magic set of ownership regulations that will perfectly balance economic realities with the principles of competition, diversity and localism. Accordingly, KVMD submits that relaxed television ownership limits must be accompanied by an updated approach to localism, as evidenced through concrete changes to existing policies. Practical policy changes at the local market level are necessary to ensure that the public interest in diverse, independent local programming benefits rather than suffers from further media consolidation.

As discussed in more detail below, local broadcast television stations are widely recognized for their singularly important role in providing local news and public affairs programming to the viewing public.[6] With numerous studies reaching opposite conclusions, the net effect of consolidation on local independent television stations – and on the diverse independent local programming of which they are the primary source – remains unclear. While relaxed ownership limits could help local independent television stations compete more

[6] *See, e.g., Local TV is Dominant Source of News: Study*, TV Newsday, Oct. 3, 2006, available at http://www.tvnewsday.com/articles/2006/10/03/daily.11/?print (visited October 17, 2006) (reporting that study by Radio and Television News Directors Foundation demonstrates that more Americans choose local television as one of their top three news sources than any other form of traditional or new media). *See also Prometheus*, 373 F.3d at 414-415 (discussing limited substitutability of cable and satellite for broadcast television as sources of local news and public affairs programming).

effectively with cable and satellite, aggressive consolidation could also drive such stations out of the market altogether. The Commission can help ensure that relaxed ownership limits benefit rather than harm local independent television stations by revising its localism policies to better reflect current market conditions and the critical importance of local independent broadcast television stations as sources of diverse local programming. KVMD submits that a new approach to local service in the must-carry/market modification context is one example of such a policy change.

In these Comments, KVMD first addresses the local television ownership rule proposed in the *Ownership Order*, and the Third Circuit's remand of the rule in *Prometheus*. Next, KVMD discusses possible changes to and justifications for the triopoly rule. Finally, KVMD addresses the need for an updated approach to localism, and proposes a related policy change in the must-carry/market modification context.

I. THE COMMISSION'S PROPOSED LOCAL TELEVISION OWNERSHIP LIMITS AND THE *PROMETHEUS* REMAND

In the *Ownership Order*, the Commission revised its Local Television Ownership Rule, in part, to set the following numerical limits: (1) in markets with 5 – 17 television stations, an entity could own two stations, but only one of these stations could be ranked among the top four stations in the market; and (2) in markets with 18 or more television stations, an entity could own up to three television stations, but only one of these could be ranked among the top four stations in the market.[7]

In justifying its new limits, the Commission noted that its decision to revise the "entire television ownership framework" reflected the "contribution of other media to competition and

[7] *See Ownership Order* at ¶ 134.

viewpoint diversity in local television markets."[8] In other words, because non-broadcast media contribute to the diversity of voices and help mitigate concerns about excessive concentration in local markets, their widespread availability supports the relaxation of local television ownership limits. In devising specific limits, the Commission chose to focus exclusively on the number of stations owned by a firm (as a proxy for the capacity to deliver programming) rather than actual market share, and attributed equal market shares to all stations in a market for purposes of calculating market concentration levels.[9] Additionally, the Commission relied upon the Department of Justice ("DOJ") and Federal Trade Commission ("FTC") *Horizontal Merger Guidelines* (1997 rev. ed.) ("Merger Guidelines") to set numerical limits loosely corresponding to a moderate market concentration level, as defined in the Merger Guidelines, a threshold equivalent to six equal-sized competitors in a given market.[10]

In *Prometheus*, the Third Circuit rejected the Commission's decision not to take into account actual market shares and its corresponding assumption of equal-sized competitors in local markets. According the Court:

> The Commission's rationale for its triopoly rule requires that we accept a combination of the first, fifth, and sixth-ranked stations as the competitive equal of a combination of the 16th, 17th, and 18th-ranked stations, just because each combination consists of the same number of stations.[11]

Further, the Court noted that in the majority of television markets, the Commission's proposed numerical limits would allow concentration levels in excess of its own benchmark.[12] Accordingly, the Third Circuit remanded the specific numerical limits for the Commission's further consideration.

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[8] *Id.* at ¶ 184.
[9] *See id.* at ¶ 193.
[10] *See id*. at ¶¶ 192-193.
[11] *Prometheus*, 373 F.3d at 418.

II. THE TRIOPOLY RULE

The Court rejected the Commission's proposed local television ownership rule because, in the Court's view, the Commission failed to provide a well-reasoned, consistent explanation for its specific numerical limits or to justify certain critical assumptions underlying those limits. This time around, the Commission must support any new local television ownership rule it proposes with a more consistent rationale and more defensible underlying assumptions. To that end, KVMD believes that highly competitive market conditions together with certain documented benefits of consolidation provide a rational basis for common ownership of three television stations in markets with 18 or more television stations. Additionally, the FCC should adopt station-combination thresholds, based on market rank or market share, and undertake case-by-case analysis of any proposed transactions surpassing those thresholds.

A. Competition and the Benefits of Consolidation

In providing additional justification for a local television triopoly rule, the Commission must not focus solely on the television market, as such a limited focus fails to reflect the multi-faceted media marketplace.[13] As the Commission record demonstrates, broadcast television stations face fierce competition from various non-broadcast media outlets, including cable, satellite, the Internet and newspapers.[14] Relaxing the local television ownership limits to permit triopolies in large markets will allow group owners of television stations to achieve efficiencies that will enable them to compete more effectively with these non-broadcast content providers.[15]

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[12] *See id.* at 420.

[13] *See Sinclair Broadcast Group, Inc. v. F.C.C.*, 284 F.3d 148, 163-165 (D.C. Cir. 2002) (finding unreasonable Commission's exclusion of non-broadcast media from voice count for purposes of local television ownership rule).

[14] *See Comments of The National Association of Broadcasters*, MB Docket No. 02-277 (Jan. 2, 2003) ("NAB Comments") at 15-23, 71-78.

[15] *See Ownership Order* at ¶ 138.

In *Prometheus,* the Third Circuit accepted the Commission's conclusion that "common ownership of television stations in local markets can result in 'consumer welfare enhancing efficiencies' by eliminating redundant expenses and increasing opportunities for cross-promotion and related programming."[16] On remand, the Commission should reiterate the public benefits that can accompany consolidation, as evidenced by the record in the previous ownership proceeding and acknowledged by the *Prometheus* Court.

Moreover, by facilitating such efficiencies, a relaxed local television ownership rule will provide for expanded local news and additional programming responsive to the needs and interests of local viewers.[17] As acknowledged by the Third Circuit, "commonly owned television stations are more likely to carry local news than other stations and air a similar quality and quantity of news as other stations."[18]

The increasing abundance of news and public affairs content available in large video markets – on 18 or more television stations, and on the Internet and cable – offers added justification for the local television ownership limits set forth in the *Ownership Order,* in particular the allowance of three commonly-owned television stations in large markets. The expanding media universe and the market conditions described above evidence a media marketplace in which relaxed local television ownership limits will not harm diversity, localism or competition, particularly in large markets where viable alternative programming sources are abundant, as long as such limits are properly reinforced by other Commission policies.

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[16] *Prometheus*, 373 F.3d at 415 (quoting *Ownership Order* at ¶ 147).

[17] *See Ownership Order* at ¶¶ 157-164.

18 *Prometheus*, 373 F.3d at 415 (citing Bruce M. Owen *et al., Effect of Common Ownership or Operation on Television News Carriage, Quantity and Quality, in Comments of Fox Entertainment Group, Inc., et al.,* MB Docket No. 02-277 (Jan. 2, 2003)).

B. Further Scrutiny of Certain Station Combinations

In order to address the Third Circuit's obvious dismay at certain potential combinations permitted by the Commission's proposed limits (largely due to the FCC's decision to assume equal market shares rather than rely upon actual market shares),[19] the Commission should consider adopting thresholds, based on certain combinations (e.g., a top-four station combined with additional stations of sufficiently high market rank) or a certain percentage of market shares, beyond which proposed mergers would be subject to case-by-case analysis.

To limit the burden imposed on the Commission by such an approach, the Commission could require parties to conduct their own analysis and certify whether or not their proposals exceed the designated thresholds. If proposals exceed applicable thresholds, parties would then be required to submit additional market information and the Commission would need to undertake specific review of the markets in question. Certifications in the negative, and any improprieties related thereto, would remain subject to the Commission's regulation and review of character qualifications.

III. AN UPDATED APPROACH TO LOCALISM

While KVMD supports the FCC's proposed triopoly rule, KVMD believes the Commission must do more than simply rely upon ownership limits to promote competition, diversity and localism. Consolidation promises certain benefits, but, by its very nature, it also poses certain threats to the diversity of voices and the availability of independent programming in local markets. As the *Prometheus* decision itself makes clear, local broadcast television stations remains the single most important source of such programming. In order to maximize

[19] As discussed above, the Third Circuit rejected the local television ownership rule in part because local television triopolies with vastly different concentration levels were equally permissible under the Commission's rule. *See id.* at 418.

the potential benefits of consolidation while minimizing its threat to the viability of independent broadcast television, the Commission should supplement its local television ownership limits with new or revised localism policies designed to protect and promote local television stations' unique programming contributions to local communities.

For example, as set forth in detail below, a revised approach to local service in the cable must-carry/market modification context would help stimulate competition and diversity in local video markets by restoring independent television stations' localism-based competitive edge. Such practical measures that directly address the economic and regulatory environment in which stations actually operate would do more to contain potentially excessive consolidation than even the most carefully crafted ownership limits.

A. The Unique Local Standing of Broadcast Television Stations

In *Prometheus*, the Third Circuit accepted as a general principle the Commission's conclusion that media other than broadcast television contribute to diversity in local markets, while leaving it to the Commission on remand "to demonstrate that there is ample substitutability from non-broadcast media to warrant the particular numerical limits that [the Commission] chooses…"[20] However, the Third Circuit expressed skepticism concerning the extent to which non-broadcast media outlets, such as cable and the Internet, can adequately serve as substitutes for broadcast media.[21] With respect to cable, the Third Circuit noted that even among cable subscribers, "only 30% have access to local cable news channels" and that "the record contains only weak evidence that cable can substitute for broadcast television as a source of viewpoint diversity."[22] With regard to the Internet, the Court concluded that, as with cable, "the Internet is

[20] *Id.* at 414-415.
[21] *Id.*
[22] *Id.* at 415.

also limited in its availability and as a source of local news."[23] Based on these determinations, the Third Circuit concluded that "the degree to which the Commission can rely on cable or the Internet to mitigate the threat that local station consolidations pose to viewpoint diversity is limited."[24]

As the above quotations demonstrate, the *Prometheus* Court found that cable and the Internet were generally poor substitutes for broadcast television. In other words, the Court recognized broadcast television stations as unique repositories of local coverage and viewpoint diversity, the loss of which could not be readily replaced by other forms of video programming. Given the Third Circuit's recognition of broadcast television as an irreplaceable source of local news and viewpoint diversity, and the Commission's own decision to include comments from its localism proceeding in the instant ownership proceeding, KVMD submits that the specific localism-based issues discussed below comprise a necessary complement to the Commission's ownership considerations.[25]

B. A New Approach to Local Service

KVMD offers its experience as an independent local broadcast television station in a large video market in order to highlight the kinds of localism-based changes necessary to ensure that local independent broadcast television remain capable of flourishing in today's media marketplace.

1. KVMD's Must-Carry Experience in the Los Angeles DMA

KVMD is currently appealing a number of proceedings before the Commission involving KVMD's efforts to secure carriage on major cable systems in the Los Angeles DMA, including

[23] *Id.*
[24] *Id.*

cable systems operated by Time Warner,[26] Comcast[27] and Cox Communications.[28] In each of these proceedings, the Media Bureau granted the cable operator's market modification petition and denied KVMD's must-carry requests.[29] Unfortunately, given the realities of today's competitive video marketplace, carriage of local independent stations like KVMD throughout their home markets is absolutely indispensable to their ability to develop and sustain first-rate local service to viewers. Taken together, KVMD's cases signal that the time has come for the FCC to revise and update its understanding of local service for "must-carry" purposes, as Commission policies designed to promote competition, diversity and localism have, in practice, produced outcomes directly at odds with those goals.

Pursuant to the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"),[30] broadcast television stations have the right to mandatory carriage on cable systems serving communities within their DMAs. Under the FCC's must-carry regulations, broadcast television stations are not given mandatory carriage rights on any cable system of their choosing, but rather only on cable systems serving communities located within the same DMA as the station. By tying must-carry rights to a defined local market, the FCC seeks to insure that

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[25] *See NPRM* at ¶ 9. *See also Broadcast Localism* (MM Docket No. 04-233), Notice of Inquiry, 19 FCC Rcd 12425 (2004) ("*Broadcast Localism NOI*").

[26] *See* Time Warner Cable Petition for Special Relief (CSR-6181-A), KVMD Licensee Co., LLC Complaint for Carriage (CSR-6180-M) ("*Time Warner Proceeding*").

[27] *See* Comcast Cable Communications, Inc. Petition for Modification of the Los Angeles, California DMA (CSR-6255-A), KVMD Licensee Co., LLC v. Comcast Cable Communications, Inc. Request for Carriage (CSR-6203-M, CSR-6243-M) ("*Comcast Proceeding*").

[28] *See* CoxCom, Inc. d/b/a Cox Communications Orange County Petition for Modification of the Los Angeles County DMA (CSR-6252-A), KVMD Licensee Co., LLC v. Cox Communications, Inc. Request for Carriage (CSR-6200-M, CSR-6242-M) ("*Cox Proceeding*").

[29] *See Time Warner Proceeding*, 18 FCC Rcd 21384 (MB 2003); *Comcast Proceeding*, 19 FCC Rcd 5245 (MB 2004); *Cox Proceeding*, 19 FCC Rcd 4509 (MB 2004).

[30] P.L. No. 102-385, 106 Stat. 1460 (1992).

there is a legitimate local connection between the station and the cable systems against which the station may assert must-carry rights. This principle of localism is one of the defining principles of the "must-carry" regime established by Congress and enforced by the Commission.

Both cable operators and stations may seek changes to DMA-based must-carry rights by showing that a DMA does not accurately represent the local connection between a station and particular communities. For example, a cable operator may argue that particular communities located within the same DMA as a station nonetheless do not belong in a station's market. Conversely, a station may argue that particular communities located outside the station's DMA nonetheless belong in the station's market. The Commission evaluates claims to modify market-based must-carry rights of a particular station based on factors enumerated in the 1992 Cable Act, including: (i) whether the station, or other stations located in the same area, have been historically carried on the cable systems within such communities; (ii) whether the station provides coverage or other local service to such communities; (iii) whether other stations that are being carried by cable systems in such communities provide local news, public affairs and sports programming to those communities; and (iv) evidence of viewing patterns in cable and non-cable households within the areas served by the cable systems in such communities.[31]

In deciding market modification cases, the Commission has traditionally treated the second factor – whether the station provides local service to the communities at issue – as more or less dispositive.[32] While KVMD agrees that local service should be the deciding factor, KVMD does not support the FCC's practice of viewing local service largely in terms of signal

[31] 47 U.S.C. § 534(h)(1)(C)(i). See also *Second Report and Order, Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366, 8369-8370 (1999).

[32] *See, e.g.*, *Time Warner Proceeding*, 18 FCC Rcd at ¶ 17; *Comcast Proceeding*, 19 FCC Rcd at ¶ 16; *Cox Proceeding*, 19 FCC Rcd at ¶ 16.

coverage and the distance between a station and the communities at issue, rather than in terms of the local programming a station actually provides to the communities. The FCC's current method of determining local markets disserves local audiences and local broadcasters and undermines the very concept of localism the Commission is charged with promoting.

Obviously, some geographic limits must apply to the must-carry regime so that stations in New York City, for example, are not deemed local in the Los Angeles DMA. However, the default DMA-wide approach provides a more fair and rational distribution of must-carry rights than the specialized market modification process, in which the Commission has relied upon narrow concepts of coverage and distance to the detriment of qualified local stations and their intended viewers. Large cable operators have taken advantage of the FCC's boilerplate coverage and distance analysis to exclude communities from a station's market, even where the communities and the station are in the very same DMA and the station offers unique local programming tailored to the needs and interests of viewers in those communities.

Quality local programming notwithstanding, large cable operators would prefer to allot their channels to paid cable networks and large network affiliates rather than to local independent stations, and they have expended significant resources to mount legal attacks on the must carry rights of independent stations. For instance, in response to KVMD's efforts to assert its 2002 must-carry rights, Time Warner, Comcast and Cox each commenced a market modification proceeding and successfully petitioned the Commission to remove their cable communities from KVMD's market. In each of these proceedings, the FCC ignored the superior local programming KVMD offers to viewers in these cable operators' communities – including extensive local sports coverage, locally-produced Spanish-language programming, and KVMD's own local news program – and removed the communities from the Station's market, primarily on the basis of the number of miles between Twentynine Palms, the Station's community of license, and the communities at issue.[33] KVMD petitioned for reconsideration of each of these proceedings, but, to date, the FCC has not taken any further action. While these proceedings remain pending, KVMD remains absent from the lineups of the dominant cable carriers in its home market.

2. Market Conditions Require a Revised Approach to Local Service

In a highly competitive video marketplace characterized by consolidation in the broadcast industry, extraordinary rates of cable and satellite penetration, and the rapid proliferation of Internet video services, the fate of an independent local television station such as KVMD is fundamentally tied to its ability to deliver unique local programming to its target audience. Cable operators serve roughly 70 percent of all U.S. households.[34] Cable carriage is thus critical to the survival of independent stations like KVMD, as cable operators are essentially the gatekeepers who control access to the local viewing audience.

Despite the extraordinary rate of cable penetration and the proliferation of alternative video service providers, free over-the-air television remains the preeminent source of local video programming in the country, as set forth above. Diverse and competitive broadcast television stations thus remain essential to developing and sustaining robust localism in video markets. In 2003, in response to the Commission's *Ownership Order*, Congress and the American people took the Commission to task for forsaking its responsibility to uphold competition, diversity and localism in the media marketplace.[35] As discussed above, the *Prometheus* Court seconded Congress and the public by rejecting a number of the Commission's proposed rules.

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[33] *See id.*

[34] *See Regarding the Transition to Digital Television: Hearings Before the House Comm. on Energy and Commerce, Subcomm. On Telecomm. and the Internet*, 107th Cong. 38 (2002)

[35] *See, e.g.*, Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004) (amending Sections 202(c) and 202(h) of the Telecommunications Act of 1996,

KVMD's battle against Time Warner, Comcast and Cox has taken place at the quiet center of this storm over media consolidation. While the issue of cable carriage has generated fewer headlines than the potential effects of further consolidation in the broadcast industry, the inability of local television stations to achieve carriage on local cable systems may, in reality, pose a graver threat to the viability of local independent television.

As KVMD can attest, without cable carriage, local independent television stations with quality local programming cannot reach their intended viewers. And without sufficient viewership, local stations cannot generate the ad revenue necessary to continue developing and producing first-rate local programming. As independent broadcast stations lose their local edge, the door leading to consolidated ownership and common programming opens a little wider. And as the diversity of voices declines, so does the breadth and depth of local offerings available to the viewing public.

In order for stations like KVMD to reach the local audiences they are uniquely capable of serving, the FCC must begin to heed its own professed interest in promoting and protecting vibrant, diverse local programming.[36] There are signs that the Commission is beginning to see the light. For example, in a recent market modification decision,[37] three Commissioners, in three

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Pub. L. No. 104-104, 110 Stat. 56 (1996) to establish a 39 percent national television ownership cap in response to the Commission's proposed 45 percent cap).

[36] *See Broadcast Localism NOI, supra*.

[37] *See Comcast Cablevision of New Mexico, Inc. for Modification of the Market of Station KRPV, Roswell, New Mexico*, 19 FCC Rcd 16771 (2004); *TCI Cablevision of New Mexico, Inc. for Modification of KRPV, Roswell, New Mexico*, 19 FCC Rcd 16779 (2004); *TCI Cablevision of New Mexico, Inc. for Modification of the Market of Station KRPV, Roswell, New Mexico*, 19 FCC Rcd 16783 (2004) (collectively the "*KRPV Decisions*"). In three separate decisions involving Station KRPV(TV), Roswell, New Mexico, each of which affirmed the Media Bureau's removal of numerous cable communities from KRPV's television market, Commissioners Adelstein and Copps and then-Commissioner, now-Chairman Martin expressed concern that the Media Bureau failed to account properly for the local presence and appeal of

separate opinions, stressed that geographic and distance factors should not trump local programming factors and appropriate consideration of a station's local service credentials. However, as the outcome of that case demonstrates – the communities at issue were removed from the station's local market, despite the Commissioners' reservations – the FCC still has not committed itself to providing relief to independent television stations struggling to assert their carriage rights against large cable operators.

The time has come for the Commission to update its approach to localism to address the challenges facing local broadcast television stations, those entities most responsible for generating the local content relied upon by the public. A concrete first step would be for the FCC to revise its analysis of local service in the context of market modification proceedings by making the local programming a station delivers to communities a decisive factor, as opposed to coverage and distance considerations. Under such a revised analysis, cable operators would face a much higher evidentiary bar in their efforts to exclude communities from a station's local market. Instead of determining must-carry rights according to mileage calculations, local broadcast television stations would retain carriage rights in all communities in their DMA unless cable operators conclusively demonstrate that such stations do not provide any local programming responsive to the needs and interests of viewers in those communities. KVMD's pending cases against Time Warner, Comcast and Cox present an opportunity for the Commission to develop and adopt such a revised local service analysis.

Locally-owned, independent television stations like KVMD are the standard-bearers of the localism-based broadcasting that so many viewers, politicians and pundits fear could be lost in the wake of further media consolidation. Yet, without more robust must-carry rights and the

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KRPV in the communities at issue. KVMD's cases against Time Warner, Comcast and Cox access to local viewers such rights provide, local independent broadcast television may be sufficiently undone by existing policies and market conditions.

exhibit the same problems identified by the Commissioners in the *KRPV Decisions*.

CONCLUSION

As set forth above, KVMD supports the Commission's triopoly rule permitting common ownership of three broadcast television stations in large markets with 18 or more television stations. Moderate consolidation would allow station owners to compete more effectively with cable and satellite and offer improved service to the public. However, KVMD also recognizes the potential threat consolidation poses to independent broadcast television stations and the independent programming voices such stations offer local communities. Accordingly, KVMD believes the Commission much supplement relaxed television ownership limits with updated localism policies to ensure that local independent broadcast television stations are helped rather than harmed by further media consolidation. The redefinition of local service in the must-carry/market modification context outlined above constitutes one such policy change. More than any particular set of ownership limits, KVMD submits that such practical, localism-based policy changes are critical to the continuing viability of diverse independent local programming in today's increasingly competitive media marketplace.

Respectfully submitted,

_______/s/_________
Barry A. Friedman
Thompson Hine LLP
1920 N Street, N.W.
Suite 800
Washington, DC 20036
(202) 331-8800

Counsel for KVMD Licensee Co., LLC

October 23, 2006

182365