

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

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

To: The Commission

COMMENTS OF ENTRAVISION HOLDINGS, 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, Entravision Holdings, LLC urges the Commission to relax its local television ownership limits to permit common ownership of three broadcast television stations in large markets. Entravision believes that the *Prometheus* Court's conservative estimates of media substitutability – made in 2004, in the context of reviewing an administrative record largely compiled in 2002 – do not capture the realities of the video marketplace in 2006 and beyond. As argued herein, the increasing substitutability of broadcast and non-broadcast content, widespread competition in video markets and the localism-based benefits of consolidation support relaxation of the Commission's local television ownership rule, in particular the permissibility of triopolies in larger markets.

However, while consolidation promises certain benefits to the public, it also poses certain threats to competition and diversity. Accordingly, the Commission should adopt regulations to prevent media conglomerates from abusing their market power to the detriment of the public interest. Specifically, Entravision proposes that the Commission promulgate a "syndicated programs" rule, a "TV listings" rule, and a "preferred ad rate" rule with respect to new media combinations.

Finally, the Third Circuit unambiguously held that based on Congress's establishment of the 39 percent national cap, the UHF discount has been permanently insulated from further Section 202(h) review by the Commission. Entravision submits that the Commission should defer any consideration of the UHF discount outside the Section 202(h) context until completion of the digital transition.

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To: The Commission

COMMENTS OF ENTRAVISION HOLDINGS, LLC

Entravision Holdings, LLC (“Entravision”), the licensee of radio and television stations providing Spanish-language programming to Hispanic audiences, by its attorneys, hereby submits these Comments in the above-captioned, consolidated proceeding¹ in which the Commission seeks comment on how to respond to the United States Court of Appeals for the

¹See *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.

Third Circuit's decision in *Prometheus 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 The Commission also requests comment on a number of related issues, including advertising markets, the ability of independent stations to compete, the availability of independent programming, the impact of new technologies on media consumption and ownership issues, and the UHF discount. With respect to these issues, Entravision states as follows.

INTRODUCTION

In *Prometheus*, the Third Circuit rejected various portions of the Commission's 2003 overhaul of its media ownership rules,⁴ and remanded certain rules for revision or further justification. Entravision generally supports the Commission's deregulatory efforts in the *Ownership Order* and submits that, with some important changes and additional justifications, many of the Commission's proposed rules should satisfy the standards applied by the Court in *Prometheus*.

In crafting revised regulations and making the case for their validity, Entravision urges the Commission to focus on the substitutability of non-broadcast media and the merits of selective consolidation to justify relaxing the Commission's existing local television ownership limits to permit triopolies in large markets. A general relaxation of the local television ownership limit is reasonable in light of the highly competitive video marketplace, the increasing

² 373 F.3d 372 (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*.

substitutability of broadcast and non-broadcast content, and the proven public benefits that accompany consolidated television ownership.

While consolidation promises certain benefits, it also poses a number of threats to competition and the viability of small and medium-size broadcast operators. In order to maximize the benefits of consolidation while minimizing its costs, Entravision urges the Commission to adopt measures to monitor and prevent anti-competitive practices on the part of any newly-formed media combinations. Establishing procedures for the detection and elimination of abuses of market power by broadcast group owners or broadcast/newspaper owners will help deter such abuses and reinforce the effectiveness and validity of the Commission's ownership limits. Specifically, Entravision proposes that the Commission promulgate a "syndicated programs" rule, a "TV listings" rule, and a "preferred ad rate" rule with respect to new media combinations.

Finally, Entravision submits that Congress's passage of a national ownership cap and the Third Circuit's treatment of Congress's action in *Prometheus* effectively eliminate the Commission's authority to reconsider the UHF discount in the context of the Commission's Section 202(h) periodic reviews. The Commission should defer any consideration of the UHF discount outside the context of Section 202(h) until completion of the digital transition.

Each of these matters is addressed, in turn, below.

I. LOCAL TELEVISION OWNERSHIP RULE

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.⁵

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 viewpoint diversity in local television markets."⁶ In other words, because non-broadcast media in local markets contribute to the diversity of voices and help mitigate concerns about excessive concentration, their widespread availability support 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.⁷ 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.⁸

In *Prometheus*, the Third Circuit accepted the Commission's conclusion that media other than broadcast television contribute to diversity in local markets, but the Court did not address the "degree to which non-broadcast media compensate for lost viewpoint diversity" in a television market with relaxed ownership limits, expressly leaving it to the Commission on remand "to demonstrate that there is ample substitutability from non-broadcast media to warrant

⁵ See *Ownership Order* at ¶ 134.

⁶ *Id.* at ¶ 184.

⁷ See *id.* at ¶ 193.

⁸ See *id.* at ¶¶ 192-193.

the particular numerical limits that [the Commission] chooses..."⁹ The Third Circuit rejected the Commission's assumption of equal-sized competitors and its corresponding decision not to take into account actual market shares.¹⁰ Further, the Court noted that in the majority of television markets, the Commission's numerical limits would allow concentration levels in excess of its own benchmark.¹¹

A. Substitutability of Non-Broadcast Media

In considering the Local Television Ownership Rule on remand, the Commission should accept the Third Circuit's guidance and emphasize the substitutability of non-broadcast media as a justification for relaxing the television ownership limits. The *Prometheus* Court drew certain conclusions concerning the limited substitutability of cable and the Internet, particularly with respect to local news and public affairs programming.¹² These conclusions must be overcome by a strong showing of current substitutability. The Third Circuit left the door open for such a showing by accepting, in principle, that non-broadcast media contribute to local market diversity.¹³ The Commission is now in a position to demonstrate that the Court's conservative estimates of substitutability – made in 2004, in the context of reviewing an administrative record largely compiled in 2002 – do not capture the realities of the video marketplace in 2006 and beyond.

To begin with, while the Third Circuit largely dismissed the Internet as a source of independent, local content, it did note the negative correlation between television and the

⁹ *Prometheus*, 373 F.3d at 414-415.

¹⁰ *Id.* at 418.

¹¹ *Id.* at 420.

¹² *See id.* at 415 (discussing limited substitutability of cable; noting negative correlation between television and Internet, but concluding Internet is "limited in its availability and as a source of local news," and therefore like cable limited in its ability "to mitigate the threat that local station consolidations pose to viewpoint diversity").

¹³ *See id.* at 414.

Internet, and the substitutability implied by that correlation.¹⁴ The years since the issuance of the *Prometheus* decision have witnessed concrete advances in the substitutability of the Internet for broadcast and print media. Fueled by the growing influence of weblogs, as well as audio and video sites, the influence of Internet sites as "diverse and antagonistic sources"¹⁵ of news, information and entertainment can no longer be discounted.

From politics,¹⁶ to popular culture,¹⁷ to stories focusing on the mainstream media itself,¹⁸ Internet websites and journalists, or bloggers, have demonstrated their power to report, critique and shape the development of contemporary events. The success and influence of different weblogs are variously linked to bloggers' knowledge of local events, their policy acumen, and their ability to respond quickly to breaking stories.¹⁹ Such traits underscore the solid substitutability of Internet offerings for other forms of media.

While many weblogs focus on national issues, weblogs targeting regional and community audiences are increasingly prevalent. For example, Metroblogging.com, a network of city-

¹⁴ See *id.* at 415.

¹⁵ *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

¹⁶ See, e.g., Brian Faler, *Parties to Allow Bloggers to Cover Conventions for First Time*, The Washington Post, July 6, 2004, at A4 (discussing bloggers' coverage of parties' national presidential conventions); Michael D. Shear and Chris L. Jenkins, *Va Legislator Ends Bid for 3rd Term*, The Washington Post, August 31, 2004, at A2 (discussing decision of Rep. Edward Schrock of Virginia not to run for reelection based on bloggers' scrutiny of his past).

¹⁷ See, e.g., The Smoking Gun's exposé of James Frey's fabrication of various parts his supposed autobiography, *A Million Little Pieces*, a book selected by Oprah Winfrey for her book club, available at <http://www.thesmokinggun.com/archive/0104061jamesfrey1.html> (visited September 5, 2006).

¹⁸ See, e.g., <http://en.wikipedia.org/wiki/Rathergate> (visited September 5, 2006) (discussing bloggers' role in investigating documents at center of a CBS *60 Minutes* program and demonstrating that they were not properly authenticated); Howard Kurtz, *Jeff Gannon Admits Past 'Mistakes,' Berates Critics*, The Washington Post, February 19, 2005, at C1 (discussing bloggers' role in unmasking lack of credentials of White House correspondent).

¹⁹ See Daniel W. Drezner and Henry Farrell, *The Power and Politics of Blogs*, July 2004, at 4, available at <http://www.utoronto.ca/~farrell/blogpaperfinal.pdf#search=%22the%20power%20and%20politics%20of%20blogs%22> (visited September 5, 2006).

specific blogs offering postings on local news and events contributed by local staff, hosts weblogs for a number of US cities, including Atlanta, Austin, Birmingham, Boston, Chicago, Dallas, Denver, Detroit, Houston, Los Angeles, Miami, Minneapolis, Nashville, New Orleans, New York City, Orlando, Philadelphia, Phoenix, Portland, Sacramento, San Francisco, Seattle and Washington, DC.²⁰ Metroblogging.com offers city-specific blogs in a number of markets in which Entravision²¹ owns television stations, such as Boston, Denver, Orlando and Washington, DC, and many of Entravision's television markets are home to other locally-oriented sites, as demonstrated by the following, hardly exhaustive list:

- "Universal Hub," providing community news and information in Boston;²²
- "Coyote Gulch," covering local politics in Denver;²³
- "Connecticut Local Politics," serving Hartford and other Connecticut communities;²⁴
- "DCist," reporting on local news and events in and around Washington, DC;²⁵
- "The Las Vegas Blog," covering news and events in Las Vegas;²⁶ and
- "Duke City Fix," providing stories and opinions about daily life in Albuquerque.²⁷

The ever-expanding universe of such sites and their growing audience provide counter-evidence to the Third Circuit's conclusion regarding the limited substitutability of the Internet.

Recent developments in the deployment of video programming over the Internet also evidence the negative correlation between and the substitutability of television and the Internet.

²⁰ See <http://www.metroblogging.com/> (visited September 6, 2006).

²¹ Entravision is the licensee of 17 full-service television stations. These stations generally offer Spanish-language programming and serve communities with significant Hispanic audiences. Entravision is the principal affiliate of the Univision and Telefutera networks and carries these networks' programs on most of its stations. Together with such network programming, Entravision offers Spanish-speaking viewers local news, public affairs and public service programming.

²² See <http://www.universalhub.com/> (visited September 6, 2006).

²³ See <http://radio.weblogs.com/0101170/> (visited September 6, 2006).

²⁴ See <http://connecticutlocalpolitics.blogspot.com/> (visited September 6, 2006).

²⁵ See <http://www.dcist.com/> (visited September 6, 2006).

²⁶ See <http://www.lasvegasvegas.com/index.php> (visited September 6, 2006).

²⁷ See <http://www.dukecityfix.com/> (visited September 6, 2006).

Mainstream programmers are not the only ones making quality content available online; technological development and the marketplace increasingly allow independent programmers to make their content widely available. The proliferation of sites such as YouTube.com²⁸ grant unprecedented audience access to would-be program producers. While many videos on YouTube are entertainment-based, its breakout success is attributable to its emergence as an alternative medium for news and public affairs video programming as well.²⁹

Beyond generating content, the Internet must also be credited with facilitating and enhancing the substitutability of various forms of media – print, audio and video – by making them readily available on one-and-the same site, and easily accessible by the click of the mouse. Even where websites are merely linking to content provided by traditional media sources, such as television stations, radio stations, and newspapers, the Internet essentially grants such content unlimited audience reach. The Internet has similarly advanced the visibility and accessibility of weekly newspapers and neighborhood-specific publications, which provide yet another source of independent local news and information.

The Third Circuit's distinction between traditional 'media' outlets, which aggregate the news and prioritize stories in terms of their public importance, and Internet postings, which, in the Third Circuit's sweeping generalization, fail to perform these aggregator and distillation functions, reveals the lapsed time-stamp on the Court's conception of Internet content.³⁰ In the Court's view, Internet content means an individual's posting in a chat room, or a local

²⁸ See <http://www.youtube.com/> (visited September 6, 2006).

²⁹ See, e.g., Griff Witte, *On YouTube, Charges of Security Flaws*, The Washington Post, August 29, 2006, at D1 (discussing whistleblower's posting of video on YouTube concerning security flaws in Coast Guard's patrol boats); <http://connecticutlocalpolitics.blogspot.com/2006/07/youtube-campaign.html> (visited September 6, 2006) (discussing the effects of YouTube on political campaigns and highlighting the effectiveness of a video critique of Senator Joseph Lieberman posted on YouTube).

³⁰ See *Prometheus*, 373 F.3d at 407.

government's or community organization's website.³¹ However, the numerous websites discussed above perform precisely these aggregator and distillation functions, and are primarily valuable insofar as they provide a meaningful alternative to the news and public affairs content delivered by other media outlets. If the Commission's diversity and localism principles are to mean anything, surely they must recognize and encourage the development of alternate sources for aggregating the news and determining what stories are of interest and importance to the public.

As for cable, the quantity and quality of cable-based local news channels has expanded and improved since *Prometheus* was decided, if somewhat less dramatically than with respect to the Internet.³² The growing number of cable-based local programming outlets, and their competitive relationship with broadcast as well as Internet media sources, contributes to the abundant supply of non-broadcast substitutes in today's media market.³³

B. The Potential Benefits of Consolidation

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

³¹ *See id.*

³² *See, e.g.,* Mike Cavendar, *Local Cable News Comes of Age*, Radio-Television News Directors Association & Foundation, November 2004, available at <http://www.rtnda.org/communicator/showarticle.asp?id=139> (visited September 5, 2006); *see also* Pew Research Center, Transcript of *Cable News: A Maturing Platform with an Uncertain Future*, Project for Excellence in Journalism, August 14, 2006, available at <http://pewresearch.org/obdeck/?ObDeckID=51> (visited September 5, 2006) (discussing, in part, relationship of online news to cable news).

³³ To the extent the Commission follows the Third Circuit and accepts the limited substitutability of non-broadcast media for the local coverage provided by broadcast television stations, the Commission should honor its designation of broadcast television as a unique repository of local programming by conferring market-wide carriage rights on television stations. *See, e.g., Position Paper: Full Market Must-Carry Rights for Digital Broadcast Television Stations are Necessary to Further the Digital Television Transition*, submitted to the Commission in June 2003 by KVMD Corporation.

efficiencies' by eliminating redundant expenses and increasing opportunities for cross-promotion and related programming."³⁴ 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.

In revising and/or providing additional justification for a relaxed local television ownership rule, the Commission must not focus solely on the television market, as such a limited focus fails to reflect the multi-faceted media marketplace.³⁵ As the Commission record demonstrates, broadcast television stations face fierce competition from various non-broadcast media outlets, including cable, satellite, the Internet and newspapers.³⁶ Relaxing the local television ownership limits will allow group owners of television stations to achieve efficiencies that will enable them to compete more effectively with these non-broadcast content providers.³⁷

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.³⁸ 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."³⁹

³⁴ *Prometheus*, 373 F.3d at 415 (quoting *Ownership Order* at ¶ 147).

³⁵ 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).

³⁶ See *Comments of The National Association of Broadcasters*, MB Docket No. 02-277 (Jan. 2, 2003) ("NAB Comments") at 15-23, 71-78.

³⁷ See *Ownership Order* at ¶ 138.

³⁸ See *id.* at ¶¶ 157-164.

³⁹ *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)).

C. Revising the Local Television Ownership Rule

In *Prometheus*, the Third Circuit rejected challenges to the Commission's regulation of local television markets, finding that the Commission's local television ownership rule was neither duplicative of antitrust regulation nor contrary to the public interest.⁴⁰ At the same time, the Third Circuit rejected the Commission's decision to assume equal market shares for all television stations in a market rather than rely upon actual market shares. The Third Circuit noted that, as a result of the assumption of equal market shares, local television triopolies with vastly different concentration levels were equally permissible under the Commission's rule:

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.⁴¹

Further, the Court instructed the Commission to provide better evidence of substitutability between broadcast and non-broadcast media to justify numerical limits adopted by the Commission on remand.⁴²

Accordingly, Entravision now submits that demonstrable gains in the quantity and quality of news and public affairs content on the Internet and cable, and commensurate increases in the substitutability of broadcast and non-broadcast media offer substantial 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 necessity of group ownership in the face of competition from non-broadcast sources and the localism-based benefits to the public from consolidation further support relaxation of the Commission's local television ownership limits. The expanding media universe and the market conditions described above evidence a

⁴⁰ *See id.* at 413.

⁴¹ *Id.* at 418.

⁴² *See id.* at 415.

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, so long as such limits are properly applied and enforced.

With regard to equal vs. actual market shares, in order to address the Third Circuit's obvious dismay at certain potential combinations permitted by the Commission's proposed limits, 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.

Whatever specific approach the Commission adopts, an administrative record amply demonstrating media substitutability and competitive market conditions, combined with evidence of the Commission's commitment to applying and enforcing its local television ownership rule should ensure that the ownership limits adopted by the Commission are capable of surviving judicial review.⁴³

⁴³ *See id.* at 417 (citing *AT&T Corp. v. F.C.C.*, 220 F.3d 607, 627 (D.C. Cir. 2000)) (stating court must uphold agency's line-drawing decision when supported by the evidence on the record).

II. REGULATING ANTI-COMPETITIVE PRACTICES

Regulations targeting certain anti-competitive practices on the part of consolidated media entities offer an important means for the Commission to promote the effectiveness and validity of its ownership limits, both in the television and the broadcast/newspaper contexts. Without weighing in on any specific ownership limit proposals other than the local television limits discussed above, Entravision simply notes that while consolidation has the potential to bestow a number of public interest benefits, it also opens the door to potential anti-competitive abuses. In order to maximize the benefits of consolidation while minimizing its costs, the Commission should adopt regulations aimed at preventing anti-competitive abuses.

A. Entravision's Proposals

While Entravision generally supports the Commission's deregulatory efforts, one of its central concerns in the Commission's ongoing ownership deliberations is with preserving a diversity of voices by ensuring that small and medium-sized operators serving minority or special interest audiences survive and flourish in the competitive marketplace.⁴⁴ Absent a sufficient degree of Commission oversight, Entravision fears that these stations and their audiences will be imperiled by the effects of further media consolidation and the clear potential for abuse by those who will hold new and/or greater market power.

As discussed in the *Entravision Comments*, many local duopolies have already found that they can be more profitable if, instead of duplicating the formats of other commonly-owned stations in a market, they reprogram some of their stations to serve audiences not adequately served by other stations in the market. In some cases these audiences are minority and specialty audiences now served by one or a handful of local stations. Also, it is increasingly clear that

⁴⁴ See *Comments of Entravision Holdings, LLC*, MB Docket No. 02-277 (Jan. 2, 2003) ("*Entravision Comments*").

group owners – particularly those that would combine with daily newspapers in their markets – will provide at least some minority, specialty and niche programming over their stations and print facilities, along with predominate service to mainstream, majority audiences. Moreover, some of these group owners may choose to reprogram certain of their stations so that they constitute a potent competitor to stations that heretofore have not faced significant competition for a particular minority or specialty audience.

The increasing provision of service to, and competition for the viewership of, minority audiences is, as a matter of principle, in the public interest. But, this ability of – and economic incentive for – consolidated operations to expand their service to minority and like audiences has the clear potential, in practice, to drive out other entrepreneurs already offering or considering offering similar services. Entravision submits that such a development would be gravely injurious to minority and specialty audiences and to the overall public interest. Entravision believes it is essential that minority and other specialty audiences be given diverse viewing and listening choices in any new post-consolidation era, not simply a substitution of one set of voices over those that might be lost due to competitive abuse by media consolidators in a market. Accordingly, the Commission should adopt well-tailored regulations to assure that other stations and the local viewing public are not the victims of anticompetitive behavior by any such new – or existing – local television combinations and local newspaper/broadcast combinations.

Specifically, Entravision submits that owners who control print, video and other media outlets in one market should not be allowed to employ their new-found strength to stifle the remaining competition. For example, these media conglomerates should not be permitted to use such tactics as: (1) having their print media affiliates list their owned-and-operated stations in print station guides but refuse to list – or list less favorably (in terms of typeface, page location

and programming detail, etc.) – some or all competing radio and television stations; (2) providing preferential rates or treatment to advertisers who buy time on their stations exclusively and/or with co-owned print media; and (3) arranging with syndicators to restrict the sale of syndicated programs to other stations in a market. Newspaper/broadcast cross-ownership and significant other consolidation already exists, and Entravision has witnessed firsthand the treatment given to new broadcasters, especially those whose programming is geared to minority and specialty audiences.

Other parties have noted similar abuses of power by large media entities. For example, in March 2001, the Network Affiliated Stations Alliance (“NASA”) petitioned the Commission to inquire into the lawfulness of certain network affiliation agreements and programming practices.⁴⁵ NASA urged prompt action, stating that “when a national network enjoys undue leverage over an affiliated station’s operations, the local affiliated station’s ability to select community-appropriate programming and to make all important business and operational decisions is significantly undermined.”⁴⁶ After promptly soliciting comments on NASA’s Petition in 2001,⁴⁷ the Commission remained silent until June 2004, when it acknowledged the pending proceeding and promised “to issue the requested declaratory ruling expeditiously.”⁴⁸ The Commission has taken no further action on NASA’s Petition since that time.⁴⁹

Past experience suggests that some form of government-compelled accountability is required here, particularly as the Commission again contemplates the weakening or rescission of

⁴⁵ See NASA’s Petition for Inquiry into Network Practices (filed March 8, 2001).

⁴⁶ *Id.* at ii.

⁴⁷ See *Public Notice, Comment Sought on “Petition for Inquiry into Network Practices” Filed by Network Affiliated Stations Alliance*, 16 FCC Rcd 10939 (2001).

⁴⁸ *Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425, 12437 (2004).

⁴⁹ See also *Comments of the National Association of Broadcasters and the Network Affiliated Stations Alliance*, MB Docket No. 02-277 (Jan. 2, 2003) at 31-45 (noting network abuses of power in context of discussion of national ownership cap).

the daily newspaper/broadcast cross-ownership rule and greater local combinations of TV stations. Entravision urges the Commission to acknowledge the concerns expressed in these comments and to take action in areas where the behavior of media conglomerates might cross the line and fall into what traditionally has been considered abusive behavior, if not unlawful predatory practice. Specifically, the Commission should adopt rules that would bar the kinds of “TV listing,” “preferential ad rate” and “syndicated programming restraint” activities described above, as well as other, similarly discriminatory practices.

In taking these steps, the government should not have any role in dictating the format or audiences that any station or group of stations – regardless of whether there is combined ownership with a local, daily newspaper – might choose to program and serve. However Entravision believes that, as part of the Commission’s review of stations’ performance in the public interest, particularly as these stations submit applications for license renewal and station transfer/assignment, the agency should require affirmative certifications as to these licensees’ or their parent, consolidated companies’ behavior in the public interest.

Entravision urges the Commission to adopt a revised regulatory system whereby all television stations with ownership interests in local, daily newspapers and other broadcast outlets– both current and future interests – periodically be required to make affirmative declarations as to their conduct. One possible approach would be for the Commission, as part of its review of television stations at license renewal time, at license mid-term (when TV stations’ EEO compliance⁵⁰ is reviewed), when TV/newspaper combinations are proposed to be transferred or assigned and when new TV/newspaper combination are proposed to be created or transferred, to require applicants/licensees to certify that they have not been engaged and will not

⁵⁰See *Second Report and Order and Third Notice of Proposed Rule Making* in MM Docket No. 98-204 (FCC 02-303), released November 20, 2002.

be engaged (the latter in the case of new station and transfer/assignment applications) in anticompetitive behavior, including those practices described above.

Based on Entravision's own experience, the first questions to be asked by the Commission during such periodic reviews would involve the "newspaper TV listings," "preferential rates," and "syndicated programming embargo" matters addressed above. Other similar indicia of anticompetitive abuse by market conglomerates also could be posed by the Commission and addressed in these periodic reviews. In this fashion, the Commission as well as other parties interested in participating in the Commission's license renewal and enforcement processes will be given new and important tools to help maintain fair competition among local market media and to assure optimized service to the broadcast audience.

This kind of periodic review will result in direct and continuing benefits to television viewers and to local television markets generally, with even greater benefits flowing to non-consolidated stations serving minority and special interest audiences and to the viewers comprising those audiences. Under this regulatory approach, additional consolidation would be allowed in local markets, but existing and new media conglomerates would be required to disclose to the Commission and to the public whether they have engaged in, or may engage in, activities that place in question these stations' operation in the public interest.

B. Commission Regulation not Duplicative of Antitrust Regulation

In the *Ownership Order*, the Commission dismissed the concerns with anti-competitive abuses expressed in the *Entravision Comments* by noting that any anti-competitive conduct arising from consolidation would be subject to antitrust statutes, and that any violations of

antitrust laws would be considered by the Commission as part of character qualification reviews.⁵¹

Entravision submits that the Commission too hastily dispensed with the concerns raised in the *Entravision Comments*. As pointed out in Section I above, localism and diversity have flourished along with the growing number and type of available media outlets. Appropriate consolidation can further promote rather than undermine these goals. However, as pointed in Section II, A, above, consolidation also poses certain threats to competition within the broadcast industry, and if small and medium-sized operators are forced out of the market by conglomerates unfairly exercising their size and/or cross-media-based advantages, the public interest in a diversity of voices will suffer.

Faced with potential anticompetitive practices in the broadcast industry, the Commission cannot pass off its regulatory responsibility to antitrust authorities. The antitrust statutes cannot substitute for FCC regulation. As the Third Circuit noted, the "Commission ensures that license transfers serve public goals of diversity, competition and localism, while the antitrust authorities have a different purpose: ensuring that merging companies do not raise prices above competitive levels."⁵² As the Commission itself has pointed out, it considers audience preferences plus advertising data as indicators of competition, while the antitrust authorities focus on price.⁵³ Moreover, the Commission reviews all license transfers while antitrust authorities review only large mergers.⁵⁴ According to the Third Circuit, based on the fact that eighty-five percent of station mergers since 2000 would not have been subject to antitrust review because the parties' assets fell below thresholds established by the FTC and DOJ, "it hardly seems that the

⁵¹ See *Ownership Order* at ¶ 208.

⁵² *Prometheus*, 373 F.3d at 414 (citing 15 U.S.C. § 18; Merger Guidelines § 0.1).

⁵³ See *Ownership Order* at ¶ 64.

⁵⁴ See *Prometheus*, 373 F.3d at 414 (citing 47 U.S.C. § 310(d), 15 U.S.C. § 18a(a)).

Commission's local television station ownership rule is duplicative of other agencies' antitrust enforcement."⁵⁵

Finally, the concerns raised by Entravision are uniquely within the province of the Commission. As the administrative body charged with regulating the broadcast industry, it falls to the Commission, utilizing its specific knowledge and expertise, to devise appropriate limits on the competitive practices of any media conglomerates whose further consolidation the Commission sanctions. The regulations proposed by Entravision implicate a number of issues with which the Commission has expressed concern, including advertising markets, the ability of independent stations to compete and the availability of independent programming.⁵⁶ For example, the availability of syndicated programming directly affects delivered program markets and viewers, discriminatory listing practices affect viewer access to programming, and ad rates implicate the Commission's concern with advertising data and audience preference. In light of the potential for anti-competitive conduct in the wake of media consolidation and the Commission's unique interest and role in combating anti-competitive practices, the "syndicated programs," "TV listings" and "preferred ad rate" rules advocated by Entravision are necessary in the public interest and constitute appropriate exercises of the Commission's regulatory authority.

III. THE UHF DISCOUNT

In the *NPRM*, the Commission seeks comment on any potential ambiguity in the *Prometheus* Court's pronouncements on the UHF discount, and on whether it should modify or eliminate the UHF discount.⁵⁷

⁵⁵ *Prometheus*, 373 F.3d at 414 (citing BIA Financial Network, *Television Market Report* (2d ed. 2003)).

⁵⁶ See *NPRM* at ¶ 6.

⁵⁷ See *NPRM* at ¶¶ 34-35.

In the Appropriations Act, Congress established a 39 percent national television ownership cap by directing the Commission to modify its multiple ownership rule in Section 73.3555 of the Commission's Rules⁵⁸ by "increasing the national audience reach limitation for television stations to 39 percent."⁵⁹ Congress further modified the 1996 Act by removing the 39 percent national audience reach limitation from the periodic reviews undertaken by the Commission, as authorized under Section 202(h) of the 1996 Act.⁶⁰

In *Prometheus*, the Third Circuit unambiguously held that based on Congress's use of the term "national audience reach" in establishing the national cap at 39 percent, the UHF discount was insulated from further periodic review by the Commission:

Since 1985 the Commission has defined "national audience reach" to mean the total number of television households" reached by an entity's stations, except that "UHF stations shall be attributed with 50 percent of the television households" reached. 47 C.F.R. § 73.3555(e)(2)(i); *Multiple Ownership of AM, FM and Television Broadcast Stations*, 50 Fed Reg. 4666, 4676, 1985 WL 260060 (Feb. 1, 1985). We assume that when Congress uses an administratively defined term, it intended its words to have the defined meaning. *See, e.g., Bragdon v. Abbott*, 524 U.S. 624, 631, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998). Furthermore, because reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit, we cannot entertain challenges to the Commission's decision to retain the 50% UHF discount. Any relief we granted on these claims would undermine Congress's specification of a precise 39% cap.⁶¹

The permanent removal of the Commission's authority to reconsider the UHF discount in the context of the Commission's Section 202(h) periodic reviews is therefore beyond dispute.

The Third Circuit did leave open the possibility that the Commission could revisit the UHF discount outside the context of Section 202(h).⁶² Presumably, the Third Circuit intended to allow the Commission an opportunity to assert its authority to adhere to its original plan, as set

⁵⁸ 47 C.F.R. § 73.3555.

⁵⁹ Appropriations Act § 629 (amending § 202(c) of 1996 Act).

⁶⁰ *See* Appropriations Act § 629 (amending § 202(h) of the 1996 Act).

⁶¹ *Prometheus*, 373 F.3d at 396.

⁶² *See id.* at 397.

forth in the *Ownership Order*, to sunset the UHF discount for the big four networks on a market-by-market basis at the end of the digital transition, and to review at that time whether continuing to apply the UHF discount to other station group owners remains in the public interest.⁶³ At this time, Entravision submits that the Commission should defer any further consideration of the UHF discount, including sunsetting the discount for the networks, until the completion of the digital transition.

⁶³ See *Ownership Report* at ¶ 591.

