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 HEARST-ARGYLE TELEVISION, INC.

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Counsel to Hearst-Argyle Television, Inc.

October 23, 2006

Table of Contents

Summary

I. The Case for Modification of the Local Television Ownership Rule

The manner in which video news, information, and entertainment programming is created and disseminated and the technology used by consumers to access and receive it have changed dramatically since the Commission modified its current local television ownership rule in 1999 and again in 2003—indeed, the pace of change is accelerating at what can only be described as "warp speed."

Cognizant that the changes in communications technology were poised to strain and eventually overtake the Commission's traditional notions of broadcast ownership regulation, Congress in 1996 adopted Section 202(h) of the Telecommunications Act of 1996 to require the Commission to periodically re-examine and "repeal or modify" those broadcast ownership rules that no longer serve the public interest. The thrust of Section 202(h) is, plainly, "deregulatory"; the Commission and the courts have expressly so held.

As forward-thinking as Section 202(h) was in 1996, neither Congress nor anyone else could have reasonably foreseen the seismic shift just ten years later in the way video programming is created, transmitted, and viewed. The minor modifications the Commission made to its local television ownership rule in 2003 (though stayed) have been overtaken by further changes in video transmission technology, the level of video competition, and the diversity of video program choices.

Notwithstanding claims to the contrary, never in history have viewers been afforded more choice in how to *receive* video programming or greater *diversity in the programming available for viewing*. Nor have local television markets ever been more competitive. The comments filed in this proceeding by Hearst-Argyle, NAB, and others document the unprecedented changes that have occurred (and are occurring by the minute) in the way in which video programming is created, transmitted, and viewed; the level and intensity of video competition, as supported by expert economic analyses; the source and viewpoint diversity in video programming that now exists in each local television market; and the impact these changes are having on local television broadcast stations.

The facts are compelling. The empirical data being submitted in this proceeding by the television industry cannot be ignored. The challenge for the Commission going forward is to fashion a local television ownership regulatory regime that will maximize for the nation's television viewers the benefits of competition and the diversity of programming available from the nation's local free, over-the-air television stations. The comments submitted by Hearst-Argyle demonstrate that relaxation of the local television broadcast ownership rule is essential to attainment of that policy objective. No observer of the nation's local television broadcast markets can credibly dispute that the explosion in technology in the delivery of video programming and the escalating fragmentation of television viewing have placed unprecedented economic stress on the nation's local television stations. The prime-time viewing audience shares of broadcast television stations, for example, have dropped precipitously from 90% in 1979-80 to just 50% in 2005-06 as the result of the introduction of hundreds of new video channels by cable and satellite companies. Local television stations in each of the nation's 210 local television markets must be able to consolidate and achieve greater economies of scale in order to compete with the newer video transmission systems and to continue to serve as viable video outlets for local self-expression. The proposal for modification of the current local television ownership rule that Hearst-Argyle proposes is quite modest—perhaps overly so, as the attached economic expert analysis suggests. But, at a minimum, it represents movement in the right direction, and it will begin the process of reformulation of a regulatory scheme that promotes and fosters video competition while preserving the free, over-the-air television system that is the foundation of the nation's television communications policy.

II. The Hearst-Argyle Local Television Ownership Proposal

Hearst-Argyle's local television ownership rule proposal eliminates the existing rule's "voice count" and "top four" restrictions. The proposal substitutes, instead, an analog of antitrust law and analysis and is two-fold: (1) The Commission should permit common ownership of local television stations as long as the combination's collective audience share is 30% or less, and (2) the resulting concentration, together with the change in concentration of audience share, post-combination, must satisfy a standard that is grounded in the general standard set forth in Section 1.51 of the Department of Justice and FTC's *Horizontal Merger Guidelines* utilizing a Herfindahl-Hirschman Index ("HHI") analog for audience share.

Among other things:

* The proposal captures consumer substitutability of television channels, be they over-the-air or cable or DBS, and avoids the arbitrariness of voice counting. In addition, the basic approach remains simple: it obviates the need to consider consumer substitutability of other media for television, especially since there is no common metric among these other media.

* The proposal is likely to survive judicial scrutiny since its pedigree is antitrust law and analysis.

* The proposal has the virtue of stability. Changes in a station's audience ratings of a few tenths of a point, as averaged over a year, will generally have no material impact on whether a combination is permissible.

* The proposal is indifferent to market size.

* The approach consists of bright-line tests, providing critical certainty to the markets, yet it accommodates one exception, for "failed" or "failing" stations, which is unlikely to have the effect of ratcheting up concentration levels over time with developing Commission precedent.

* The approach will be straightforward for Commission staff to apply, greatly speeding application processing time and freeing up Commission resources for other tasks.

Neither economic theory nor empirical evidence support the current rule's "voice count" or "top four" merger restrictions, and they should be eliminated. Attached to these Comments is a Joint Declaration of Luke Froeb, Padmanabhan Srinagesh, and Michael Williams, economic experts that the Commission itself relied upon in the *2002 Biennial Review Order*, which states that, if anything, the Hearst-Argyle proposal is overly conservative.

The proposal satisfies Section 202(h)'s mandate. It satisfies all reasonable desiderata for a structural rule. It advances the Commission's competition, diversity, and localism policy objectives. It will not result in an unchecked wave of mergers. Its pedigree is unimpeachable, and it can be rationally adopted by the Commission and survive judicial scrutiny.

III. The Newspaper/Broadcast Cross-Ownership Rule Should Be Repealed

Finally, the empirical data supporting repeal of the newspaper/broadcast cross-ownership rule hardly need to be restated. There is simply no record evidence upon which the Commission may reasonably retain or relax the newspaper/broadcast cross-ownership rule. To the contrary, the record evidence, as demonstrated at length by Hearst-Argyle and numerous other parties, both in this proceeding and in the earlier proceedings, supports repeal of the rule.

* * *

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 HEARST-ARGYLE TELEVISION, INC.

Hearst-Argyle Television, Inc. ("Hearst-Argyle"), by its attorneys, submits these comments in response to the *Further Notice of Proposed Rulemaking* ("*Notice*"), FCC 06-93, released July 24, 2006, in the above-captioned proceeding. Hearst-Argyle respectfully urges the Commission to (1) modify the local television ownership rule, as proposed herein, and (2) repeal the newspaper/broadcast cross-ownership rule.

The *Notice* was issued pursuant to Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which requires the Commission to review its broadcast ownership rules every four years. The *Notice* is also in response to the decision of the United States Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), which remanded for further agency consideration the most recent decision of the Commission concerning the broadcast ownership rules.

Section 202(h) of the 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" and to "repeal or modify any regulation it determines is no longer in the public interest." Therefore, the Commission has a statutory duty to reexamine its ownership rules and make appropriate adjustments to those rules in light of competitive changes in the marketplace. This requirement is, plainly, "deregulatory" in nature, *Prometheus Radio*, 373 F.3d at 394-95; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir. 2002) (holding that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules"); *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (stating that *Fox* "limit[s] the Commission's authority only to retain a rule 'necessary in the public interest'"), requiring the Commission to abandon rules that are no longer necessary. It is essential, then, that the Commission demonstrate that its current ownership rules are necessary to protect competition in the local media marketplace or modify those rules to accommodate the competitive conditions that currently exist.

By statute, therefore, the Commission is mandated to undertake an examination in *this* proceeding in light of the facts as they present themselves *now*, not when the Commission adopted its currently effective rules in 1999,[1] nor when the Commission concluded its reexamination of the rules in 2003.[2] The Section 202(h) review is independent of the review required by the Third Circuit's remand in *Prometheus*. Accordingly, the Commission must adopt additional deregulatory measures—even as to matters not subject to the *Prometheus* remand—should it be determined that

[1] *See Review of Commission's Regulations Governing TV Broadcasting, TV Satellite Stations Review of Policy & Rules*, 14 FCC Rcd 12908 (1999).

[2] *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) ("*2002 Biennial Review Order*").

the current rules are no longer in the public interest in light of circumstances as they exist now. As the Supreme Court has explained:

> It is a guiding principle of administrative law . . . that an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. . . . Application of that general principle . . . best respects the congressional scheme investing the [agency] and not the courts with broad powers to fashion [rules] that will effectuate national . . . policy. It also affords the [agency] the opportunity, *through additional evidence or findings*, to reframe its order better to effectuate that policy.

NLRB v. Food Store Employees Union, Local 347, 417 U.S. 1, 9-10 (1974) (internal quotation marks and citations omitted) (emphasis added); *see also Bridge v. United States Parole Comm'n*, 981 F.2d 97, 105 (3d Cir. 1992) (quoting *Food Store* and stating that "legal error in an agency decision does not prevent the agency from expanding its record and rethinking its original order").

Current empirical evidence demonstrates the existing local television ownership rule and the newspaper/broadcast cross-ownership rule do not effectuate the congressional policy set forth in the 1996 Act. The manner in which news, information, and entertainment programming is created and transmitted and the technology used by consumers to receive it have fundamentally changed since 1999 and 2003—indeed, the pace of change is accelerating at what can only be characterized as "warp speed." Congress, in enacting Section 202(h), was cognizant of the ever-quickening pace of technological change, and it expressly directed the Commission to reassess and modify its ownership rules periodically to take these changes into account. Accordingly, Hearst-Arygle respectfully requests the Commission to (1) modify its local television ownership rule, as proposed herein, and (2) repeal the current prohibition against common ownership of a television station and daily newspaper in the same market.

I. The Local Television Ownership Rule Must Be Revised Consistent with the Increase in Competition and Diverse Video Delivery Outlets

A. The Number and Popularity of Competing News and Information Outlets Has Exploded

Since 2003—and certainly since 1999—the increase in the number and variety of media outlets—locally and nationally—that deliver video programming has fundamentally altered the balance of competition and diversity in local television markets. In its *2002 Biennial Review Order*, the Commission justified its proposed local television ownership restrictions on concerns regarding competition, rather than on localism and diversity. *See 2002 Biennial Review Order* at ¶ 140 (concluding that competition is linchpin of modified ownership rule); *see also id.* at ¶ 164 (owners/operators of same-market combinations 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); ¶ 165 (there is no record evidence linking relaxation of the local ownership rule to a reduction in local control over content); ¶ 169 (the costs of local news production are rising and this, combined with declines in network compensation and costs of DTV transition, are likely to place some broadcasters under financial pressure which could cause them to choose a less expensive option than producing their own local programming). But the explosion in media outlets discussed below will promote competition, localism, *and* diversity—all of which requires the Commission to adopt further deregulatory measures.

More than 94 million television households now receive video programming from cable, satellite, or another MVPD.[3] And nearly 43 million households (as of December 31, 2005) have access to high-speed DSL or cable-modem services which permit realistic viewing of video programming via the Internet—a figure that is nearly a year old already and is undoubtedly higher

[3] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006), at ¶ 8.

today.[4] The nation's telephone companies have also committed substantial resources to deliver video programming to consumers, either by twisted-pair wire, coaxial cable, or fiber optic cable and by utilizing Internet Protocol.[5]

Cable, satellite, and telephone companies can offer consumers access to hundreds of channels of video programming,[6] while the Internet offers the potential for literally thousands of channels and sources of video programming. Moreover, with video compression technology advancing each day, the ability of local viewers to access a virtually limitless number of video programming sources and services, from local, regional, national, and international programmers, advances each day as well.

There is no way, in view of these changes in technology, in competition, and in the diversity of video delivery systems and sources of program content, that the Commission's current constraints on the number of television broadcast stations a single entity may own in a local market can be rationally justified. A local cable company, telephone company, or satellite carrier can, under the Commission's current rules, own and control the program content of hundreds of channels of video programming—indeed, they can also own and control a television station in the same market. Yet entities are constrained by the current ownership rules from owning and controlling no more than *two* over-the-air television stations in local markets with at least eight independent owners of television stations, and then only if at least one is not among the top four rated stations in the market. The current rule defies reason and logic. It cannot be justified under any rational analysis of today's competitive market conditions.

But while the programming prowess and channel capacity of cable and satellite companies

---

[4] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2005* (July 2006), at 3.

[5] *See id.* at ¶¶ 121-25.

[6] *See id.* at ¶¶ 21-22 (identifying 531 satellite-delivered national programming networks and 96 regional networks).

have existed for years, it is the viability of the Internet as a video delivery mechanism that has produced a seismic shift in video competition and viewpoint and source diversity since the Commission's last review. Today, nearly one-third of U.S. Internet users watch online video at least monthly, and 8% *upload* video clips—all of which represents a sea change from Internet usage habits since the Commission's current ownership rules were adopted.[7] These changes have profound implications for free over-the-air local television stations. The viewing share of broadcast television during prime time hours has dropped precipitously from 90% in 1979-1980 to 50% in 2005-2006.[8]

The past year alone has witnessed a proliferation of video programming delivered by the Internet. The key to this fastest growing media technology has been the rapid deployment of high-speed Internet service. As of December 2005, residential subscribers were served by some 42.9 million high-speed lines.[9] As of May 2006, nearly 75% of active Web users in the U.S. connected at home via broadband, an increase of 15 percentage points over a year ago.[10]

As a result, access to video programming is an essential part of the Internet experience:

> For the first time, the majority of the U.S. households now use some sort of a broadband connection, which means downloading video, which takes a lot of time, is faster now. And, at the same time, over the past several years, especially with Internet growing, younger people in particular have been paying less attention to traditional forms, like TV or even going out to [] see movies. So, all of these things have compelled the content creators and studios to look for

[7] *Communications Daily* (Sept. 22, 2006), at 11 (citing Parks Assoc. study).

[8] *See* BEAR STEARNS, TELEVISION BROADCASTING: BROADCAST TELEVISION FACT BOOK (July 2006), at 163.

[9] *See* Industry Analysis and Technology Division, Wireline Competition Bureau, Federal Communications Commission, *High-Speed Services for Internet Access: Status as of December 31, 2005* (July 2006), at 3.

[10] "U.S. Broadband Composition Reaches 72 Percent at Home, a 15 Point Year-Over-Year Increase, According to Nielsen//NetRatings," Nielsen//NetRatings (June 21, 2006), *available at* <http://netratings.com/pr/pr_060621.pdf>.

> new ways of distribution, being online especially.[11]

The convergence of broadband deployment, advances in compression technology, and consumer interest have reached the "tipping point,"[12] where consumers and programmers are accepting of—and, indeed, demanding—video programming from the Internet. As one industry study observes:

> Today, audiences are becoming increasingly fragmented, splicing their time among myriad media choices, channels and platforms. For the last few decades, consumers have migrated to more specialized, niche content via cable and multichannel offerings. Now, with the growing availability of on demand, self-programming and search features, some experiencers are moving beyond niche to individualized viewing. With increasing competition from convergence players in TV, telecommunications and the Internet, the industry is confronting unparalleled complexity, dynamic change and pressure to innovate.[13]

Because of the Internet, the cost of entry into the video programming marketplace by producers of video programming is at an all-time low. Thanks to technological advances, the costs of video streaming and video storage have plummeted.[14] The price of registering an Internet domain name—the basic "price of admission" to acquire space on the Internet—is *de minimis*, and web hosting has become a commodity service.[15] Individuals now have a host of outlets for making original content available to anyone with broadband Internet access. Their own content can be

---

[11] The Online NewsHour, Transcript, "Apple Reveals New Internet Movie Service," *available at* <http://www.pbs.org/newshour/bb/media/july-dec06/ipod_09-13.html> (interview with Safa Rashtchy, managing director and senior research analyst at the investment bank Piper Jaffray).

[12] *See generally* MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE (Little, Brown & Co. 2000), at 1-14.

[13] IBM Institute for Business Value Study, "The End of Television As We Know It: A Future Industry Perspective" (Mar. 27, 2006), *available at* <http://www-935.ibm.com/services/us/index.wss/ibvstudy/imc/a1023172?cntxt=a1000062&re=endoftv>.

[14] *Id.* at 18.

[15] *See, e.g.*, <http://www.register.com> (offering domain registrations for $10/year); <http://www.networksolutions.com> (offering entry level web hosting services for $9.96/month).

posted on their own websites or on the websites of others, often for no cost at all. It is estimated that today one can create a full-fledged television "network" on the Internet for less than a million dollars.[16] It is, of course, axiomatic in antitrust analysis that concerns over competitive concentration and market dominance lessen in markets with low entry costs.

A prime example of this phenomenon is the emergence of "YouTube" and its announced acquisition by Google for $1.65 billion in October 2006. Founded only in February 2005, YouTube allows users to post and share video content, and the content posted on the site includes works such as fan-created music videos and parodies as well as whole and/or unaltered scenes, commercials, music videos, and short films. In its short life, YouTube has become one of the fastest-growing websites on the World Wide Web, and it is currently ranked as the tenth most popular website in terms of traffic.[17] The site has nearly 20 million visitors each month, and some 100 million clips are viewed *daily*, with an additional 65,000 new videos uploaded every 24 hours.[18] As evidence of this success, YouTube has also captured the attention of mainstream programmers; for example, in September 2006, Warner Music announced a partnership with YouTube to distribute music videos over the site.[19] Other popular sites offer similar services and allow users to post, share, and view

---

[16] *Communications Daily*, "Low Costs Lure Start-up Video Programmers to Internet," (Sept. 27, 2006) ("For under $1 million, you can have yourself your own TV network." (quoting Radek Burkart, CTO of Rip.TV)).

[17] Alexa Traffic Rankings, *available at* < http://www.alexa.com/site/ds/top_500> (last visited Sept. 19, 2006).

[18] Source: <http://en.wikipedia.org/wiki/YouTube> (last visited Sept. 19, 2006) (citing "YouTube serves up 100 million videos a day online," *USATODAY.com* (July 16, 2006); "YouTube U.S. Web Traffic Grows 17 Percent Week Over Week, According to Nielsen//Netratings," Press Release, Netratings, Inc. (July 21, 2006)).

[19] "Warner Music Group and YouTube Announce Landmark Video Distribution and Revenue Partnership," Press Release (Sept. 18, 2006), *available at* <http://www.youtube.com/press_room_entry?entry=vCfgHo5_Fb4>.

video clips.[20] Such services fundamentally alter the video programming marketplace, as they fragment viewership and offer a limitless variety of programming alternatives. Moreover, Google's willingness to pay $1.65 billion for YouTube confirms the value the competitive market places on video delivery by the Internet.

The Commission cannot overlook the fact that the entire YouTube phenomenon, including its wealth-generating effects, has occurred entirely since the Commission's last ownership review and the *Prometheus Radio* decision. That is indicative of the speed at which the marketplace for delivered video is changing. Moreover, YouTube, MySpace, Google Video, and most of today's other popular websites were started with minimum capital investment and by *individuals*, not major media companies. The barriers to entry in this market space are *de minimis*—all it really takes is a creative idea and an entrepreneurial spirit.

Moreover, as additional evidence of the emergence of Internet video as a commercially viable path of distribution, the Internet is increasingly a source for distribution of television broadcast network programming. Recent broadcast network initiatives include the following:

* In November 2005, ABC began allowing episodes of *Lost* and *Desperate Housewives* to be downloaded for $1.99 via Apple's iTunes service. The other networks quickly followed suit with similar plans. NBC announced that it would allow shows such as *Law & Order: SVU* and *Monk* to be downloaded onto DirecTV digital video recorders for 99 cents each. CBS made shows such as *Survivor* available to Comcast's cable-TV subscribers also for 99 cents per download.[21]

* Each of the major networks now offers downloads of network shows on Apple's iTunes service. iTunes currently has more than 220 shows from most of the major studios available for download.[22] A partial list of these

---

[20] *See, e.g.*, Google Video, *available at* <http://video.google.com/>; Yahoo Video, *available at* <http://video.search.yahoo.com/>; DAVE.TV, *available at* <www.dave.tv>.

[21] *Multichannel News*, "Television May Have Just Passed Its 'Tipping Point'" (Nov. 14, 2005), at 1.

[22] "Apple Computer Aims to Take Over Your Living-Room TV," WALL ST. J. (Sept. 13, (continued...)

shows is attached hereto as Attachment 1.

* The major networks (as well as many cable channels) also offer shows for download through Amazon Unbox and Google Video.[23]

* In March 2006, CBS permitted live, free streaming of “March Madness” NCAA basketball tournament games via the NCAA tournament site.

* In September 2006, CBS and Comcast announced that they would begin offering episodes of popular network programming for download at no charge.[24]

* NBC is debuting two new series this fall and four returning series on its new website, NBCFirstLook.com, one week before their respective broadcast debuts. Similarly, NBC is providing other network shows on AOL, Yahoo, and Google. The CW Network permitted MSN to stream several of its new shows. Fox is using its websites MySpace and IGN in connection with its fall season premiere.[25]

* Beginning in September 2006, ABC is streaming episodes of its programming on ABC.com after they air. ABC will also allow local affiliates to stream some prime time shows as well as clips from *ABC News* on local Web sites.[26]

* In October 2006, CBS Television Stations and Yahoo! announced an exclusive syndication agreement in which local news video from 16 CBS

(...continued)
2006), at B1.

[23] *See* <http://www.amazon.com/b/?&node=16261631>.

[24] “CBS, Comcast Shift From 99-cent Downloads to Free Online Fare,” L.A. TIMES (Sept. 15, 2006), *available at* <http://www.latimes.com/business/la-fi-video15sep15,1,3150256.story?coll=la-headlines-business&ctrack=1&cset=true>.

[25] *Advertising Age*, “Must-See Computer Screens; As Fall Shows Debut Online, Network Execs Experiment with Web Strategies” (Sept. 14, 2006), *available at* <http://adage.com/print?article_id=111849>.

[26] *See id.*; *see also* Press Release, “Disney-ABC Television Group’s Emmy-winning ABC.com Brings Back Enhanced, Ad-supported Broadband Player This Month,” *available at* <http://www.abcmedianet.com/pressrel/dispDNR.html?id=091306_01>; *Broadcasting & Cable tv fax* (Sept. 26, 2006) (reporting on same).

O&O television stations would be made available daily on Yahoo! News.[27]

Perhaps most importantly, television broadcast-like video services via broadband platforms are emerging. Indeed, "[t]he computer has crashed into the television set,"[28] with the result that consumers can now access television-quality programming over their computers. For example, MobiTV has recently announced the expansion of its service to not only AT&T wireless users but also AT&T broadband subscribers (dubbed, "AT&T Broadband TV").[29] This is one of the first major efforts to bring subscription TV service to the U.S. broadband market.[30] Other similar services include "JumpTV," which offers live television channels from foreign countries, and "Virtual Digital Cable" which offers a subscription television service with shopping and news channels.[31]

Similar efforts have been launched by other programmers. AOL and Time Warner have launched "AOL In2TV," which they promote as the "first broadband television network." AOL In2TV claims to offer the largest collection of free television shows on the Internet, featuring classic episodes from their archives in genre-themed channels, together with viral videos and interactive games.[32] In2TV includes such shows as *Gilligan's Island*, *Chico and the Man*, and *Wonder Woman*

---

[27] *See* Press Release, "Yahoo! News and CBS Television Stations Form Exclusive Partnership to Deliver Local News Video" (Oct. 16, 2006), *available at* <http://yhoo.client.shareholder.com/press/ReleaseDetail.cfm?ReleaseID=214656>.

[28] *The End of TV (As You Know It)*, *News: Analysis and Commentary* (Nov. 21, 2005) (quoting Brian L. Roberts, CEO of Comcast Corp.), *available at* <http://www.businessweek.com/magazine/content/05_47/b3960075.htm>.

[29] Telecom Web, "ABC, NBC, CBS And Now . . . AT&T" (Sept. 12, 2006), *available at* <http://www.telecomweb.com/tnd/19183.html>. *See also* Press Release, "AT&T and MobiTV Launch Live TV Subscription Service for Broadband" (Sept. 12, 2006), *available at* <http://www.mobitv.com/press/press.php?i=press/release_091206>.

[30] *See* "AT&T Sets Live Web TV for PCs," WALL ST. J. (Sept. 12, 2006), at A13.

[31] *See* <http://www.vdc.com> and <http://www.jumptv.com>.

[32] *See* <http://television.aol.com/in2tv>; "AOL In2TV Launches First Broadband Television

(continued...)

(a complete list of programming is attached hereto as Attachment 2). Likewise, many cable networks, such as MTV, Sci Fi, and Court TV, have launched broadband channels on their websites.[33]

The content now available via the Internet is not only national but is increasingly local in nature. For example, the world's most popular Internet portal, Yahoo.com, currently offers on its home page a link to local news content based on the user's input of his or her zip code. By clicking on the "local" tab, users are immediately provided with links to *local* news and weather. In addition, the site has permanent "top-of-the-page" tabs to *local* weather and traffic. Similarly, *local* events such as popular sports programming are increasingly available to consumers from the Internet.[34] For example, Raycom Sports, Lincoln Financial Sports, and The Atlantic Coast Conference have formed a partnership that now offers online video streaming, called "ACC Select," of ACC conference sports not available via broadcast or cable television during the 2006-2007 school year. Devices such as Slingbox allow users to view local television programming over a broadband connection from any location in the world.[35] With such devices, it is possible for a viewer who lives in Hawaii to watch his or her local television programming via a broadband connection in New York City. Indeed, Slingbox can even be used to deliver video of local interest that is *not* transmitted by a television station or MVPD, as has been done to provide coverage of a football game between the University of California at Berkeley and Washington State.[36] In addition, Motorola has demonstrated

(...continued)
Network" (Mar. 15, 2006), *available at* <http://informitv.com/articles/2006/03/15/aolin2tvlaunches/>.

[33] *See Broadcasting & Cable*, "The Broadcast Upfront" (May 8, 2006), at 19.

[34] *See, e.g.*, News Release, "The Atlantic Coast Conference and Raycom Sports, Lincoln Financial Sports Launch ACC Select" (Sept. 18, 2006).

[35] *See* <www.slingmedia.com>.

[36] *See Broadcasting & Cable tvfax*, "Slingbox to the Rescue" (Oct. 16, 2006), at 5 (discussing
(continued...)

a service called "Follow Me TV" that will eventually make it possible to move video from a home television's set-top box to a cellphone. The first version, launched recently by Verizon under the name "Home Media DVR," lets consumers pipe video only to television screens in the house, at about $20 a month.

Through these and other innovations the traditional distinction between the computer and the television is disappearing. This process will accelerate with Apple's recent announcement of "iTV," which aims to introduce an iPod-like device to allow consumers to view on their television sets video programming delivered via the Internet.[37] The wireless device will display movies and other video purchased or downloaded from the Internet on television sets, thus marrying the computer with the television in a manner that will make all computer video content accessible by consumers from their television sets. As a result, the number of channels or sources of video programming potentially available to consumers will have increased from the several hundred channels now provided by cable and satellite companies to the literally thousands upon thousands of sources available from the Internet.

At the same time that consumers are accessing broadcast-like video via the Internet, they are also receiving such programming via mobile devices such as cellphones and PDAs. For example, MobiTV has entered into arrangements with the major wireless carriers to provide access to a wide range of television programming via wireless devices.[38] The service, which currently has more than

---

[36](...continued)
Slingbox being used to take in-stadium video feed in Pullman, Washington, to provide game coverage at stadium in Berkeley).

[37] "Apple Computer Aims to Take Over Your Living-Room TV," WALL ST. J. (Sept. 13, 2006), at B1.

[38] *See* <http://www.mobitv.com/channels/channels.php> (last visited Sept. 21, 2006) ("With MobiTV your phone becomes a portable TV. Watch your favorite channels right in the palm of your hand. . . . The Emmy® Award winning service is available through your wireless carrier and offers
(continued...)

one million subscribers, has some 20 channels of live and made-for-broadband television content, including national news, sports, and entertainment programming from programmers such as Fox News, Bloomberg, Oxygen, the History Channel, and the Weather Channel.[39]

Broadcast television itself is also now available via mobile applications[40]:

* The producers of ABC's hit series *Lost* are planning a series of two-minute *The Lost Diary* mini-episodes on Verizon's V Cast service, using actors and writers from the show. The mini-episodes will later be made available on ABC.com.

* Cingular Wireless and HBO have produced made-for-mobile mini-episodes of *Entourage*, featuring the same writers and actors behind the hit comedy series. In addition, subscribers to HBO Mobile can watch full-length episodes on their phones, along with *Sex and the City*, *Curb Your Enthusiasm*, and other programs.

* The Weather Channel currently produces some 4,800 clips per day for mobile devices on all the major carriers. New services will combine on-demand or live video with mobile Web and text messaging. For example, a user could receive a severe weather alert via text message and then, by clicking on the message, could access related video clips related to the weather event.

* ABC News offers short on-demand clips from *Good Morning America*, *World News Tonight*, and *Nightline* on Cingular, Sprint, and Verizon. Sprint and Cingular, through MobiTV, also offer a live ABC News channel.

* Alltel Wireless is offering video and audio podcasts as part of a monthly $3.99 subscription.

The roll-out of mobile video is expected to be facilitated by the recently completed auction of Advanced Wireless Services spectrum by the Commission. This new spectrum—purchased by wireless entities such as T-Mobile USA Inc. and Verizon Wireless, among others—will allow

---

(...continued)
many popular TV channels such as MSNBC, ABC News Now, CNN, Fox News, Fox Sports, ESPN 3GTV, MLB, NBC Mobile, CNBC, CSPAN, The Discovery Channel, TLC, The Weather Channel and others that deliver cartoons, music videos and comedy.").

[39] *See id.*

[40] *USAToday.com*, "Will Consumers Tune in to a Tiny TV in Their Hand?" (Sept. 17, 2006), *available at* <http://www.usatoday.com/tech/wireless/2006-08-17-mobile-tv_x.htm>.

wireless providers to roll-out Third Generation (3G) devices that will make it easier to access data, including video, over a wireless connection. As Chairman Martin stated: "Auction winners are expected to use this prime 'spectrum real estate' to roll out new devices, which will allow consumers to access the Internet and dedicated video services wherever they want, whenever they want. For example, sports fans watching their favorite team will no longer need to wait until they get home to catch up on the games—they will be able to watch highlights and obtain scores on their mobile devices in *real-time*."[41]

It is also technically possible to deliver mobile (and fixed location) video by satellite digital audio radio services (satellite "DARS"). Sirius Satellite Radio has recently filed a new satellite application with the Commission in which it describes an advanced modulation scheme that would permit a 1.35 Mbps digital stream capable of delivering compressed video channels to automobiles.[42]

The emergence of broadband, wireless, and other non-traditional, non-broadcast video as a viable alternative to local broadcast television station programming is occurring at the same time that sweeping changes are taking place in the multichannel video programming marketplace. As telephone companies enter the video market, states are adopting streamlined entry requirements that will drastically lower regulatory costs of entry. As of this date, eight states have adopted such streamlined regulations, and many other states are considering similar legislation.[43] In addition, bills

---

[41] FCC, *Statement of Chairman Kevin J. Martin on the Conclusion of the Advanced Wireless Service Auction*, News Release (Sept. 18, 2006) (emphasis in original); *see also WashingtonPost.com*, "FCC Auction Could Open Up Airwaves" (Sept. 19, 2006), at D0, *available at* <www.washingtonpost.com/wp-dyn/content/article/2006/09/18/AR2006091801328.html>.

[42] *See* Sirius Satellite Radio Inc. Application for Authority to Launch and Operate SIRIUS FM-5, a Geostationary Satellite, to Provide Satellite Digital Audio Radio Services, File No. SAT-LOA-20060901-00096, at Attachment A, p. 9.

[43] *See* Ca. AB 2987, Ch. 700, Statutes of 2006; Ind. H.B. 1279, Act No. 1279; Kan. S.B. 449; N.J. A-804, P.L. 2006, c. 83; N.C. H2047, S.L. 2006-151; S.C. H4428, Act No. 288; Tex. S.B. 5; Va. S706, c. 73. Legislation is pending or contemplated in many other states, including Connecticut,

(continued...)

are pending in Congress that would mandate such streamlined video delivery regulation nationwide.[44] The end result of such efforts is likely to be significant new competition in the multichannel video programming marketplace by telephone companies and other new entrants.

Together, these regulatory, technological, and market developments are transforming the Delivered Video Programming ("DVP") industry. Barriers to entry are disappearing, technology which facilitates the delivery of new video services is being deployed widely, and consumers are increasingly accepting of video programming delivered by non-traditional media such as mobile devices and the Internet. It is in this context that the Commission must evaluate its existing and proposed ownership restrictions.

These transformations are occurring so rapidly, however, that they underscore two difficulties the Commission necessarily faces in this proceeding. *First*, the Commission should accept that it will have to act on the basis of information available *today*. Announcements pertaining to video programming delivered via broadband are literally occurring every day, and the trend is all one way: There is substantially more video programming delivered to viewers over the Internet today than there was in 2003; there will be more video programming delivered to viewers over the Internet when the Commission issues its order in this proceeding than there is today; and there will be even more video programming delivered to viewers by the time the inevitable court review of the Commission's order is complete. The accelerating increase in delivery of video programming by cable, satellite, and telephone companies, and now the Internet, is coupled with a troubling decrease in audience viewing shares of local television stations. It is an indisputable fact that local television stations are being watched, in percentage terms, by fewer viewers now than at anytime in recent history. As noted above, the audience share of broadcast television during prime time hours has

---

(...continued)
Florida, Iowa, Maine, Michigan, Minnesota, Missouri, New York, Pennsylvania, and Tennessee.

[44] *See, e.g.*, H.R. 5252.

fallen from 90% in 1979-1980 to just 50% in 2005-2006.[45] Because there are only so many hours in a day in which people can watch video programming, the increasing trend in delivered video programming via cable, satellite, and telephone companies, and now the Internet, will only exert continued downward pressure on the declining trend in broadcast television viewership. The only rational conclusions the Commission can draw from these trends is that the existing local television ownership rule is hopelessly antiquated, the rule no longer advances its original public policy objectives, and, in order for local television stations to be competitive in a virtually limitless multi-channel marketplace, the local television ownership rule must be reformed. It is in *this* context that the Commission confronts Section 202(h)'s deregulatory mandate.

Second, because the new mechanism of delivering video programming via the Internet is fundamentally different than the traditional mechanism of delivering video programming by television stations, cable, and satellite, the industry has yet to develop comprehensive ways to measure the overall audience share of all programming across all means of delivery.[46] Just because it has yet to be measured comprehensively, however, does not mean that it cannot be measured, and just because it is not yet comprehensively measured does not mean that video programming delivered via the Internet is not competitive with or a substitute for video programming delivered via traditional means. Moreover, this current lack of measurement of all video programming on a comprehensive and comparative basis does not justify forestalling modification under Section 202(h) of the local televison ownership rule. The Commission can rationally modify its television ownership restrictions by acknowledging that the two opposing trends discussed above have real effects in the DVP market, even if those effects are not being fully measured on a comprehensive

[45] *See* BEAR STEARNS, TELEVISION BROADCASTING: BROADCAST TELEVISION FACT BOOK (July 2006), at 163.

[46] *See* Emily Steel, "Who's Watching Those Webisodes?" WALL ST. J. (Oct. 11, 2006), at B4 (discussing how research firms are trying "to figure out a standard way to measure audiences across different media").

basis at the current time.

In short, the accelerating trend of video programming delivery by new media and the current inability to capture its full effects on broadcast television audiences are not insuperable barriers to the Commission's task in this proceeding. The Commission can both integrate the overwhelming empirical evidence of the explosion in the number of outlets providing news, information, and entertainment to consumers and fulfill its obligation under Section 202(h).

B. There Is an Abundance of Viewpoint Diversity in Local Markets

In its *2002 Biennial Review Order*, the Commission correctly concluded:

> Upon review of the record in this proceeding as well as our own analysis of local media markets, we find that media other than television broadcast stations contribute to viewpoint diversity in local markets. The data in the record indicate that the majority of markets have an abundance of viewpoint diversity.
>
> . . . [W]e find that media outlets other than television stations contribute significantly to viewpoint diversity in local markets, and that our current [local television ownership] rule fails to account for this diversity.[47]

Other parties will be documenting in their comments the full extent to which daily newspapers, weeklies, full and low power radio stations, local magazines, and other media outlets constitute alternative sources of viewpoint diversity in local markets. However, the *Prometheus Radio* Court suggested that the evidence before the Commission in the 2002 proceeding was inadequate to demonstrate that cable and the Internet are sufficient sources of viewpoint diversity.[48] The Court's reading of the evidence was internally inconsistent and, with respect to the local television ownership rule, *dictum*. Moreover, current evidence makes it plain that cable and the Internet provide significant outlets for viewpoint diversity in local markets.

With respect to the newspaper/broadcast cross-ownership rule, the Court in *Prometheus*

---

[47] *2002 Biennial Review Order* at ¶¶ 171, 176.

[48] *See Prometheus Radio*, 373 F.3d at 415.

Radio stated that "the Commission found that diverse viewpoints from other media sources in local markets (such as cable and the Internet) compensate for viewpoints lost to newspaper/broadcast consolidations. We *agree* record evidence suggests that *cable and the Internet* supplement viewpoint diversity provided by broadcast and newspaper outlets in *local markets*."[49] With respect to the local television ownership rule, the Court stated, "We agree with the Commission's conclusion that broadcast media are not the only media outlets contributing to viewpoint diversity in local markets."[50] These statements clearly indicate that the Commission's reliance on the evidence before it was appropriate.

Nevertheless, the Court specifically stated that, because it was remanding the Commission's numerical limits in its new local television ownership rule, "we need not decide the degree to which non-broadcast media compensate for lost viewpoint diversity to justify the modified rule."[51] The Court then when on to "note," in a textbook example of *dictum* because its further statement was not necessary to the Court's decision to remand the numerical limits, that "it *seems* that the degree to which the Commission can rely on cable or the Internet to mitigate the threat that local station consolidations pose to viewpoint diversity is limited."[52]

The significance of the *Prometheus Radio* Court's *dictum* for this new proceeding is inconsequential. Not only is the Court's own concurrence in the Commission's legal conclusion about cable's and the Internet's contributions to viewpoint diversity abundance internally inconsistent with its *dictum*, but more current evidence demonstrates, beyond any question, that cable and the Internet are significant sources of *local* viewpoint diversity in *local* markets.

---

[49] *Id*. at 400 (emphases added).

[50] *Id*. at 414.

[51] *Id*. at 415.

[52] *Id*. (emphasis added).

Not only do typical cable systems provide a hundred or more channels of national news, sports, and entertainment programming, each providing an outlet for the expression of diverse viewpoints, but many cable systems provide access to local or regional news channels, public affairs networks, and public, educational, and governmental ("PEG") access channels. A 2004 report from the Radio and Television News Directors Foundation ("RTNDF") provides details on some 40 local and regional news channels, ranging from New England Cable News,[53] which is provided to some 3 million households in the New England region, to Chicagoland Television News, to Arizona's News Channel/¡Mas! Arizona in Phoenix.[54] Collectively, these local and regional news channels reach approximately 41% of television households nationwide. The RTNDF report also provides data on some 25 state public affairs networks (with ten more that were to have been launched after 2004), ranging from The California Channel, which reaches 89% of California's cable households, Pennsylvania Cable Network, which reaches 85% of cable households in Pennsylvania, and Michigan Government Television, which reaches 75% of cable households in that state, to much smaller networks, such as Helena Civic Television in Helena, Montana.[55] In addition to those discussed in the RTNDF report, other such networks exist, such as OPEN/net in North Carolina, which was begun in the early 1980s, and which is available on many cable systems throughout the state.[56]

At the same time that there is substantial penetration of local and regional news channels and public affairs networks, cable systems almost universally offer multiple PEG access channels

---

[53] New England Cable News is co-owned by The Hearst Corporation.

[54] *See* RADIO AND TELEVISION NEWS DIRECTORS FOUNDATION, CABLE NEWS: A LOOK AT REGIONAL NEWS CHANNELS AND STATE PUBLIC AFFAIRS NETWORKS (2004), *available* at <http://www.rtnda.org/resources/cable.pdf >.

[55] *See id.* at 18, 19, 23.

[56] *See, e.g.*, <http://www.ncapt.tv/net_tv.htm>.

pursuant to local franchise agreements. One of the groups that represents PEG access programmers, the Alliance for Community Media, has recently stated to the Commission at its hearing in Keller, Texas, that it represents some 3000 PEG access centers nationwide.[57] These PEG access centers provide, in turn, an outlet for 250,000 different community organizations to provide local programming in local communities across the nation.[58] These "[l]ocal PEG programmers produce 20,000 hours of new programs per week—that's more new programming than all of the broadcast networks combined."[59] These figures are beyond impressive; they are staggering in their magnitude.

In addition to these additional cable outlets that are targeted expressly at local and regional audiences, even traditional cable channels provide ample opportunity for the expression of diverse *local* opinions, another fact that cannot be dismissed. For example, politicians in this 2006 election season are embracing traditional cable channels as a means to more precisely target those segments of the electorate they wish to reach with their political speech. It is estimated that in this mid-term election year some $200 million will be spent for political discourse on local and national cable spots, which is 70% more than was spent on such spots in the 2004 presidential election year cycle.[60] Cable stations carried paid-for political speech in nearly every major statewide primary campaign nationwide this year. This growth in the utilization of cable channels for political speech of concern to local viewers is the result of cable's increasing facility in inserting local spots in cable channels and a recognition that the "television audience is not as monolithic on the broadcast side as it once

---

[57] *See* Alliance for Community Media, Testimony of Sharon King in MB Docket No. 05-255 (Feb. 10, 2006), *available at* <http://www.alliancecm.org/news.php?news_id=54>.

[58] *See id.*

[59] *Id.*

[60] *See* Amy Schatz, "As TV Campaign Spending Soars, Cable Outlets Attract More Dollars," WALL ST. J. (Aug. 28, 2006), at A1.

was."[61] The willingness by local politicians and others with political messages to communicate to spend several hundred million dollars on cable spots is plain evidence that these individuals and groups view cable channels as a substitute for local broadcast television stations. The Commission cannot ignore this evidence.

The only conclusion that can be drawn from the evidence of cable local and regional news channels, public affairs networks, PEG access channels, and political expression on traditional cable channels is that there is no shortage of independent and alternative *local* outlets for viewpoint diversity in *local* markets.

But as impressive as are the opportunities for the expression of diverse opinions on multiple cable channels, they pale in comparison to the potential avenues for the expression of diverse opinions on the Internet. As the Supreme Court recognized nearly a decade ago (ancient history in terms of the Internet):

> Finally, unlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a "scarce" expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. . . . This dynamic, multifaceted category of communication includes not only traditional print and news services, but also audio, video, and still images, as well as interactive, real-time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.

Reno v. ACLU, 521 U.S. 844, 870 (1997). Much of the explosive growth in the Internet, particularly as a mechanism for the delivery of video programming, as well as its *de minimis* entry cost, was described above. But the one realm of expression, not mentioned by the *Reno* Court, that exemplifies the soapbox town crier is the web log (or "blog"), an electronic media outlet for *local* self-expression. The "blog" scarcely existed in 1997 and was of little significance even in 2002 and

---

[61] *Id*. (quoting Ed Dunbar, a Comcast executive).

2003, but it now constitutes a formidable force both in reporting local and national news and in expressing diverse opinions.

Blogs are one of the most dynamic facets of the Internet today. The phenomenon was recently summarized as follows:

> While many blogs concern an individual's life or perspective on a variety of issues, blogs range in scope from small on-line diaries targeting personal groups of friends to large, frequently updated Web sites that aim their content at worldwide audiences. It is estimated that there are over sixty million blogs currently on the Internet, and this number is growing at a tremendous rate every day.
>
> Especially over the past year, bloggers have placed the traditional media in a precarious situation as bloggers have been able to fully cover numerous news stories of great public importance in a humanistic voice before the mainstream media had even begun reporting on the situations. While the mainstream media struggled to cover these stories, blog posts quickly appeared online, bringing thousands of first-hand accounts into homes across the globe. Due to the widespread coverage of such important news events, many bloggers consider themselves citizen journalists who target their sites to vast audiences.[62]

Just one recent example of a blogger acting as citizen journalist and breaking an important story is the identification by a blogger of one of the House pages who had received salacious messages from former Congressman Mark Foley.[63] And for those who think the Internet and blogs are not a serious source of *local* news and opinion, the coverage of the Duke University lacrosse/alleged rape case stands as a clear rebuttal.[64]

Data and websites measuring, aggregating, and indexing blogs are constantly changing. Data as of May 2005, which is, no doubt, outdated by now, showed that two leading blog indexers

---

[62] Melissa A. Troiano, Comment, "*The New Journalism? Why Traditional Defamation Laws Should Apply to Internet Blogs*," 55 AM. U. L. REV. 1447, 1448-49 (June 2006) (citations omitted).

[63] *See* Amy Schatz, "*How a Blogger Put Himself in the Middle of Mark Foley Story*," WALL ST. J. (Oct. 16, 2006), at A1.

[64] *See, e.g.*, <http://durhamwonderland.blogspot.com/> (blog of K.C. Johnson, with links to other blogs concerning the Duke lacrosse/alleged rape case).

(Technorati Inc. (www.technorati.com) and BlogPulse (www.blogpulse.com)) each had more than 10 million blogs world-wide, with daily volume on Technorati some 800,000 to 900,000 posts and daily volume on BlogPulse some 350,000 to 450,000 posts.[65] It was estimated in 2005 that approximately 32 million American adults read blogs.[66] A more recent article stated that blogs are updated 50,000 times per *hour* and that 75,000 new blogs are created every day.[67]

Blogs are local outlets not only for news junkies but also for everyday Americans, from those who like to discuss local sports, restaurants, and music, to those interested in celebrity gossip, and even for soldiers serving in Iraq and Afghanistan. Political debate is a staple. Blogs are the quintessential "soapbox" with virtually no barrier to entry, a platform to address any topic of interest, and an audience as vast as one desires. Though by no means comprehensive, there are blog portals that allow one to seek and read blogs by geographic locality, showing that the blogosphere can be as local or as global as a user wishes.[68]

Between the explosion in the means of posting and receiving video content discussed in the previous section and the many millions of local blogs expressing individual opinions discussed above (as well as the ease with which anyone can participate), there can be no question that the Internet is suffused with opportunities for viewpoint diversity. Together with the myriad opportunities to communicate diverse viewpoints provided by cable local news channels, public affairs channels, and

---

[65] *See* Carl Bialik, "*Measuring the Impact of Blogs Requires More Than Counting*," WALL ST. J. ONLINE (May 26, 2005), *available at* <http://online.wsj.com/public/article/SB111685593903640572.html>.

[66] *See id.*

[67] *See* Pat Flannery, "*Blogs changing political discourse*," ARIZ. REPUBLIC (May 26, 2006), *available at* <http://theadvertiser.gns.gannettonline.com/apps/pbcs.dll/article?AID=/20060525/TECH01/605250301/1001/tech>.

[68] *See, e.g.*, <http://portal.eatonweb.com/country/United%20States> (providing blogs by state); <http://www.feedmap.net/BlogMap/Search.aspx> (providing a search function to identify blogs by location).

PEG access channels (and even traditional general entertainment cable channels), American consumers have access to a virtual cornucopia of news, information, and entertainment—local, national, and international in character—from these two categories of alternative non-broadcast sources. Every leisure moment that consumers create, write, watch, or read these alternative viewpoint outlets is a moment they are not viewing their local television station. They are substitutes in the production and consumption of information in every meaningful way. There is an abundance of viewpoint diversity in local markets that can scarcely be doubted. Whatever shortcomings the Third Circuit may have perceived in the evidence in the last review clearly no longer exist now—if they ever did.

C. Hearst-Argyle Proposes a Local Television Ownership Rule Predicated on an "Audience Share" Metric Derived from Antitrust Analysis

In its *2002 Biennial Review Order* the Commission stated:

> Our current rules inadequately account for the competitive presence of cable [and] ignore the diversity-enhancing value of the Internet . . . . Neither from a policy perspective nor a legal perspective can rules premised on such a flawed foundation be defended as necessary in the public interest. . . . Our current rules are, in short, a patchwork of unenforceable and indefensible restrictions that . . . do not serve the interests they purport to serve."[69]

Because the Commission recognizes that the existing local television ownership rule cannot stand, and in view of the trends discussed in the preceding section together with Section 202(h)'s mandate to revisit the local television ownership rule afresh in this new quadrennial proceeding, any revised rule cannot slight the competitive presence of cable or consist of a hodge-podge of unintegrated restrictions. Rather, a revised local television ownership rule should be grounded in competition theory, should account for the substitutability of cable/satellite viewing (which is fully measurable and, in fact, is actually measured), and should be logical and complete without unsupportable,

---

[69] *2002 Biennial Review Order* at ¶ 4.

extraneous elements.

In light of the evidence, discussed above, of the declining audience shares for broadcast television, the increasing availability of alternative outlets for news and information programming, and the lack of any empirical data to retain the existing rule as "necessary in the public interest," together with the evidence adduced by other commenters, including the financial pressures of DTV conversion, the declining financial position of many smaller market television broadcasters, and the increasing expenses of local news production, the local television ownership rule cannot persist in its current form or that adopted, but vacated, in the *2002 Biennial Review Order*. Indeed, it is now clear that any version of the rule that relies on a "voice count" will remain hopelessly arbitrary and irrational, whether that "voice count" includes local television stations only or other types of media outlets, and any such rule will likely continue to affect negatively opportunities to bring the benefits of common ownership to any but the largest markets. Instead, a more reasonable and rational alternative to a "voice count" or "top four" metric would be a local television ownership rule based upon an "audience share" metric, derived from antitrust analysis, that avoids the question altogether.

Hearst-Argyle previously formulated such an alternative approach to the structure of a revised local television ownership rule and respectfully requests the Commission to consider it anew in light of the intervening changes in the DVP marketplace. Hearst-Argyle's proposal respects the core predicate set forth above, and it satisfies the desiderata for a revised rule. Hearst-Argyle's proposal is two-fold:

(1) The Commission should permit any common ownership of local television stations as long as the combination's collective *audience share* is 30% or less, <u>and</u>

(2) The resulting concentration, together with the change in concentration, of post-combination audience share satisfies a standard that is an analog of the general standard set forth in Section 1.51 of the Department of Justice and FTC's *Horizontal Merger Guidelines* utilizing a Herfindahl-Hirschman Index ("HHI") analog for audience share.

This proposal for measuring program diversity and competition is rooted in the traditional merger analysis performed by the Antitrust Division of the Department of Justice and the Federal Trade Commission. Moreover, this proposed approach does not suffer the infirmities of the so-called Diversity Index that the Commission devised in the 2002 proceeding, which are detailed by the *Prometheus Radio* Court. The Hearst-Argyle proposal, unlike the Diversity Index, focuses purely on competition and diversity issues in the DVP market and does not resort to artificial assignments of value to various other media.

The proposal provides as direct an analog to long-standing antitrust analysis as feasible while preserving certain elements of simplicity not necessarily present in antitrust analysis. Antitrust analysis and case law are well-developed and sufficiently well-understood for them to serve as the ideal basis for the Commission's competition and diversity concerns in the formulation of its local television ownership rule. Accordingly, *audience viewing share* is the basic metric, and this audience viewing share should be broadly measured in three different ways: (1) by taking a broad approach to what consumers may watch, that is by aggregating the audience viewing share over all channels available to viewers—specifically, all local broadcast channels, all out-of-market broadcast channels viewable over the air, and all cable and DBS channels—and thereby capturing the substitutability of these channels from a viewer's perspective[70]; (2) by taking a broad daypart share measure, 7:00 a.m. to 1:00 a.m., to truly capture the "share" of audience that watches a particular television channel; and (3) by taking a sufficiently broad historical average, the most recent four Nielsen ratings books, providing a current annualized average audience share measure.

The first prong of the proposed rule would establish a 30% collective audience share as a bright-line hard cap: If the proposed combination's collective audience share exceeds 30%, then the

[70] Ideally, Internet "channels" providing video programming would be included in the universe of the audience share, but, as noted above, there is currently no comprehensive or comparative measure of such viewing that can be integrated with existing data on the audience share of broadcast, cable, and satellite channels. Consequently, Hearst-Argyle's proposal necessarily *over*states broadcast television audience shares and is, accordingly, conservative by nature.

combination would be impermissible. If, however, a proposed combination's collective audience share is 30% or less, then the combination is not presumptively impermissible but must be analyzed under the second prong to determine its permissibility. The threshold of "30%" has been selected because that is the threshold under antitrust case law in which a claim of attempted monopolization has typically been accepted or essential for a finding of undue concentration.[71] In fact, a 30% threshold is modest—indeed, quite conservative—since the *Horizontal Merger Guidelines* themselves suggest a 35% threshold and that only when market concentration data already fall outside the safe-harbor regions set forth in Section 1.5 of the Guidelines.[72] The modest and conservative character of a 30% threshold is noted in the Joint Declaration of Luke Froeb, Padmanabhan Srinagesh, and Michael Williams ("Economists' Joint Declaration"), economic experts that the Commission relied upon in the *2002 Biennial Review Order*. *See* Economists' Joint Declaration at ¶ 20.

The second prong of Hearst-Argyle's proposed rule would establish a direct audience share analog to the HHI and apply basic HHI analysis using that analog to determine whether a combination is permissible. Therefore, instead of using advertising share, as the antitrust agencies would in their competition analysis, Hearst-Argyle proposes using Nielsen audience share data, as defined above, to determine an HHI analog, which, for purposes of nomenclature, Hearst-Argyle has called the "Audience Market Index" ("AMI"). The AMI is, simply, the sum of the squares of the individual

[71] *See, e.g.*, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963) ("Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat."); *Mid-Nebraska Bancshares, Inc. v. Board of Governors of Fed. Reserve Sys.*, 627 F.2d 266, 271 (D.C. Cir. 1980); *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1018 (2d Cir. 1989) (citing, *inter alia*, 3 Areeda and Turner, ANTITRUST LAW, at ¶ 835 (1978) ("[c]laims [of attempted monopolization] involving 30 percent or lower market shares should presumptively be rejected" (brackets in case's citation))).

[72] *See Horizontal Merger Guidelines* at § 2.211 (1997 revision).

audience shares of all local television stations in the relevant DMA.[73] For example, if a given local television market, with no duopolies, were comprised of Station 1 with an audience share of 20.75, Station 2 with an audience share of 14.5, Station 3 with an audience share of 3.5, Station 4 with an audience share of 3.25, and Station 5 whose audience share is too low to be reported by Nielsen, then the AMI for this market would be calculated as follows[74]:

$$\text{AMI} = 20.75^2 + 14.75^2 + 3.5^2 + 3.25^2 + 0^2 = 664$$

Audience market concentration is divided along a spectrum, as measured by the AMI (and directly analogous to, and using the same thresholds as, the HHI under the *Horizontal Merger Guidelines*[75]), as follows:

Unconcentrated	AMI less than 1000
Moderately concentrated	AMI between 1000 and 1800
Highly concentrated	AMI greater than 1800

Then, in evaluating a proposed combination of local television stations, the Commission would

[73] Although the audience share aggregates the share with respect to all available television channels, the AMI is the sum of the squares of the audience shares of only the *local* television stations because those are the *only* market participants whose combination is of concern. That is, a local television station combining with an out-of-market television station does not implicate the Commission's *local* television ownership rule but rather its national ownership rule instead. Similarly, there is currently no prohibition against a cable company that owns cable channels from merging with a local television station. In any event, with the hundreds of other channels of delivered video programming typically available in any given market, the audience shares of most of these channels are unmeasurably low. Since even the most popular cable networks have audience shares in the very low single digits, the AMI, while always less than the HHI, will be very close to the HHI, making the AMI a reasonably close analog of the HHI.

[74] These share data reflect the actual market of Tri-Cities, Tennessee-Virginia, which was Market 91 during the 2005-06 television season. *See* NAB Comments, Appendix K, Duopoly Analysis Report.

[75] *See Horizontal Merger Guidelines* at § 1.5.

consider both the *post-combination market concentration*, as measured by the AMI, and the *increase in concentration resulting from the combination*, as measured by the change in the AMI. For example, using the market above, if Station 2 and Station 3 were to combine, the post-combination market concentration would be calculated as follows:

$$\text{AMI} = 20.75^2 + (14.75 + 3.5)^2 + 3.25^2 + 0^2 = 774$$

And the increase in concentration resulting from the combination would then be

$$\Delta\text{AMI} = 774 - 664 = 110$$

As a further analog to the *Horizontal Merger Guidelines* (and, again, using the same thresholds),[76] the Commission should regard combinations of local television stations as follows:

(a) Post-Combination AMI Less Than 1000. The Commission should regard the combination as posing no harm to competition (or diversity or localism) and should permit the combination without further analysis, regardless of the amount of increase in the AMI.

(b) Post-Combination AMI Between 1000 and 1800. If the combination produces an increase in the AMI of less than 100 points, the Commission should regard the combination as posing no harm to competition (or diversity or localism) and should permit the combination without further analysis. If the combination produces an increase in the AMI of more than 100 points, then the combination should be impermissible unless the stations can carry the burden of proof under a "failing" or "failed" station exception.

(c) Post-Combination AMI Greater Than 1800. If the combination produces an increase in the AMI of less than 50 points, the Commission should regard the combination as posing no harm to competition (or diversity or localism) and should permit the combination without further analysis. If the combination produces an increase in the AMI of more than 50 points, then the combination should be impermissible unless the stations can carry the burden of proof

[76] *See Horizontal Merger Guidelines* at § 1.51. For the sake of simplicity and to maintain the certainty that the markets appreciate in bright-line tests, Hearst-Argyle does not propose that the Commission import in its entirety the *Horizontal Merger Guidelines*. For example, Hearst-Argyle does not propose that the Commission utilize the factors set forth in Sections 2-4 of the *Guidelines*, although the Commission should utilize a factor, such as that set forth in Section 5 of the *Guidelines*, for a "failing" or "failed" station exception.

under a "failing" or "failed" station exception.

In the example given above, the combination of the second and third ranked stations would be permitted because the combined audience share, post-combination, would be less than 30% (i.e., 14.75 + 3.5 = 18.25 < 30), and the post-combination AMI is less than 1000 (i.e., 774 < 1000).[77]

Hearst-Argyle believes this proposal satisfies all reasonable considerations for a structural ownership rule for local television ownership, with the added benefit of addressing diversity concerns:

* Audience shares are a reasonable, objective measure of competition and diversity. Nielsen share data capture who and how many are watching each specific program. Thus, share data serve as a reasonable, aggregated proxy for outlet, source, and program diversity, and these forms of diversity, in turn, are the best means of achieving viewpoint diversity, an otherwise elusive concept that no one, including the Commission, has yet devised a way to measure directly. In addition, share data also measure the relative success of television channels in competing for viewers.

* By limiting the reach of common ownership, a proposed local television ownership rule predicated on audience share insures outlet diversity. By limiting common ownership of stations to those whose collective audience share is 30% or less, the proposed rule insures that there will always remain at least four owners of significantly viewed channels available to consumers in any given DMA.

* Because the AMI, or change in AMI, includes measurement of all viewable channels, even less popular channels can materially affect the prospects for any given combination. Thus, the continued existence and importance of these channels provide avenues for source and program diversity.

* Source and program diversity are also preserved because a common owner must, in a virtually limitless multi-channel universe, differentiate its programming among its various channels to be competitive. Thus, co-owned stations will program different formats (program diversity), and obtaining that diverse programming will require that content to be obtained from multiple sources (source diversity).

* The proposed approach resolves the issue of accounting for the fact that

[77] A combination of the first and second ranked stations in this market would not be permitted because the combined audience share, post-combination, exceeds 30% (i.e., 20.75 + 14.75 = 35.5; 35.5 > 30).

approximately 86% of American households subscribe to an MVPD service.[78] All viewable channels are included in the analysis, and the probability that a Nielsen diary may be completed by an over-the-air viewer or an MVPD subscriber is reflected in the final share data.

* The proposed approach is consistent with the Commission's focus on the DVP market.

* The proposed approach captures consumer substitutability of television channels, be they over-the-air or cable or DBS, and avoids the arbitrariness of voice counting. In addition, the basic approach remains simple: it obviates the need to consider consumer substitutability of other media for television, especially since there is no common metric among these other media.

* The proposal is likely to survive judicial scrutiny since its pedigree is antitrust law and analysis, including both the 30% hard cap (derived from U.S. Supreme Court precedent) and the AMI analysis (a direct analog of HHI analysis under the *Horizontal Merger Guidelines*). There is nothing arbitrary or capricious about it, and it is supported by empirical evidence.

* The proposal has the virtue of stability. Changes in a station's audience ratings of a few tenths of a point, as averaged over a year, will generally have no material impact on whether a combination is permissible.

* The proposal accommodates all types of combinations, including triopolies, common ownership where at least one station is a full-power satellite, and common ownership involving attributable LMAs.

* The proposal is indifferent to market size. Therefore, there is no inherent bias against providing relief for broadcasters in smaller-sized markets.

* The approach consists of bright-line tests, providing critical certainty to the markets, yet it accommodates one exception, for "failed" or "failing" stations, which is unlikely to have the effect of ratcheting up concentration levels over time with developing Commission precedent.

* The approach will be straightforward for Commission staff to apply, greatly speeding application processing time and freeing up Commission resources for other tasks—and it avoids the complexity and legal deficiencies of the Commission's Diversity Index.

In sum, Hearst-Argyle believes that this proposal makes up for the slight increase in complexity by providing a comprehensive approach to revising the local television ownership rule.

---

[78] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Twelfth Annual Report, 21 FCC Rcd 2503 (2006), at ¶ 8.

D. The Commission's "Top Four" Restriction Is Not Supported by Economic Theory or Current Empirical Evidence; Instead, Such Theory and Evidence Support Hearst-Argyle's Proposal

In the *2002 Biennial Review Order*, the Commission rejected the Hearst-Argyle proposal for three reasons[79]: *First*, the Commission objected to the fact that combinations among the top four stations, by audience share, would be permitted if the 30% and AMI thresholds are satisfied. Instead, the Commission believed that a "top four" restriction was necessary to promote competition. *Second*, the Commission objected to the fact that the proposal did not limit the number of stations a single owner could own in a market if the 30% and AMI thresholds are satisfied. Instead, the Commission believed that a specific limit on the number of co-owned stations—two or three stations, depending on the post-merger number of independently-owned stations in a market—was necessary to protect consolidation of "capacity" in the market. *Third*, and finally, the Commission seemed to object to the initial 30% threshold itself, although it provided no reasons.[80]

The Commission's reliance on a "top four" restriction appears to have been the key consideration in the Commission's initial reluctance to adopt the AMI proposal and it is discussed in detail below. The other two objections have less weight and do not really go to the heart of the proposal.

The Commission's concern about the initial 30% threshold is without support. As stated above, the 30% threshold figure derives specifically from antitrust case law, including Supreme Court

[79] The *2002 Biennial Review Order* misstates Hearst-Argyle's proposed rule by asserting that the proposal permits common ownership of stations if the resulting combination exceeds 30% yet still satisfies the AMI thresholds. *See 2002 Biennial Review Order* at ¶ 218. As clearly explained above (and explained in Hearst-Argyle's Reply Comments in MB Docket No. 02-277), a combination is permitted only if it does *not* exceed 30% and satisfies the AMI thresholds. Although the *Order* misstated the proposal, it does not appear that that misstatement materially affected the reasons why the Commission rejected the proposal.

[80] *See 2002 Biennial Review Order* at ¶ 219.

precedent, which the Commission noted in its *2002 Biennial Review Order*.[81] The 30% threshold is lower than the 35% threshold used in the *Horizontal Merger Guidelines*.[82] A 30% threshold (unlike a 35%, or higher, threshold) preserves at least four independent owners of significantly viewed channels available to consumers in any given market. And, finally, a 30% threshold is far more conservative than extensive merger experience has shown, or contemporary economic or antitrust analysis suggests, is necessary to protect competition, as demonstrated at length by Froeb, Srinagesh, and Williams. *See* Economists' Joint Declaration at ¶¶ 15-20. Indeed, as Professor Froeb has stated in a paper relied upon by the Commission in the *2002 Biennial Review Order*, "it is possible for mergers to enhance welfare even though they involve firms with a combined share in excess of 50 percent."[83] In sum, Hearst-Argyle's proposal, far from being a liberal relaxation of the local television ownership rule, presents a revised rule based on a bright-line initial 30% audience share threshold that is the most modest and conservative approach the Commission could adopt that is grounded in established antitrust law and yet that still comports with Section 202(h)'s deregulatory mandate.

Another concern noted in the *Order* is that the proposal could, in some circumstances, permit a local ownership combination of more than three stations with low audience shares. The

[81] *See 2002 Biennial Review Order* at ¶ 218 n.468.

[82] *See Horizontal Merger Guidelines* at § 2.211. As stated by Professor Froeb and his colleague in a paper relied upon by the Commission to support its revised local television ownership rule:

> Under that standard [of the *Guidelines*], a merger is presumed to harm consumers significantly if the combined share of the merging firms is at least 35 percent. By negative implication, one may infer that a merger will be presumed not to harm consumers significantly if the combined share of the merging firms is below 35 percent.

Gregory Werden and Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy*, 10(2) J. L. ECON ORG. 407, 423 (1994) ("*Merger Policy*") (cited in *2002 Biennial Review Order* at ¶ 194 n.405).

[83] Werden and Froeb, *Merger Policy*, at 414-15.

Commission observed that the very number of stations a firm owns "is a measure of its capacity to deliver programming," which can be an "important factor in measuring the competitive structure of the market."[84] Capacity, of course, is important. Indeed, the capacity to deliver video programming in the DVP market may be the most important consideration of all in determining the nature of any local television ownership rule. But the *Order* fails to consider what "capacity" means in the DVP market. The *Order* appears to assume that the universe of firms possessing such capacity is limited to local television stations. But it is not only local television stations that have "capacity" to deliver video programming to viewers. So, too, do the out-of-market television stations that are significantly viewed in the local market, the hundreds of cable and satellite networks available in that market, and the ever-increasing number of websites delivering such content over the Internet. Because each "channel" has the same *potential* to reach viewers, each "channel," be it a broadcast television, cable or satellite, or Internet "channel," possesses the same capacity. Consequently, in a market with 100 channels (and most markets in the country have at least 100 channels of video programming available by cable or satellite), the HHI is only 100. In a market with 500 channels, the HHI is only 20, and in a market with 1000 channels, the HHI is just 10. In other words, the level of concentration of "capacity" is minuscule. It is obvious that there can be no opportunity for monopolizing "capacity" or any danger to competition if firms are permitted to own multiple television stations in any particular market. Nor can such a limitation be rationally justified on capacity grounds when there is no similar such limitation on multiple ownership of cable networks or of Internet websites delivering video programming.

The Commission's principal concern with Hearst-Argyle's AMI proposal was that it potentially permits combinations among the top four rated stations in a local market. That concern rests, in turn, on the Commission's determination that its own rule was founded upon the necessity

---

[84] *2002 Biennial Review Order* at ¶ 219.

of maintaining a "top four" restriction. The Commission supported its top four restriction, on a purely theoretical basis, by citing three economic papers by recognized experts[85] and, on an empirical basis, by citing evidence that there is a "cushion of audience share percentage points [that] separates the top four and the remaining stations, providing some stability among the top four-ranked firms in the market."[86] Unfortunately, the economic studies do not support the Commission's inferences, and a close analysis of current audience share data across all 210 DMAs does not support the Commission's conclusion of a "cushion" between the fourth and fifth ranked stations in a market.

The *2002 Biennial Review Order* asserts that the McAfee and Williams study found that "mergers that do not create a new largest firm are welfare enhancing."[87] However, the *Order* failed to note that the McAfee and Williams study examined mergers among firms producing homogeneous products, not differentiated products. But the *Orde*r expressly acknowledged that "[e]ach broadcast station tends to deliver a differentiated product."[88] Unfortunately, the mathematical economic analysis of firms producing homogeneous products does not apply to the analysis of firms producing differentiated products. As Michael Williams, the co-author of the McAfee and Williams study, explains in the accompanying declaration:

> [B]efore using conclusions from [the McAfee-Williams] model to inform policy, we would caution the FCC to make sure that the model fits the facts of the industry under consideration. For example, several features of this model, such as quantity competition, symmetry,

---

[85] *See 2002 Biennial Review Order* at ¶ 194 (citing R. Preston McAfee and Michael Williams, *Horizontal Mergers and Antitrust Policy*, XL J. INDUS. ECON. 181 (June 1992); Luke M. Froeb, Gregory J. Werden, and Timothy J. Tardiff, *The Demsetz Postulate and the Effect of Mergers in Differentiated Product Industries*, Working Paper EAG 93-5 Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Aug. 1993); Gregory Werden and Luke M. Froeb, *The Effects of Mergers in Differentiated Products Industries: Logit Demand and Merger Policy,* 10(2) J. L. ECON ORG. 407 (1994)).

[86] *2002 Biennial Review Order* at ¶ 195 (citing BIA Media Access Database (Mar. 18, 2003)).

[87] *2002 Biennial Review Order* at ¶ 194.

[88] *2002 Biennial Review Order* at ¶ 195.

> homogeneous products, and increasing marginal costs do not seem to characterize competition well in the broadcast media industry. In fact, the FCC itself acknowledged that the industry produces differentiated products. It would seem unwise to rely on the conclusions of this stylized model to design merger policy for the industry.

Economists' Joint Declaration at ¶ 8. Therefore, the McAfee and Williams study, by its own terms and as noted by one of its authors, does not lend itself to analysis of the broadcast industry and, accordingly, does not support the Commission's theoretical underpinnings of its "top four" restriction.

The *2002 Biennial Review Order* also asserts that two studies by Luke Froeb and others find that "mergers among smaller firms tend to be welfare enhancing, and that mergers that do not create a significant increase in the market share of the largest firm pose little risk of competitive harm. By contrast, the research of Froeb *et al.* demonstrates that a merger of the second and third largest firms, which would significantly overtake the largest firm in size, would create welfare harms."[89] However, neither of these studies supports the *Order*'s assertion. In one of Professor Froeb's studies, the largest firm controlled 85% of the market,[90] and in the other study, the largest firm controlled 61.4% of the market.[91] But the *total* audience viewing share of *all* local broadcast television stations in any given market is only approximately 50%, so the inferences the *Order* drew from Professor Froeb's studies are not applicable to local television ownership. Moreover, as Professor Froeb explains in the accompanying declaration:

> While differentiated goods oligopoly models are more suitable than homogeneous goods models for the study of local television markets, we note that these are models of single-sided competition, whereas in the delivered video programming (DVP) market, firms compete for

---

[89] *2002 Biennial Review Order* at ¶ 194.

[90] *See* Luke M. Froeb, Gregory J. Werden, and Timothy J. Tardiff, *The Demsetz Postulate and the Effect of Mergers in Differentiated Product Industries*, Working Paper EAG 93-5 Economic Analysis Group, Antitrust Division, U.S. Department of Justice (Aug. 1993), *republished in* Fred McChesney (ed.), *Economic Inputs, Legal Outputs: The Role of Economics in Modern Antitrust* 141, 144 (1998).

[91] *See* Werden and Froeb, *Merger Policy,* at 417 n.18.

> both audience as well as advertising revenue.
>
> With this caveat, we note that the Froeb *et al.* paper concludes that structural rules should recognize that "high concentration may not merit greater restraints on the mergers of smaller firms." Indeed, an application of the theoretical model to Japanese long distance telecommunications services showed that even in this *highly concentrated* market (with an HHI exceeding 1800) consisting of only four firms, three of the six possible mergers resulted in an increase in total (consumer plus producer) welfare. For this example, a structural rule that prohibited mergers among the top four firms, or a rule that prohibited common ownership of two or three firms unless the market had at least twelve or eighteen firms, respectively, could have the effect of preventing mergers that would increase total welfare.

Economists' Joint Declaration at ¶¶ 9-10. Therefore, the two Froeb studies also fail to support the Commission's theoretical underpinnings of its "top four" restriction.

In short, because neither the McAfee and Williams study nor the two Froeb studies provide support for the Commission's "top four" restriction, the *Order* is bereft of any economic and/or antitrust analysis providing rationality to the "top four" restriction. In fact, the authors of the very studies that the Commission relied upon to fashion its "top four" restriction state that their studies do not support the restriction! As Froeb, Srinagesh, and Williams conclude:

> [T]he FCC's existing and proposed structural rules for television station mergers, such as the prohibition of mergers between two "top four" stations and restrictions on the common ownership of two or three television stations are likely to be overly restrictive and thwart the FCC's fundamental goals of competition and diversity.

Economists' Joint Declaration at ¶ 26.

The other principal support the *Order* provides for the Commission's "top four" restriction is its claim that "there is a general separation between the audience shares of the top-four ranked stations and the audience share of other stations in the market," providing a "cushion" between the fourth and fifth ranked stations.[92] Whatever may have been the empirical basis of that claim in 2003,

---

[92] *2002 Biennial Review Order* at ¶ 195.

current audience share data (July 2005-May 2006) from all 210 DMAs no longer support it.[93] As shown in Table 1, the average separation between the audience shares of the second and third ranked stations in the Top 100 DMAs is 2.93, the average separation between the audience shares of the third and fourth ranked stations in the Top 100 DMAs is 3.13, but the average separation between the audience shares of the fourth and fifth ranked stations in the Top 100 DMAs is only 2.59. In other words, the so-called "cushion" between the fourth and fifth ranked stations in the Top 100 markets is *smaller* than the "cushion" between the second and third ranked stations *and* the "cushion" between the third and fourth ranked stations. Similarly, across *all* 210 DMAs, the average separation between the audience shares of the second and third ranked stations is 3.54, the average separation between the audience shares of the third and fourth ranked stations is 3.46, but the average separation between the audience shares of the fourth and fifth ranked stations is only 2.70. Again, across *all* markets, the "cushion" between the fourth and fifth ranked stations is *smaller*, indeed, substantially smaller, than the "cushion" between the second and third ranked stations *and* the "cushion" between the third and fourth ranked stations.[94]

Not only is the average separation between audience shares of the fourth and fifth ranked stations smaller than the average separation between the audience shares of the third and fourth ranked stations, but the *frequency* with which the "cushion" between the third and fourth ranked stations is greater than the "cushion" between the fourth and fifth ranked stations is substantial. As shown in Table 2, in the Top 100 DMAs, the "cushion" between the third and fourth ranked stations is greater than the "cushion" between the fourth and fifth ranked stations 61% of the time, and in all

[93] The underlying audience share data used in this discussion is being provided by the National Association of Broadcasters in its Comments in this proceeding. *See* NAB Comments, Appendix K, Duopoly Analysis Report.

[94] The "cushion" between the fourth and fifth ranked stations is also smaller than the "cushion" between the third and fourth ranked stations in the Top 25 DMAs, the Top 50 DMAs, and in DMAs 101-210.

210 DMAs it is greater 60% of the time. In fact, the "cushion" between the third and fourth ranked stations is either greater than or within 1% of the "cushion" between the fourth and fifth ranked stations 74% of the time in the Top 100 DMAs and 73% of the time across all 210 DMAs.

Table 1

Average Separations in Audience Shares Between Certain Adjacently Ranked Stations

	Δ(2,3)	**Δ(3,4)**	**Δ(4,5)**
Top 10	1.35	1.35	1.65
Top 25	1.49	2.1	1.96
Top 50	1.75	2.67	2.16
Top 100	2.93	3.13	2.59
101-210	4.28	3.95	2.97
All	3.54	3.46	2.7

Table 2

Frequency with Which the "Cushion" Between the Third and Fourth Ranked Stations Is Greater Than or Within 1% of the "Cushion" Between the Fourth and Fifth Ranked Stations

	Frequency Δ(3,4) ≥ Δ(4,5)	**Frequency Δ(3,4) ≥ Δ(4,5) − 1%**
Top 10	60.0%	70.0%
Top 25	56.0%	76.0%
Top 50	62.0%	80.0%
Top 100	60.8%	74.2%
101-210	59.0%	69.2%
All	60.3%	72.8%

In support of its "cushion" theory, the *Order* claimed that the "gap between the fourth-ranked national network and the fifth-ranked national network represents a 60% drop in audience share (from a ten share to a four share), a significant breakpoint upon which we base our rule."[95] Moreover, the *Order* assumed that each of the Big 4 network stations garnered a share between 10 and 13. Current data, however, compel a different conclusion. As shown in Table 3, the average audience share of the fourth ranked station across all markets which have at least four stations is 4.79, not 10. The difference between the average fourth ranked station and the average fifth ranked station is 2.33, not 6. That difference is less than the differences between the average first and second ranked stations (6.28), the average second and third ranked stations (2.96), and the average third and fourth ranked stations (3.06).

Table 3

Average Audience Shares of Various Ranked Stations

	#1	**#2**	**#3**	**#4**	**#5**	**#6**
Top 10	11.18	8.93	7.58	6.23	4.58	3.53
Top 25	12.09	9.8	8.31	6.21	4.25	3.3
Top 50	12.71	10.45	8.7	6.03	3.87	2.71
Top 100	14.75	11.74	8.81	5.68	3.08	1.96
101-210	19.22	9.88	6.67	3.44	0.9	0.18
All	17.09	10.81	7.85	4.79	2.46	1.7

The *Order* also seemed to assume that the top four stations in each market were stations owned or affiliated with either ABC, CBS, Fox, or NBC.[96] However, in numerous large markets, such as New York, Los Angeles, Phoenix, Miami, San Diego, San Antonio, Birmingham, Norfolk, New Orleans, Memphis, Albuquerque, and Jacksonville that is not the case. And in many dozens of

---

[95] *2002 Biennial Review Order* at ¶ 195.

[96] *See 2002 Biennial Review Order* at ¶ 196.

smaller markets there is not a full complement of stations owned or affiliated with ABC, CBS, Fox, or NBC at all.

In addition, the *Order* claims that "[p]ermitting mergers among top four-ranked stations would also generally lead to large increases in the HHI."[97] Table 3 suggests what increases in the AMI are likely to result from mergers among top four stations.[98] Even mergers among the first and second ranked stations will not, based on average audience shares (of course, each market must be analyzed separately), result in increases in the AMI greater than 400. Most mergers among top four stations would, based on average audience shares, result in increases in the AMI of less than 200, and many mergers among top four stations would result in increases in the AMI of less than even 100.

Even in the abstract, these are not "large increases" in concentration. But when considered in the context of how very *un*concentrated nearly all local television markets currently are, it quickly becomes apparent that combinations among top four stations will only occasionally result in problematic increases in concentration. As shown in Table 4, there are *no* markets in which the current AMI exceeds 1000, based on ownership data as of July 2006. Any market with an AMI less than 1000 is unconcentrated. Among the Top 10 DMAs, the average AMI is only 439, which is remarkably unconcentrated (the AMIs range from 318 for San Francisco to 512 for Dallas). Even across all 210 DMAs, the average AMI is only 549, which is also very unconcentrated (the AMIs range from only 67 in Juneau, Alaska, to 940 in Sioux Falls, South Dakota). When such unconcentrated AMI levels are considered together with the likely increases in AMI as a result of combinations among top four stations (as derivable from Table 3), it is evident that the average post-combination AMI will be less than 1000 in many markets. In such circumstances, even the larger increases in AMI resulting from top-four combinations, around say, 200, will not rise to a level

---

[97] *2002 Biennial Review Order* at ¶ 197.

[98] For any two stations *a* and *b*, the increase in AMI, post-combination, is given by $2ab$.

warranting further scrutiny.

Table 4

Average, Maximum, and Minimum AMIs

	Average	Maximum	Minimum
Top 10	439	512	318
Top 25	481	635	318
Top 50	495	752	265
Top 100	554	927	265
101-210	543	940	67
All	549	940	67

To be clear, Hearst-Argyle's proposal will not result in a carte blanche for unbridled mergers of local television stations. There would be numerous combinations in specific markets in which two top four stations would be prohibited from merging—either because the combination would result in a combined audience share exceeding 30% or because the post-combination AMI will exceed 1000 and the increase in AMI will be greater than 100.[99] For example, Hearst-Argyle's KCCI(TV), the first ranked station in the Des Moines-Ames DMA, would be unable to combine with the second, third, or fourth ranked stations in that market (or the fifth ranked station, for that matter), either because the combination's audience share would exceed 30% (if it merged with the second ranked station) or because the post-combination AMI would exceed 1000 and the increase in the AMI would be greater than 100 (if it merged with the third, fourth, or fifth ranked station). Similarly, Hearst-Argyle's KETV(TV), the second ranked station in the Omaha DMA, would be unable to combine with the first

[99] Even were that not the case, combinations of top four stations may be precluded by conventional antitrust analysis.

ranked station in that market because the combination's audience share would exceed 30%, and KETV would also be unable to combine with the third ranked station in the market because the post-combination AMI would exceed 1000 and the increase in the AMI would be greater than 100. What current audience data demonstrate, instead, is that, as a general empirical matter, audience concentration levels are, on average, low, and, consequently, as a theoretical matter, the Commission would not be warranted in assuming that mergers among top four stations will necessarily result in harm to competition, diversity, localism, or viewers.

Finally, the *Order* justified its "top four" restriction on the basis that "[b]ecause top four-ranked stations already provide local news programming, a combination involving more than one top four-ranked station is less likely to result in a new or enhanced local news offering than would a combination involving only one top four-ranked station."[100] This "justification" was provided with no theoretical or empirical support.[101] As a legal matter, the Commission has no basis to prize one form of programming (news) over another (entertainment). Indeed, the very notion turns the Commission's concept of localism on its head: It is within the discretion of the licensee, in its judgment, to determine what programming would best serve the public interest in its community of license. Even so, other filings in this proceeding confirm there is no lack of viewer access to a plethora of sources of video programming, including local (as well as national and international) news, from cable, satellite, and telephone companies, from local digital multicast channels, and from the Internet.

---

[100] *2002 Biennial Review Order* at ¶ 198.

[101] *Cf. Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 163 (D.C. Cir. 2002) ("The Commission's conclusion that the 'top four-ranked stations in each market generally have a local newscast, whereas lower ranked stations often do not have significant local news programming, given the costs involved,' offers no further insight on the critical question.").

Yet what the *Order* misses even more essentially is that a combination among top four stations is likely to result in *more*, not less, diversity, including diversity of news stories and opinions. This is because in markets with differentiated products, such as television programming, merged firms will not cannibalize their own products/programming but will, instead, seek to differentiate them even more. As Froeb, Srinagesh, and Williams explain:

> We disagree with the Commission's conclusion that such mergers would necessarily result in harm to viewers because the merged firm has an incentive to "move" its products away from one another which reduces incentives to raise price while simultaneously increasing product diversity.
>
> . . . Merging firms reposition their products relatively far away from each other to reduce sales cannibalization, and non-merging firms reposition their products in between those of the merged firm, increasing competition for consumers of these products. The net result of the repositioning mitigates the anticompetitive effects of the merger on consumer welfare—an effect that has not been considered by the *Guidelines*, case law, or the record in this proceeding. . . .
>
> In sum, models of post-merger repositioning suggest that more limited "price-only" models may overstate harm to consumer welfare likely to arise from increased mergers because the simpler models fail to consider product repositioning. Additionally, the empirical work on post-merger repositioning suggests that the FCC's concern that concentration will lead to reduced variety may be exactly misplaced—the available evidence suggests that increased concentration leads to *greater* diversity.

Economists' Joint Declaration at ¶¶ 22, 23, 25. Consequently, the Commission's concern that a combination among top four stations will result in a homogenization of programming, including news programming, is entirely unfounded. Quite to the contrary, as Professor Froeb and his colleagues conclude in an independent August 2006 study, "product repositioning enhances consumer welfare."[102]

---

[102] A. Gandhi, L. Froeb, S. Tschantz, & G.J. Werden, *Post-Merger Product Repositioning* (Aug. 3, 2006), at 15-16.

In sum, the Commission's previous objections to Hearst-Argyle's proposal are unfounded. Most importantly, neither economic theory nor empirical evidence support a "top four" restriction, which Hearst-Argyle's proposal does not contain. Rather, current theory and evidence actually support Hearst-Argyle's proposal instead.

* * *

Hearst-Argyle's local television ownership rule proposal satisfies Section 202(h)'s mandate. It satisfies all reasonable desiderata for a structural rule. It respects the Commission's competition, diversity, and localism concerns. It will not result in an unchecked wave of mergers. Its pedigree is unimpeachable, and it can be rationally adopted by the Commission and survive judicial scrutiny.

II. The Commission Should Repeal Immediately the Newspaper/Broadcast Cross-Ownership Rule

The facts supporting repeal of the newspaper/broadcast cross-ownership rule hardly need to be restated. As demonstrated above in the discussion of the local television ownership rule, there are multiple and diverse outlets for local, national, and international news and information competing for the attention of consumers. Indeed, as pointed out in Hearst-Argyle's previous filings advocating repeal of the cross-ownership ban, Hearst-Argyle undertook its own comprehensive examination of traditional media "voices" in each of the nation's 210 DMAs and found that, on average, each DMA is home to 81 traditional media "voices" for which there are 39 separate owners. There is simply no evidentiary basis on which the Commission could retain the existing cross-ownership ban or on which the Commission could impose "lesser" cross-media restrictions. The Commission should repeal immediately the newspaper/broadcast cross-ownership rule in its entirety.

A. There Is No Legal or Evidentiary Impediment to Repealing Immediately the Ban on Newspaper/Broadcast Combinations

The Commission first adopted the newspaper/broadcast cross-ownership ban in 1975 based upon the (unsupported) supposition that prohibiting cross-ownership would promote a diversity of viewpoints.[103] Tellingly, the cross-ownership ban was not based on any *evidence* that it would promote viewpoint diversity. Rather, the Commission attempted to justify the ban on the theory that it might "*possibly* result in enhanced diversity of viewpoints."[104]

When the Commission subjected this quarter-century-old supposition to empirical scrutiny during its 2002 review of its ownership rules, it found no evidence that the newspaper/broadcast cross-ownership ban was necessary to further the principles of competition, localism, and diversity that inform the Commission's public interest standard. *First*, the Commission found that the cross-ownership ban did not affect competition between broadcast stations and newspapers in the local advertising market because "most advertisers do not view newspapers and broadcast stations as close substitutes."[105] *Second*, the Commission found that the quality and quantity of local news and public affairs programming was greater among broadcasters that co-owned a newspaper—in part because of the ability of co-owned entities to share newsgathering and production resources.[106] *Third*, and finally, the Commission found that cross-ownership did not pose a "widespread threat to diversity

---

[103] *See Multiple Ownership of Standard, FM and Television Broadcast Stations*, Second Report and Order, 50 FCC 2d 1046 (1975) ("*Second Report and Order*"), *on recon.*, 53 FCC 2d 589, (1975) ("*Reconsideration Order*"), *aff'd sub nom. FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

[104] *NCCB*, 436 U.S. at 786 (emphasis added).

[105] *2002 Biennial Review Order* at ¶ 332.

[106] *See id.* at ¶ 343.

of viewpoint or programming," citing the "ample evidence that competing media outlets abound in markets of all sizes—each providing a platform for civic discourse."[107] In light of this evidence (or lack of evidence in support of the prohibition), the Commission eliminated its newspaper/broadcast cross-ownership ban—but it retained *restrictions* on newspaper/broadcast combinations as part of its new cross-media limits.

The Commission's decision to eliminate the newspaper/broadcast cross-ownership *ban* was fully supported by the record. This is particularly the case with respect to viewpoint diversity. In comments filed with the Commission in 2001, Hearst-Argyle submitted a comprehensive examination of traditional media "voices" in each of the nation's 210 DMAs ("HTV Media Voices Survey").[108] The HTV Media Voices Survey found that an average DMA is home to 81 traditional media voices for which there were 39 separate owners.[109] This voice count was conservative because HTV did not even account for new or nontraditional media voices such as the Internet, weekly or speciality newspapers, low power radio or television stations, specific local cable news channels, satellite radio services, or multicasting by digital television stations.[110] Yet even in this conservative voice count, the net effect of allowing cross-ownership of a newspaper and broadcast station was to reduce the number of owners of traditional media voices from 39 to 38 in an "average" DMA and from 20 to 19

---

[107] *Id.* at ¶¶ 365, 369.

[108] *See* Comments of Hearst-Argyle Television, Inc., MM Docket Nos. 01-235 and 96-197 (filed Dec. 3, 2001), at Exhibits 1 & 2. Although developments in the marketplace will have changed the precise data reported in the earlier proceeding, the data are unlikely to have changed materially given that there has been no change in the Commission's rules since the time of Hearst-Argyle's survey. Thus, the results of that study remain relevant to the current consideration of the newspaper/broadcast cross-ownership rule.

[109] *See id.* at 7 & Exhibit 2.

[110] *See id.* at 8.

in DMAs ranked 151-200.

The Third Circuit affirmed the Commission's decision to eliminate the newspaper/broadcast cross-ownership ban, holding that "reasoned analysis supports the Commission's determination that the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest."[111] Because there is no legal or evidentiary impediment to repealing the ban on newspaper/broadcast cross-ownership in this proceeding, the Commission should immediately repeal the ban.

B. The Commission Should Reject *Any* Restrictions on Newspaper/Broadcast Combinations Contained in Any Cross-Media Limits That May Be Proposed by the Commission

In addition to repealing the blanket ban on newspaper/broadcast combinations, the Commission should go further and remove *any* restrictions on newspaper/broadcast combinations that are part of any "cross-media" limits. In the 2002 review proceeding, the Commission established cross-media limits that included (1) a prohibition on newspaper/broadcast combinations in markets with three or fewer full-power television stations and (2) a restriction, in markets that have between four and eight television stations, that an entity may own newspapers and either (a) one television station and up to 50 percent of the number of radio stations that may be commonly owned under the applicable radio cap or (b) up to 100 percent of the number of radio stations allowed under the applicable radio cap (but not television stations).[112] The Third Circuit remanded the cross-media limits to the Commission to correct the methodology underlying the "diversity index" that the

[111] *Prometheus Radio*, 373 F.3d at 398.

[112] *See 2002 Biennial Review Order* at ¶¶ 454, 466.

Commission used to fashion its limits.[113]

The fact that the Third Circuit permitted the Commission to retain restrictions on newspaper/broadcast combinations to "ensure diversity" in local markets that the Commission determined to be "at risk" for high levels of viewpoint concentration in *2002*[114] is irrelevant *today*. There can be nothing in the record as it stands four years later in 2006 to support any such restriction. *First*, as the HTV Media Voices Survey demonstrated five years ago, even smaller markets (i.e., DMAs ranked 151-200) would have, on average, 19 separate owners of traditional media voices after a newspaper/broadcast combination.[115] It is difficult to discern any rational basis upon which to argue that 19 separate owners of traditional media voices competing for a local audience are not sufficient to address any lingering concerns over viewpoint concentration—especially when those 19 voices do not include the Internet, satellite radio, or other emerging platforms for news and information. NAB's comments in this proceeding offer an updated and detailed description of the diverse array of competing media outlets that exist tody and also detail how these competing outlets are creating a decline in viewership for broadcast television news and diminishing broadcasters' share of advertising revenue.[116]

Second, as NAB explains in the current proceeding, the Internet has shown the most prolific

---

[113] *Prometheus Radio*, 373 F.3d at 402-12.

[114] *Id*. at 402

[115] *See* Comments of Hearst-Argyle Television, Inc. (MM Docket Nos. 01-235 and 96-197), at 10.

[116] *See* NAB Comments at 6-11, 32-33.

growth in news and information content since 2002.[117] In 2005, more than 50 million Americans received news from the Internet on a daily basis, and broadband penetration has now risen to 37% of all adult Americans.[118] More broadband users receive news from the Internet (43%) than from their local newspaper (37%), and almost as many broadband users receive news from the Internet as from radio and national television (49%).[119] The number and type of news platforms on the Internet also continue to expand. Three of the most popular Internet platforms for news and information—blogs, user-generated video content (such as YouTube and Google Video), and podcasts—either did not exist or were largely irrelevant three years ago. The ability of these Internet news sources to reach new audiences and affect the debate and direction of news and public opinion has been a constant subject of discussion of study and debate since the 2002 ownership proceeding.[120]

* * *

Congress has directed the Commission to modify or repeal any of its ownership rules that are no longer in the public interest. Because the evidence before the Commission during its 2002 biennial

---

[117] *See id.* at 11-21.

[118] *See* John B. Horrigan, *Online News*, at 1-2, Pew Internet & American Life Project (Mar. 22, 2006).

[119] *See id.* at 3. Local television stations attracted the largest number of broadband users (57%).

[120] *See e.g.*, "Bloggers and Journalists," *The Online News Hour*, *available at* <http://www.pbs.org/newshour/bb /media/jan-june05/blog_2-14.html> (last visited Sept. 18, 2006); Michael Cornfield *et al.*, "Buzz, Blogs, and Beyond: The Internet and the National Discourse in the Fall of 2004," Pew Internet & American Life Project (May 16, 2005), *available at* <http://www.pewinternet.org/PPF/p/1088/pipcomments.asp> (last visited Sept. 18, 2006); Daniel W. Drezner and Henry Farrell, "The Power and Politics of Blogs" (Presentation to the Annual Meeting of the American Political Science Association), *available at* <http://www.danieldrezner.com/research/blogpaperfinal.pdf> (last visited Sept. 18, 2006).

review demonstrated that the newspaper/broadcast cross-ownership rule did not promote competition, localism, or diversity, there was no basis for the Commission to impose any restrictions on newspaper/broadcast combinations. The evidence of an even more diverse market of competing media voices in 2006 makes the case for repeal of any and all restrictions on newspaper/broadcast combinations even more compelling today than it was in 2002.[121] As a result, it is respectfully requested that the Commission immediately repeal the current cross-ownership ban and not impose any restrictions on newspaper/broadcast cross-ownership.

Conclusion

For the foregoing reasons, as well as those set forth in Hearst-Argyle's previous comments and reply comments in MB Docket No. 02-277 and in MM Docket No. 01-235, the local television ownership rule should be relaxed as described at length above and the newspaper/broadcast cross-ownership rule should be repealed.

---

[121] *See Second Report and Order* at ¶ 100 (stating that the Commission is "obliged to give recognition to the changes which have taken place and see to it that its rules adequately reflect the situation as it is, not was").

Respectfully submitted,

HEARST-ARGYLE TELEVISION, INC.

/s/ ______________________________

Wade H. Hargrove
Mark J. Prak
Marcus W. Trathen
David Kushner
BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Its Attorneys

October 23, 2006

Attachment 1

Partial List of Television Shows Available in Apple iTunes Store

- *24*
- *30 Days*
- *A Baby Story*
- *ABC News Special*
- *Adam-12*
- *Alfred Hitchcock Presents*
- *Alias*
- *Amazing Babies*
- *America's National Parks*
- *America's Funniest Home Videos*
- *American Dragon: Jake Long*
- *American Misfits*
- *American Muscle Car*
- *Anthony Bourdain: No Reservations*
- *Aqua Teen Hunger Force*
- *Aquaman*
- *Aviator: The Last Airbender*
- *Æon Flux*
- *Babylon 5*
- *Battlestar Galactica*
- *Beavis and Butt-Head*
- *Best of Comedy Central Stand-Up*
- *Beyond the Break*
- *Big Brother7: All Stars*
- *Biography: Great Inventors and Explorers*
- *Biography: Great Leaders*
- *Biography: Great Women*
- *Biography: Notorious*
- *Black. White.*
- *Blade: The Series*
- *Blue's Clues*
- *Bones*
- *Breed All About It*
- *Brilliant But Cancelled*
- *Buffy the Vampire Slayer*
- *Carpocalypse*
- *Caught on Tape*
- *Celebrity Flashback*
- *Chappelle's Show*
- *Cheap Seats*
- *City Slam*
- *CNBC Specials*
- *CNN Presents*
- *Codename: Kids Next Door*
- *Commander in Chief*
- *Conviction*
- *Crank Yankers*
- *Criss Angel Mindfreak*
- *CSI: Crime Scene Investigation*
- *CSI: Miami*
- *CSI: NY*
- *Danny Phantom*
- *Dateline: Crime and Punishment*
- *Desperate Housewives*
- *Digging for the Truth*
- *Disney's Mickey Mouse Clubhouse*
- *Disorderly Conduct: Video On Patrol*
- *Dog Bites Man*
- *Dora the Explorer*
- *Dr. 90210*
- *Dragnet*
- *Drawn Together*
- *Driving Force*
- *EUReKA*
- *Extreme Engineering*
- *Falcon Beach*
- *Fallen*
- *Fashion Week*
- *Fat Actress*
- *Fatherhood*
- *Fear Factor*
- *Firefly*
- *First Hand*
- *Foster's Home for Imaginary Friends*
- *Free For All*
- *Friends*
- *Gene Simmons Family Jewels*
- *Ghost Hunters*
- *Hannah Montana*
- *Hi-Jinks*
- *Higglytown Heroes*
- *High School Musical*
- *Hill Street Blues*
- *I Wanna Be a Soap Star*
- *Inked*
- *Inside the Actors Studio*
- *Invader ZIM*
- *It's Always Sunny in Philadelphia*
- *Jackass*
- *Jamie Kennedy's Blowin' Up*
- *Johnny Bravo*
- *Just For Kids*
- *Kathy Griffin: My Life on the D List*
- *Kenny the Shark*
- *Kim Possible*
- *Knight School*
- *Knight Rider*
- *Kyle XY*
- *Laguna Beach*
- *Late Night with Conan O'Brien*
- *Law & Order: Criminal Intent*
- *Law and Order*
- *Law & Order: Trial By Jury*
- *Law & Order: Special Victims Unit*
- *Little People, Big World*
- *Little Einsteins*
- *Lockup*
- *Lost in Space*
- *Lost*
- *MADtv*
- *Meet the Presidents*
- *Miami Vice*
- *Mighty Morphin Power Rangers*
- *Million Dollar Listing*
- *Mind of Mencia*
- *Modern Marvels*
- *Monk*
- *Murder One*
- *MuscleCar*
- *My Super Sweet Sixteen*
- *MythBusters*
- *NBC News Time Capsule*
- *NBC News Onstage*
- *NBC News Specials*
- *NCIS*
- *Night Stalker*
- *Numb3rs*
- *O'Grady*
- *Open Bar*
- *Passport To Europe*
- *Pimp My Ride*
- *Pinks*
- *Power Rangers: Mystic Force*
- *Pregnancy for Dummies*
- *Prison Break*
- *Project Runway*
- *Psych*
- *Punk'd*
- *Queer Eye*
- *Raising the Roofs*
- *Reno 911!*
- *Saturday Night Live*
- *Saved by the Bell*
- *Schoolhouse Rock*
- *Scrubs*
- *Sealah 2021*
- *Shalom in the Home*
- *Shark Week*
- *Sit Down Comedy with David Steinberg*
- *Sleeper Call*
- *Soapography*
- *South Park*
- *South of Nowhere*
- *SpongeBob SquarePants*
- *Sports Century*
- *SportsCenter Ads*
- *Squirrel Boy*
- *Stacked*
- *Star Wars: Clone Wars*
- *Stargate Atlantis*
- *Stargate SG-1*
- *Stella*
- *Strangers With Candy*
- *Streetball*
- *Super Robot Monkey Team Hyper Force Go!*
- *Surface*
- *Survivor*
- *Tabloid Wars*
- *Texas Hardtails*
- *That's So Raven*
- *The Captain and Casey Show*
- *The Emperor's New School*
- *The Proud Family*

- *The Showbiz Show with David Spade*
- *The Simple Life*
- *The Suite Life of Zack & Cody*
- *The Soup*
- *The Tonight Show With Jay Leno*
- *The Dukes of Hazard*
- *The Real Housewives of Orange County*
- *The Biggest Loser*
- *The Munsters*
- *The Most Extreme*
- *The Flintstones*
- *The Jetsons*
- *The Girls Next Door*
- *The Gauntlet 2*
- *The Dead Zone*
- *The Day It Happened*
- *The Shield*
- *The Contender*
- *The Colbert Report*
- *The Apprentice*
- *The Andy Milonakis Show*
- *The X's*
- *The Adventures of Jimmy Neutron: Boy Genius*
- *The Adventures of Chico and Guapo*
- *The A-Team*
- *The Venture Bros.*
- *The Real World*
- *The Save-Ums*
- *The Office*
- *The Fairly OddparentsThe Daily Show*
- *Three Moons Over Milford*
- *TNA iMPACT!*
- *Tom Brokaw Reports*
- *Top Chief*
- *Two-A-Days*
- *U.S. of ANT*
- *Unan1mous*
- *Unique WhipsUSA Basketball World Tour*
- *Viva La Bam*
- *Weeds*
- *What Not to WearWho Wants to be a Superhero?*
- *Wild 'N Out*
- *Wildboyz*
- *Wildfire*
- *Wonder Showzen*
- *Workout*
- *World Series of Poker*
- *World's Best*
- *X Games*
- *Xtreme 4x4*
- *Zoey 101*

Source: <http://en.wikipedia.org/wiki/List_of_television_shows_available_in_iTunes_Store>

Attachment 2

In2TV Shows

Adventures of Brisco County Jr
Adventures of Superman
Alice
Animaniacs
Babylon 5
Beetlejuice
The Ben Stiller Show
Change of Heart
Chico and the Man
The D.A.
Dark Justice
Eight is Enough
Elimidate
F Troop
Falcon Crest
The FBI
Freakazoid
Freddy's Nightmares
The Fugitive
George Carlin
Gilligan's Island
Godzilla: King of the Monsters
Godzilla Raids Again
Growing Pains
Hangin' With Mr. Cooper
Head of the Class
Jamie Foxx
Jesse
Kirk
Kung Fu
La Femme Nikita
Lois & Clark
Maverick
Max Headroom
Monkey'd Minutes
Moral Court
New Adventures of Batman
New York Daze
Off Centre
The Office
Our Gang
The People's Court
Perfect Strangers
Pinky and the Brain
Police Academy
Real Gilligan's Island
Scarecrow & Mrs. King
Sisters
Spenser: For Hire
Superboy
Superman Cartoons
V
Welcome Back, Kotter
Wonder Woman