

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

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

To: The Commission  
The Secretary

**COMMENTS OF SINCLAIR BROADCAST GROUP, INC.  
ON FURTHER NOTICE OF PROPOSED RULE MAKING**

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Dated: October 23, 2006

## Summary

This further rulemaking proceeding, *inter alia*, marks the FCC's third attempt to establish a coherent, rational local television ownership rule since Congress ordered the FCC under Section 202(h) of the Telecommunications Act of 1996 to periodically review all of its broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition." In making its determination, the Commission must take into consideration not only the Third Circuit's directives in remanding the 2003 local television ownership rule, but also the conclusions of the D.C. Circuit in *Sinclair* that the FCC's 1999 local television ownership rule was insufficiently deregulatory and in *Fox* that the Commission's obligation under Section 202(h) is more akin to Admiral Farragut's famous command, "Damn the torpedoes! Full speed ahead," than to an incremental deregulatory approach.

Under the dictates of Section 202(h) and the D.C. Circuit's decisions in *Sinclair* and *Fox*, the Commission should immediately accept and process applications seeking waivers for joint ownership of television stations, otherwise impermissible under the current ownership rules, pending resolution of this proceeding. It has been more than four years since the D.C. Circuit concluded that the existing 1999 local television ownership restriction is arbitrary and capricious and directed the FCC to repeal or modify that rule as required under Section 202(h). Yet, the FCC has continued to enforce the rule, even though it affirmatively determined in the *2002 Biennial Review* that the rule was not necessary in the public interest to promote viewpoint diversity, program diversity, competition, or localism. Indeed, the Commission concluded that the rule could harm competition and hinder program diversity and localism. Under such circumstances and the high likelihood that a new rule is unlikely to take effect any time soon, the Commission should grant waiver requests of the 1999 local television rule currently being

enforced in those situations where an applicant can demonstrate that no harm will result from the proposed combination and that there will be public interest benefits.

When the Commission does address its rules, it must acknowledge that there is no logical or scarcity-based justification for any restrictions on local television ownership. Indeed, the Commission's repeated failure to establish a local television ownership rule able to survive judicial scrutiny further supports that conclusion. In the modern multimedia environment, not only do viewers watch video programming provided over cable, satellite, and fiber optic systems, but they also download video programming to their iPods; watch the latest news, sports, and weather updates on their cell phones; view popular broadcast and cable network programs on their computers; produce, disseminate, and watch amateur video programs through web sites such as YouTube and MySpace; use the Internet to read and watch local and national news; rent and watch DVDs delivered through the mail; and post and read personal, first-hand accounts of major news events through "blogs." In short, viewers are able to receive local and national news and entertainment programming through a variety of different media platforms and from a number of different sources.

Rather than serving the public interest, local television ownership restrictions simply impair the ability of stations to compete effectively in the modern media marketplace. For example, in Columbus, Ohio (and in many other markets) the multi-faceted media giant Time Warner owns the dominant cable system, an extremely popular Internet access service and content provider, CNN and Headline News (as well as other cable channels like HBO, Cinemax, TBS, TNT, Cartoon Network, and Turner Classic Movies), and the CW Network. Time Warner is also free to start a local cable news channel. No FCC rule prohibits Time Warner from buying a top four-ranked broadcast station in the market (nor should such a prohibition exist).

Nonetheless, Sinclair must compete with such media powerhouses, but is prohibited from owning two top four-ranked stations in the same market as a result of an irrational fear, based purely on conjecture, that such a combination would somehow harm competition and viewers.

As part of the Commission's quadrennial review, the FCC is obligated to reexamine and demonstrate anew the necessity of all of its broadcast ownership rules, including the Top Four Rule. For the reasons discussed herein, that rule should be eliminated. It is based on an out-dated framework, and there is simply no evidence that such combinations harm competition. Sinclair's own experience in Columbus, Ohio, Dayton, Ohio, and Charleston, West Virginia, where it programs two top four-ranked stations pursuant to grandfathered local marketing agreements, reveals that the FCC's fears are completely baseless. In addition, there are many markets with only a handful of stations, but the Commission has never alleged, much less demonstrated as required under Section 202(h), that stations in such markets have high advertising rates or exercise market power to the detriment of viewers.

Additionally, the advent of digital operations permits a single licensee to be the local affiliate of two or more major broadcast networks, circumventing one of the stated purposes of the Top Four Rule. Moreover, as Sinclair has repeatedly argued, the Top Four Rule inappropriately treats Fox stations, typically the fourth-ranked station in a market, the same as affiliates of the other three major broadcast networks, despite clear differences to the contrary. Accordingly, the Top Four Rule is arbitrary and capricious and cannot be justified as necessary in the public interest.

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**COMMENTS OF SINCLAIR BROADCAST GROUP, INC.  
ON FURTHER NOTICE OF PROPOSED RULE MAKING**

Sinclair Broadcast Group, Inc. (“Sinclair”), by its attorneys, hereby submits its comments in response to the Further Notice of Proposed Rule Making, FCC 06-93, in the above-captioned proceedings, released July 24, 2006 (the “*FNPRM*”). Sinclair is a television broadcasting company that owns, provides programming services pursuant to local marketing agreements (“*LMA*”), or provides sales services to 58 television stations in 36 markets across the United States.

## I. BACKGROUND

### A. Section 202(h) of the Telecommunications Act of 1996

This further rulemaking proceeding, *inter alia*, marks the FCC's third attempt to establish a coherent, rational local television ownership rule since Congress ordered the FCC under Section 202(h) of the Telecommunications Act of 1996 to periodically review all of its broadcast ownership rules to "determine whether any of such rules are necessary in the public interest as the result of competition." Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). In *Fox Television Stations, Inc. v. FCC*, the D.C. Circuit determined that the Commission's obligation under Section 202(h) is more akin to Admiral Farragut's command "Damn the torpedoes! Full speed ahead" than to an incremental deregulatory approach.<sup>1</sup> In *Sinclair Broadcast Group, Inc. v. FCC*, the same court concluded that the FCC's 1999 Local Television Ownership Rule, was insufficiently deregulatory and remanded the arbitrary and capricious 1999 rule to the FCC to justify as necessary in the public interest or to repeal or modify it.<sup>2</sup> Thus, in determining whether any broadcast ownership restriction is necessary in the public interest, the FCC must be guided not only by the comments of the Third Circuit in *Prometheus Radio Project v. FCC*<sup>3</sup> but also by the D.C. Circuit's instructions to deregulate in both *Sinclair* and *Fox*.

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<sup>1</sup> 280 F.3d 1027 (2002), *rehearing granted*, 293 F.3d 537 (D.C. Cir. 2002).

<sup>2</sup> 284 F.3d 148 (D.C. Cir. 2002), *rehearing denied*, 2002 U.S. App. LEXIS 16619 (D.C. Cir. Aug 12, 2002). Under the 1999 Local Television Ownership Rule, an entity is permitted to own two television stations in the same market provided that at least one of the stations is not ranked among the top four-ranked stations and at least eight independently owned and operating stations would remain in the market after the proposed combination.

<sup>3</sup> *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 125 S. Ct. 2902 (2005).

B. *2002 Biennial Review*<sup>4</sup>

In 2002, the FCC initiated a comprehensive rulemaking proceeding regarding all of its media ownership rules and invited comments on the impact of its ownership rules on the Commission's policy goals of diversity, competition, and localism.<sup>5</sup> In response, Sinclair provided a comprehensive and thorough analysis of the media landscape and demonstrated that retention of any local television ownership restriction could not be justified and would be contrary to the public interest.<sup>6</sup>

In the Report and Order concluding that proceeding, the Commission, citing numerous studies, including ones submitted by Sinclair, reached the following conclusions:

- “our existing local television ownership rule is not necessary to achieve our [viewpoint] diversity goal” (*2002 Biennial Review*, at ¶ 171);
- “Although our local TV ownership rule was not intended to promote program diversity, . . . [w]e conclude that the current rule is not necessary to promote program diversity” (*id.* at ¶ 172);
- “the current local television ownership rule is not necessary to protect competition” (*id.* at ¶ 140);
- “the adoption of the local television ownership rule was not predicated on promoting localism” (*id.* at ¶ 155) and “the current local television ownership rule is not necessary in the public interest to promote localism” (*id.* at ¶ 169); and
- “in light of the myriad sources of competition to local television broadcast stations, . . . our current local TV ownership rule is not necessary in the public interest . . . .” (*id.* at ¶ 138).

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<sup>4</sup> See *In the Matter of 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (“*2002 Biennial Review*”), remanded, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

<sup>5</sup> See *2002 Biennial Review*, at ¶¶ 17-79.

<sup>6</sup> See generally Comments of Sinclair Broadcast Group, Inc. (January 2, 2003) (the “2003 Sinclair Comments”), which are incorporated herein by reference.

Specifically, the Commission found that its 1999 Local Television Ownership Rule prohibited efficiency-enhancing mergers, impairing broadcasters' ability to compete with cable and DBS operators and to enjoy cost-saving measures that would facilitate the transition to digital operations.<sup>7</sup>

The Commission agreed with the studies submitted by Sinclair demonstrating that same-market combinations do not result in higher advertising prices or competitive harm.<sup>8</sup> With respect to viewpoint diversity, the Commission concluded that there were “countless sources of news and information available to the public”<sup>9</sup> and that therefore its “existing local TV ownership rule [was] not necessary to achieve our diversity goal.”<sup>10</sup> The Commission, instead, elected to rely primarily on its media cross-ownership restrictions and its restrictions on protecting competition in the broadcast television advertising market to further its goal of protecting viewpoint diversity.<sup>11</sup> As to the goal of localism, the FCC concluded that the weight of the evidence indicated that owners/operators of same-market combinations have the ability and incentive to offer more programming responsive to the needs and interests of their communities<sup>12</sup> and that same-market combinations generally improved audience ratings,

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<sup>7</sup> See *2002 Biennial Review*, at ¶¶ 147, 149.

<sup>8</sup> See *id.* at ¶ 153 (citing 2003 Sinclair Comments, Exhibit 1 – The Economic Impact of Providing Service to Multiple Local Broadcast Stations Within a Single Geographic Market and Exhibit 8 – Analysis of the Competitive Effects of an LMA between WTTE-TV and WSYX-TV in Columbus, Ohio).

<sup>9</sup> *Id.* at ¶ 178.

<sup>10</sup> *Id.* at ¶ 171. The Commission equates viewpoint diversity with diverse ownership or control of sources of local news.

<sup>11</sup> See *id.* at ¶ 171.

<sup>12</sup> See *2002 Biennial Review*, at ¶¶ 159-63.

demonstrating that fears that consolidation would adversely affect programming were entirely unfounded.<sup>13</sup>

For these reasons, the Commission decided to repeal its 1999 Local Television Ownership Rule. Nonetheless, out of speculative competitive concerns that broadcast stations would possess the ability to price discriminate against some advertisers that do not have good substitutes for local television advertising, the Commission elected to maintain a numerical limit on local television ownership.<sup>14</sup>

Under the rule established in the *2002 Biennial Review* (the “2003 Local Ownership Television Rule”), a licensee essentially would be permitted to own two or three stations in a market depending on the total number of stations, provided that the licensee did not own more than one of the top four-ranked stations in that market.<sup>15</sup> The Commission’s justification for the numerical ownership limits was based on the premise that six equal-sized competitors in each market, in terms of capacity to deliver programming, would be sufficient to protect competition for local television advertising.<sup>16</sup> The Commission retained its Top Four Rule, because it concluded that such stations, typically ABC, CBS, Fox, and NBC affiliates, comprised a “strategic group” different from lower-ranked stations.<sup>17</sup> The Commission also reasoned that

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<sup>13</sup> *See id.* at ¶ 150.

<sup>14</sup> *See id.* at ¶ 152. As discussed *infra* in Part III.B, this argument fails.

<sup>15</sup> *See id.* at ¶ 134.

<sup>16</sup> *See id.* at ¶ 192. The Commission relaxed its requirement for six competitors in markets with fewer than twelve stations because “owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets.” *Id.* at ¶ 201.

<sup>17</sup> *See 2002 Biennial Review*, at ¶¶ 195-96 (The continued ability of “Big Four” networks to attract mass audiences supports “our decision to separate ownership of local stations carrying the programming of Big Four networks.”).

mergers within that strategic group were more likely to enhance market power in the local television advertising market and less likely to result in expanded local news programming because such stations generally already originate such programming.<sup>18</sup>

C. *Prometheus v. FCC*

Numerous parties, including Sinclair, appealed the ownership rules, including the local television ownership rule, and by lottery, the U.S. Court of Appeals for the Third Circuit was assigned to adjudicate the appeal.<sup>19</sup> Rather than transferring the case back to the D.C. Circuit, as several parties had logically requested because that court had previously addressed the 1999 Local Television Ownership Rule as well as several other FCC media ownership rules, the Third Circuit elected to adjudicate the matter.

Before the rules took effect, the Third Circuit issued a stay and ordered the FCC to continue to enforce the 1999 ownership rules, held to be arbitrary and capricious by the D.C. Circuit. Subsequently, the court rejected, *inter alia*, the 2003 Local Television Ownership Rule as arbitrary and capricious, remanding for the FCC to justify the basis for the numerical limits established by the rule.<sup>20</sup> With respect to the FCC's competition analysis, the court held that the Commission's assumption that six equal-sized competitors, based on spectrum capacity, would ensure competition in a market was unsupported by the record and also inconsistent with the Commission's use of actual market shares as a basis for the Top Four Rule.<sup>21</sup> The Third Circuit

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<sup>18</sup> See *id.* at ¶¶ 197-98.

<sup>19</sup> See *Prometheus*, 373 F.3d at 389.

<sup>20</sup> See *Prometheus*, 373 F.3d at 418.

<sup>21</sup> See *id.* at 419.

affirmed the Commission's retention of the Top Four Rule, concluding that the Commission's justifications for the rule were supported by the record.<sup>22</sup>

The Third Circuit also affirmed the FCC's conclusion that consolidation improves local programming and that media other than broadcast television contribute to viewpoint diversity.<sup>23</sup> However, the court ordered the Commission to demonstrate that there is ample substitutability from non-broadcast media to warrant any numerical limits that the FCC establishes on remand. In *dicta*, the court suggested that cable and Internet news sources were weak substitutes for local television news, arguing that only 30% of cable subscribers had access to local cable news channels, and "the Internet is also limited in its availability and as a source of local news."<sup>24</sup>

D. *Further Notice of Proposed Rulemaking*

Several parties, including Sinclair, challenged the decision of the Third Circuit, but the Supreme Court declined to grant certiorari.<sup>25</sup> A year after the Supreme Court's denial and three years after the release of the 2002 *Biennial Review*, the Commission issued this *FNPRM* inviting comments on the various issues raised by the *Prometheus* court and generally on whether the media ownership rules are "necessary in the public interest."<sup>26</sup> The Commission proposed no new rules but asked that commenters address "whether [the FCC's] goals would be better addressed by employing an alternative regulatory scheme or set of rules."<sup>27</sup>

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<sup>22</sup> *See id.* at 416; *see supra* notes 17-18 and accompanying text.

<sup>23</sup> *See id.* at 415.

<sup>24</sup> *Id.*

<sup>25</sup> *See* 125 S. Ct. 2902 (2005).

<sup>26</sup> *FNPRM*, at ¶ 1.

<sup>27</sup> *Id.* at ¶ 4.

The Commission stated that the Media Bureau would incorporate a summary of the record of its separate localism proceeding into this docket, including information obtained from several public hearings and more than 82,000 comments,<sup>28</sup> and that this information would be considered as the proceeding progressed.<sup>29</sup>

## **II. THE FCC MUST IMMEDIATELY PROCESS APPLICATIONS SEEKING WAIVERS FOR JOINT OWNERSHIP OF TELEVISION STATIONS, OTHERWISE IMPERMISSIBLE UNDER THE PRESENT LOCAL TELEVISION OWNERSHIP RULE, PENDING RESOLUTION OF THIS PROCEEDING**

The *Sinclair* court's direction to the FCC in 2002 was clear – justify the insufficiently deregulatory and arbitrary and capricious 1999 Local Television Ownership Rule or repeal or modify it,<sup>30</sup> and the FCC is compelled to follow this mandate. The FCC subsequently determined in the *2002 Biennial Review* that the rule was not necessary in the public interest to promote viewpoint diversity, program diversity, competition, or localism.<sup>31</sup> Indeed, the Commission concluded that the rule could harm competition and hinder program diversity and localism.<sup>32</sup> Nonetheless, four years have passed since the *Sinclair* decision, and as a result of the Third Circuit's stay and remand of the FCC's 2003 Local Television Ownership Rule, the FCC continues to enforce the arbitrary and capricious 1999 rule, which the FCC itself determined was not in the public interest and the D.C. Circuit ordered to be modified or eliminated. Given that

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<sup>28</sup> As discussed *infra* in notes 121-122 and the accompanying text, these emails are the result of organized email campaigns by a small group of individuals with specific agendas and are not evidence of broad public support for the advocated policies.

<sup>29</sup> *See id.* at ¶¶ 8-9.

<sup>30</sup> *Sinclair*, 284 F.3d at 159, 162-65.

<sup>31</sup> *See 2002 Biennial Review*, at ¶¶ 140, 169, 171-72.

<sup>32</sup> *See id.* at ¶¶ 133, 180.

the Commission's last attempt to establish a local television ownership rule took approximately two years<sup>33</sup> and the prior attempt required eight years,<sup>34</sup> there is a strong likelihood that the insufficiently deregulatory rule will continue to apply as the *de facto* permanent rule for years to come.<sup>35</sup>

Accordingly, consistent with the D.C. Circuit's decisions in *Sinclair* and *Fox* ("Damn the torpedoes! Full speed ahead."),<sup>36</sup> the FCC must immediately accept and process applications seeking waivers of the arbitrary and capricious 1999 Local Television Ownership Rule, pending resolution of this proceeding. The FCC should grant such waivers if the applicant can demonstrate that there will be no harm to diversity or competition and that the proposed combination will result in public interest benefits.

For example, in Columbus, Ohio, Dayton, Ohio, Charleston, West Virginia, Baltimore, Maryland, Charleston, South Carolina, and Anderson, South Carolina, Sinclair has owned one station and sought to acquire another station that Sinclair has programmed for a number of years pursuant to a grandfathered LMA. In applications to the FCC for such acquisitions, Sinclair affirmatively demonstrated that the programming relationships have led to increased newscasts

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<sup>33</sup> *Prometheus*, 373 F.3d at 386.

<sup>34</sup> *See Review of the Commission's Regulations Governing Television Broadcasting*, 14 FCC Rcd 12903, ¶ 1 (1999).

<sup>35</sup> *See, e.g., American Broad. Co., Inc. v. FCC*, 191 F.2d 492, 500-01 (D.C. Cir. 1951) ("There comes a point when what has been designed a 'temporary measure' lasts for so long, and shows so little sign of being terminated in the foreseeable future, that to continue to categorize it as 'temporary' is to ignore the realities of the situation."); *MCI Telecomm. Corp. v. FCC*, 627 F.2d 322, 325 (D.C. Cir. 1980) (Unless there is "some limit to the time tariffs unjustified under the law can remain in effect . . . the regulatory scheme Congress has crafted becomes anarchic and whatever tariff rates the 'regulated' entity files become, for all practical purposes, the accepted rates.").

<sup>36</sup> *Fox*, 280 F.3d at 1044.

and assisted the transitions to full-power digital operations.<sup>37</sup> In three of the markets, Sinclair noted that the proposed acquisitions would have been permissible under the 2003 Local Television Ownership Rule. For the other three markets, Sinclair showed that joint ownership would be critical to maintaining the competitiveness of the stations. Importantly, to Sinclair’s knowledge, no advertiser or competitor in any of the markets has ever raised a complaint or expressed a concern about any anticompetitive result of those LMAs. In fact, for each of the proposed acquisitions, Sinclair submitted the requisite Hart-Scott-Rodino antitrust filing, and neither the Antitrust Division of the Department of Justice nor the Federal Trade Commission took action to prohibit the agreement.<sup>38</sup> Yet, the Commission has refused to consider the merits of Sinclair’s waiver requests of the 1999 Local Television Ownership Rule for any of the markets.<sup>39</sup>

The Commission has the authority to act on requests for waivers of its ownership rules, and such actions would be fully consistent with Commission policy, the D.C. Circuit opinion in *Sinclair*, and the stay imposed by the Third Circuit. The Commission has repeatedly acknowledged that it is “obligated to give a hard look . . . to waiver requests.”<sup>40</sup> Indeed, the FCC

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<sup>37</sup> See, e.g., File Nos. BALCT-20031107AAU *et al.* (November 7, 2003).

<sup>38</sup> Prior to 1999, the Commission did not treat LMAs as attributable ownership interests. The Department of Justice and Federal Trade Commission, however, treated LMAs as acquisitions requiring Hart-Scott-Rodino filings.

<sup>39</sup> See Letter to Kathryn Schmeltzer from Kenneth Ferree, 19 FCC Rcd 3897 (2004) (dismissing applications as premature), *application for review pending*; see also Motion for Decision on Application for Review (January 6, 2006).

<sup>40</sup> 2002 *Biennial Review*, at ¶ 85; see also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (“[A]llegations such as those made by petitioners, stated with clarity and accompanied by supporting data, are not subject to perfunctory treatment, but must be given a ‘hard look.’”); see also FCC Brief in *Prometheus*, at 41 n. 18 (3d Cir.) (acknowledging that the Commission has a “duty to give a ‘hard look . . . to waiver requests’”); Public Notice,

has granted waivers of its 1999 ownership rules to permit ownership of media interests otherwise inconsistent with its rules in cases where the applicant has demonstrated lack of harm to diversity and competition and public interest benefits resulting from the proposed combination.

For example, in *Telemundo Communications Group*, the Commission granted a waiver of the 1999 Local Television Ownership Rule permitting the ownership of three television stations in Los Angeles, California in light of the demonstrated lack of harm to diversity and competition.<sup>41</sup> More recently, in *Counterpoint Communications, Inc.*, the Commission granted a waiver request of the 1999 newspaper-broadcast cross-ownership rule permitting a licensee to own a daily newspaper and two television stations in light of the number of media voices in the Hartford-New Haven, Connecticut market, the demonstrated lack of market power of the combined entity, and the public interest benefits resulting from the combination.<sup>42</sup>

Moreover, to the extent the Commission decides to address and eliminate its newspaper-broadcast cross-ownership rule in a separate proceeding in order to expedite the repeal of that restriction, Sinclair submits that this is further justification for immediate processing of

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DA 03-2867, at 2 (September 10, 2003) (noting that waiver requests must accompany all applications that do not comply with the 1999 ownership rules).

<sup>41</sup> See *Telemundo Communications Group, Inc.*, 17 FCC Rcd 6958, at ¶ 46 (2002). While the FCC stated in its grant that the licensee would be required to divest its interest in the third station within two years, the FCC has never subsequently required any divestiture, and that combination exists to this day. See BIA Investing in Television 2006 Market Report 2<sup>nd</sup> Edition (2006); see also Letter to Marlene H. Dortch from F. William LeBeau, FCC File No. BTTCT-20011101ABK *et seq.* (July 7, 2003).

<sup>42</sup> See *Counterpoint Communications, Inc.*, 20 FCC Rcd 8582 (2005). Although the FCC ostensibly conditioned the ownership on the licensee's continued efforts to divest one of the stations, the FCC is not obligated to take any further action until 2007, at which time the FCC is likely to have eliminated the newspaper-broadcast cross-ownership restriction. See *Prometheus*, 373 F.3d at 398 (affirming the FCC's repeal of the newspaper-broadcast cross-ownership restriction, but leaving in place the stay of all the new ownership rules pending remand).

television ownership waiver requests. While Sinclair wholeheartedly supports any FCC decision to eliminate unnecessary ownership regulations, the Commission must deregulate across all media industries in an equitable manner to ensure that no group is unfairly treated. For these reasons, the Commission should process applications seeking waivers for joint ownership of television stations otherwise impermissible under the present local television ownership rule, pending resolution of this proceeding.

### **III. THE PROLIFERATION OF VIDEO CONTENT SOURCES AND NON-BROADCAST MEDIA PLATFORMS ELIMINATES ANY NEED FOR LOCAL TELEVISION OWNERSHIP RESTRICTIONS**

An FCC local television ownership rule is completely unnecessary to protect diversity, competition, or localism. The modern media landscape has changed dramatically in the last few years. Today, not only do viewers watch video programming provided over cable, satellite, and fiber optic systems, but they also download video programming to their iPods; watch the latest news, sports, and weather updates on their cell phones; view popular broadcast and cable network programs on their computers; produce, disseminate, and watch amateur video programs through web sites such as YouTube and MySpace; use the Internet to read and watch local and national news; rent and watch DVDs delivered through the mail; and post and read personal, first-hand accounts of major news events through “blogs.”

This year’s Video Music Awards hosted by MTV provides a prime example. Not only was the show carried on its traditional cable network channel, but a backstage view of the show was simultaneously made available on MTV’s broadband website, MTV Overdrive; video clips were sent to cell phone users who requested such service; another version of the same show was shown on a sibling cable channel, MTV2; and separately mtvU, a cable channel available only

on college campuses, aired a college-themed version of the program.<sup>43</sup> MTV's multi-platform production also provided a host of sponsorship opportunities. In these circumstances, government intervention is completely unnecessary.

A. The wide availability of local and national news and entertainment programming on the Internet and through non-broadcast media platforms ensures viewpoint and program diversity

1. High-speed Internet access is readily available to the public

The most profound change to the market in the past three years has been the virtual explosion of news and entertainment content online, due in large part to the tremendous growth in broadband availability. As the most recent Commission broadband status report shows, compared to 2002 when the Commission last invited comments on its ownership rules, the number of high-speed lines have nearly tripled and now reach over 50 million households or businesses in all 50 states.<sup>44</sup> Consumers obtain broadband from an extraordinary number of connections both "traditional," such as cable modem and DSL, and non-traditional, such as satellite, fixed and mobile wireless, and even utility power lines. Indeed, in the last three years the Commission itself has initiated and/or concluded numerous proceedings (e.g., broadband

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<sup>43</sup> See, e.g., Emily Steel, Pop Mix: MTV's Awards Show Goes Multimedia, *The Wall Street Journal*, August 17, 2006, at B2; Brian Garrity, MTV awards show moves beyond TV screens, *The Washington Post*, August 27, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/27/AR2006082700245.html> (last visited August 28, 2006).

<sup>44</sup> See *In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11, at Table 1 (2006) ("2006 Video Status Report"). The FCC defines "high-speed" lines (or wireless channel) as connections to the Internet which provide at least 200 kbps in one direction (download), which is generally sufficient for video streaming.

over power line, the BRS/EBS transition, and the AWS auction)<sup>45</sup> to facilitate broadband availability, one of the stated goals of the FCC and this Administration.<sup>46</sup>

Industry and communities have also taken the initiative in making broadband widely available at no charge. For example, Google, Inc. recently announced that it will offer free wireless access in its home town of Mountain View, California.<sup>47</sup> Other communities, including Annapolis, Philadelphia, Chicago, and Manhattan, are also deploying similar free wireless service.<sup>48</sup> These facts readily show that high-speed Internet access is not “limited in availability,” as the *Prometheus* court concluded in 2004, and all the outlets available on the Internet must be considered as sources of viewpoint diversity, competition, and localism for purposes of the Commission’s ownership restrictions.<sup>49</sup>

2. The Internet provides the public virtually limitless sources of local and national news and entertainment programming

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<sup>45</sup> See, e.g., *In the Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Powerline Systems*, Memorandum Opinion and Order, FCC 06-113 (August 7, 2006); *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Order on Reconsideration, FCC 06-46 (April 27, 2006).

<sup>46</sup> See President George W. Bush, “A New Generation of American Innovation,” at pp. 11-12 (April 2004), available at [http://www.whitehouse.gov/infocus/technology/economic\\_policy200404/innovation.pdf](http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf) (last visited January 10, 2005).

<sup>47</sup> See Michael Liedtke, Google set to connect its entire home town to Internet for free, USA Today, August 16, 2006, available at [http://www.usatoday.com/tech/wireless/2006-08-16-google-free-wifi\\_x.htm?POE=TECISVA](http://www.usatoday.com/tech/wireless/2006-08-16-google-free-wifi_x.htm?POE=TECISVA) (last visited August 17, 2006).

<sup>48</sup> See, e.g., Jennifer LeClair, Google Bringing WiFi to Hometown, TechNewsWorld, August 16, 2006, available at <http://www.technewsworld.com/story/52452.html> (last visited September 19, 2006); Annapolis Wireless Launches Free Public WIFI in Annapolis, Nortel: News Release, April 24, 2006, available at [http://www2.nortel.com/go/news\\_detail.jsp?cat\\_id=-8055&locale=en-US&oid=100199042](http://www2.nortel.com/go/news_detail.jsp?cat_id=-8055&locale=en-US&oid=100199042) (last visited October 3, 2006).

<sup>49</sup> *Prometheus*, 373 F.3d at 415.

As the Commission recognized in its last ownership proceeding, virtually every major media company has a web site.<sup>50</sup> Today, the websites of numerous local newspapers, radio stations, television stations, magazines, broadcast networks, and cable networks, as well as other “non-traditional” media entities such as government organizations, Internet portals (e.g., Yahoo, Google, and home pages of cable Internet Service Providers (“ISPs”), such as [www.comcast.net](http://www.comcast.net) and [www.aol.com](http://www.aol.com)), and countless websites offer the public news and entertainment content, including video programming, ensuring that no local television ownership rule is necessary to protect viewpoint diversity.

For example, in 2005 ABC made available through its website some of its more popular prime time entertainment shows, *Desperate Housewives*, *Lost*, *Alias*, and *Commander-in-Chief*, and the network has announced that it will put even more shows on its website this fall.<sup>51</sup> CBS makes available on its broadband website Innertube all three *CSI* shows, *NCIS*, *Numb3rs*, *Survivor*, and its new drama *Jericho*.<sup>52</sup> NBC also offers programming content online and has agreed recently to work with YouTube, an online video distribution company, to cross-promote their respective video products.<sup>53</sup> Similarly, Fox makes available full episodes of several of its

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<sup>50</sup> See 2002 Biennial Review, at ¶ 119.

<sup>51</sup> See Communications Daily, August 7, 2006, at p. 13.

<sup>52</sup> See, e.g., Natalie Finn, CBS’ Innertube Blows Up, E! Online, August 15, 2006, available at [www.eonline.com/News/Items/Pf/0,1527,19774,00.html](http://www.eonline.com/News/Items/Pf/0,1527,19774,00.html) (last visited September 5, 2006).

<sup>53</sup> See, e.g., Sara Goo, NBC Taps Popularity of Online Video Site, The Washington Post, June 28, 2006, at D1.

broadcast programs, including *Prison Break*, *Justice* and *Bones*, on MySpace and on the websites of its 24 owned-and-operated stations.<sup>54</sup>

The new CW Network recently debuted four television programs online three days before their over-the-air broadcasts.<sup>55</sup> Similarly, CBS teamed up with TiVo to distribute its new show *The Class* prior to its over-the-air premiere.<sup>56</sup> Google recently announced an agreement with MTV providing for the distribution of full-length episodes of three contemporary and popular cable network shows, including *South Park* and *Jackass*.<sup>57</sup> Moreover, many of these programs and that of other broadcast and cable networks are available on a pay-per-episode basis via iTunes, an online clearing house for video and audio content, which in the past few years has seen incredible growth as a result of the phenomenal popularity of iPod devices.<sup>58</sup>

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<sup>54</sup> See, e.g., Fox offers shows on MySpace, TV sites, Boston Globe, October 3, 2006, available at [http://www.boston.com/business/technology/articles/2006/10/03/fox\\_offers\\_shows\\_on\\_myspace\\_tv\\_sites/](http://www.boston.com/business/technology/articles/2006/10/03/fox_offers_shows_on_myspace_tv_sites/) (last visited October 3, 2006).

<sup>55</sup> See, e.g., Carly Mayberry, CW, MSN team on sneak previews, Reuters/Hollywood Reporter, August 31, 2006, available at [http://today.reuters.com/news/articlenews.aspx?type=internetNews&storyID=2006-08-31T082622Z\\_01\\_N31369218\\_RTRUKOC\\_0\\_US-CW.xml](http://today.reuters.com/news/articlenews.aspx?type=internetNews&storyID=2006-08-31T082622Z_01_N31369218_RTRUKOC_0_US-CW.xml) (last visited September 6, 2006).

<sup>56</sup> See, e.g., CBS, Tivo Join Forces for First TV Debut, MediaPost Publications, September 6, 2006, available at <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=47695&Nid=23070&p=383412> (last visited September 6, 2006).

<sup>57</sup> See Andrew Wallenstein, MTV, Google deal makes video AdSense, Hollywood Reporter, August 7, 2006.

<sup>58</sup> An iPod is a portable, digital media device capable of playing audio and, in more recent models, video content. User-created content for iPods are generally referred to as “podcasts.” See e.g., iPod 101: Master Your Music and More, available at <http://www.apple.com/support/ipod101/> (last visited August 31, 2006).

With respect to news programming, in November 2005 NBC became the first broadcast network to offer online newscasts.<sup>59</sup> On September 5, 2006, CBS began “simulcasting” its evening news broadcast on the Internet for free.<sup>60</sup> The network also makes available Internet-exclusive programming such as *Couric & Company*, a “blog” exploring the day’s news;<sup>61</sup> *Eye to Eye*, a daily, on-demand feature hosted by Katie Couric offering extended interviews with top newsmakers; *CBS News First Look with Katie Couric*, a summary, available early each weekday afternoon, of the stories being considered for coverage on that night’s broadcast; and *Katie Couric’s Notebook*, a one-minute look at a top story or issue by Couric, which is available as an audio and video podcast. Other broadcast and cable networks provide similar news programming online.<sup>62</sup>

The growth and popularity of online news has been extraordinary. The Pew Research Center estimates that there are over 147 million Internet users in the U.S., and “[s]ome 50 million Americans turn to the internet for news on a typical day . . . .”<sup>63</sup> While these Internet users favor websites of traditional media sources (e.g., CNN or MSNBC, local and national newspapers, radio stations, and television stations), a substantial percentage of Internet users (39% of all Internet users) also obtain news from portal websites (e.g., Yahoo, Google, and ISP

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<sup>59</sup> See, e.g., NBC Nightly News Netcast, MSNBC.com, November 10, 2005, available at <http://www.msnbc.msn.com/id/9880369> (last visited August 7, 2006).

<sup>60</sup> See [www.cbsnews.com/stories/2006/08/17/eveningnews/main1903849.shtml](http://www.cbsnews.com/stories/2006/08/17/eveningnews/main1903849.shtml) (last visited August 18, 2006).

<sup>61</sup> See *infra* note 74 and accompanying text (discussing “blogs”).

<sup>62</sup> See, e.g., <http://abcnews.go.com>, <http://www.cnn.com> and <http://www.headlinenews.com>.

<sup>63</sup> See John B. Horrigan, Online News, PEW Internet & American Life Project, March 22, 2006, available at [http://www.pewinternet.org/pdfs/PIP\\_News.and.Broadband.pdf](http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf) (last visited September 1, 2006) (“PEW Report”).

home pages, such as [www.comcast.net](http://www.comcast.net) and [www.aol.com](http://www.aol.com)), news blogs (9%), non-media news websites such as [Newsmax.com](http://Newsmax.com) or [Altnet.com](http://Altnet.com) (6%), and listservs (5%).<sup>64</sup> Moreover, online news, which is available twenty-four hours a day, seven days a week, is rapidly becoming the news source of choice for the younger generation – “71% of adults 18-29 say they get their news online, yet only 46% say they regularly watch local TV news.”<sup>65</sup> Indeed, one study conducted by Penn State University predicted that the sports segments of newscasts will eventually disappear from local news broadcasts and migrate online.<sup>66</sup>

Importantly, the availability of news and entertainment programming online is not limited to major broadcast networks, traditional network content providers, and television stations. Local governments, newspapers, magazines, and radio stations also provide video programming of national and local news events.<sup>67</sup> Indeed, reporters for newspapers, such as the New York Times and the Washington Post, now carry digital video cameras as a routine matter and shoot video footage to be included on the newspaper’s website as a supplement to the story.<sup>68</sup> The success of print media’s transition to video is illustrated by the fact that five of the seven

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<sup>64</sup> See Pew Report, at iv.

<sup>65</sup> See Allison Romano, Bring It On-Line, *Broadcasting and Cable*, December 12, 2005, available at <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6344830> (last visited August 28, 2006).

<sup>66</sup> See, e.g., Allison Romano, Station To Station: Local Teams Get Shut Out, *Broadcasting and Cable*, October 2, 2006, available at <http://www.broadcastingcable.com/article/CA6376567.html?&display=Features&referral=SUPP> (last visited October 5, 2006).

<sup>67</sup> See, e.g., [www.dc.gov](http://www.dc.gov), <http://www.washingtonpost.com>, and <http://www.wtop.com>; see also Brian Steinberg, Ready For Their Close-Up, *The Wall Street Journal*, September 5, 2006, at A15.

<sup>68</sup> See, e.g., Harry Jaffe, Reporters as Shooters – the Newest New Journalism Arrives at the Washington Post, *The Washingtonian*, June 19, 2006, available at <http://www.washingtonian.com/buzz/2006/0619.html> (last visited October 4, 2006);

nominees for this year's Emmy Awards for the emerging media category were reporters for the websites of The New York Times and The Washington Post.<sup>69</sup>

Indeed, given the ease and popularity of storing and distributing video content online through websites such as YouTube ([www.youtube.com](http://www.youtube.com)) and MySpace ([www.myspace.com](http://www.myspace.com)), effectively every Internet user is a potential source of viewpoint and program diversity, as illustrated by the following examples.<sup>70</sup> In a recent political campaign, an individual recorded a political candidate purportedly making racially insensitive remarks. The recording was made available on YouTube, allowing the public and voters to judge for themselves the content and context of the alleged racist statements. As one reporter stated in describing the significance of YouTube, "[t]he barriers to video broadcast are now gone. So an opposing campaign no longer has to rely on a local news station or CNN or CSPAN to run video of a gaffe. Any dolt with a handycam now can capture the unscripted reality of a candidate and disseminate it worldwide."<sup>71</sup>

Similarly, the Washington Post carried a story recently as a result of a video posted on YouTube detailing alarming shortcomings in a \$24 billion government project by a major defense contractor.<sup>72</sup> The whistle-blower, who created the video, first attempted to alert his

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<sup>69</sup> Nick Madigan, Video stories put newspapers on a whole new page, *The Baltimore Sun*, September 24, 2006, *available at* <http://www.baltimoresun.com/features/custom/aetoday/bal-ae.ey24sep24,0,7834745.story> (last visited October 4, 2006).

<sup>70</sup> YouTube, which is the present leader in this field, reported that viewers saw 2.5 billion videos on its website in June 2006 alone. *See* YouTube hits 100m videos per day, *BBC News*, July 17, 2006, *available at* <http://news.bbc.co.uk/1/hi/technology/5186618.stm> (last visited August 1, 2006). Other providers offering similar video storage and distribution include Yahoo, Microsoft's MSN, Google, and AOL.

<sup>71</sup> *See, e.g.*, Tim Dickinson, The First YouTube Election: George Allen and "Macaca," *Rolling Stone*, August 15, 2006, *available at* <http://rollingstone.com/nationalaffairs/?p=246>.

<sup>72</sup> *See* Griff Witte, On YouTube, Charges of Security Flaws, *The Washington Post*, August 29, 2006, at D1; Tom Siebert, Citizen Media Beats Big Media, YouTube Blows the Whistle,

bosses, government investigators, traditional media outlets, and congressmen, but to no avail. The YouTube video, however, caught the attention of various defense trade magazines and the ranking Democrat on the Homeland Security Committee, who wrote a letter to the relevant agency, the Coast Guard, asking for a response to the allegations. As noted by several members of the media industry, this is a prime example of “democratization of the media, where everyone has access to the printing press of the 21<sup>st</sup> century.”<sup>73</sup>

The popularity and ease of “blogging” is also broadly expanding the number of viewpoints accessible to the public.<sup>74</sup> For example, Dan Rather’s fraudulent document scandal regarding President Bush’s military record was discovered and made public by a blogger.<sup>75</sup> Howard Dean’s dramatic initial success in campaigning for the 2004 Democratic Presidential nomination has been largely attributed to his online grassroots recruiting and his personal blog.<sup>76</sup> As a more recent example, frustrated by what one soldier felt was mainstream media’s liberal bias, he decided to create a website organizing “blogs” of first-hand accounts of U.S. war efforts

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MediaPost Publications, August 31, 2006, *available at* <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=47533&Nid=22947&p=383412> (last visited August 31, 2006).

<sup>73</sup> *Id.*; *see also* Tom Siebert, Citizen Media Beats Big Media, YouTube Blows the Whistle, MediaPost Publications, August 31, 2006, *available at* <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=47533&Nid=22947&p=383412> (last visited August 31, 2006) (“[T]he Internet has given the average person a way to be heard.”).

<sup>74</sup> A “blog” is short for “web log” and is an online personal journal that is frequently updated and contains the reflections and comments of the author (the “blogger”). *See, e.g.*, <http://www.webster.com/dictionary/blog> (last visited August 31, 2006).

<sup>75</sup> *See, e.g.*, Paul Farhi, Blogger Takes Aim at News Media and Makes a Direct Hit, The Washington Post, August 9, 2006, at C1.

<sup>76</sup> *See* Dan Balz, Dean’s Manager Weds New Tech and Old Tactics, The Washington Post, July 27, 2003, at A5.

abroad.<sup>77</sup> Today, that website (www.milblogging.com) links to more than 1400 military blogs and receives about 210,000 unique visitors per month.<sup>78</sup> Importantly, the website provides alternative perspectives to the viewpoints of mainstream media. As these examples readily show, there is simply no diversity justification for continued regulation of local television ownership in light of the accessibility of high-speed broadband and the availability on the Internet of virtually limitless sources of local and national news and entertainment content, including video programming. This conclusion is made even more apparent when one considers the wide availability, as the Commission itself has acknowledged, of local and national news content from traditional media outlets, such as newspapers, radio, and cable news channels.<sup>79</sup>

3. The vast majority of the viewing public obtains news and entertainment programming through non-broadcast media platforms, such as cable and DBS

Even without considering the increase in diversity made available as a result of the Internet, the sheer number of non-broadcast platforms able to deliver video news and entertainment programming requires that the Commission eliminate any local television ownership restriction based on viewpoint diversity. In prior comments in the Commission's ownership proceeding, Sinclair and others demonstrated that viewers consider cable network channels as substitutes for broadcast television.<sup>80</sup> The Commission agreed stating:

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<sup>77</sup> See Mike Spector, Cry Bias, and Let Slip the Blogs of War, *The Wall Street Journal*, July 26, 2006, at B1.

<sup>78</sup> *Id.*

<sup>79</sup> See *2002 Biennial Review*, at ¶ 365 (“The record in this proceeding provides ample evidence that competing media outlets abound in markets of all sizes – each providing a platform for civic discourse.”); see also *infra* Part III.B.

<sup>80</sup> See 2003 Sinclair Comments, at 9-11.

For most viewers the programming choices offered by local broadcast television stations and cable networks represent good alternatives for one another. Most households subscribe to cable or DBS and receive DVP from cable networks and local broadcast television stations. These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television stations. The ease of switching from broadcast to cable networks for these household provides strong incentives for cable networks and local broadcast television stations to provide programs that attract viewers.<sup>81</sup>

Indeed, the vast majority (85.98%) of households actually watch television via a subscription service, such as cable or DBS,<sup>82</sup> and increasingly those viewers are watching cable network channels more than broadcast stations. For the 2004-2005 television season, Nielsen reported that cable network programs accounted for a combined average audience share of 53 for prime time viewing and 59 for all-day viewing versus a combined average audience share of 47 and 41, respectively, for broadcast stations.<sup>83</sup> More current industry reports indicate that the disparity is growing and that cable network programs are now favored over broadcast programming by a ratio of two to one.<sup>84</sup>

Cable operators offer a wide variety of different national news networks and are also increasingly becoming a separate source of local news. In July 2002, the FCC reported that only one-third of cable subscribers, 22.3 million, had access to one or more of the 23 local or regional

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<sup>81</sup> See *2002 Biennial Review*, at ¶ 143 (citations omitted).

<sup>82</sup> See *2006 Video Status Report*, at Appendix B, Table B-1.

<sup>83</sup> See *id.* at ¶ 93.

<sup>84</sup> See Wayne Friedman, *Cable Gains in Program Ratings, Wary of Commercial Ratings*, August 24, 2006 (“This season, cable continues to gain on broadcast networks. . . . Ad-supported cable has a 62.2 household share versus 31.1 share for seven broadcast networks.”), available at [http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art\\_aid=47166](http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=47166).

news channels programmed by cable operators.<sup>85</sup> Today, over 40.6 million cable subscribers have access to one or more of 42 cable news channels.<sup>86</sup> Moreover, cable operators are required to provide access channels for public affairs, educational, and governmental programming, which must also be considered a separate and independent source of local news.<sup>87</sup>

The same reasons that justify treating broadcast television and cable channels as substitutes and distinct sources of viewpoint diversity require that the Commission acknowledge that Direct Broadcast Satellite (“DBS”) systems must also be treated similarly.<sup>88</sup> DBS is available nationwide and provides service to more than 26 million U.S. households (as of June 2005), representing a 40% increase since 2002.<sup>89</sup> DBS operators provide all of the popular cable network programs, but ultimately control which programming is carried over their systems.<sup>90</sup> Accordingly, at a minimum they also must be considered as separate sources of viewpoint diversity.

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<sup>85</sup> See *2002 Biennial Review*, at ¶ 413 n. 921; see also *Regional Cable Television Services, Broadcasting & Cable Yearbook*, at E-12 (2001).

<sup>86</sup> This estimate was derived by summing the subscriber statistics from the National Cable & Telecommunications Association Directory of Cable Networks (*available at* <http://www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907> (last visited September 6, 2006)), for those systems having local or regional cable news channels, as listed in the *Broadcasting & Cable Yearbook*, at E-12 to E-13 (2006).

<sup>87</sup> See 47 U.S.C. § 531.

<sup>88</sup> To the extent other multichannel video programming distributors are present in a specific market, they too must be considered as distinct sources of viewpoint diversity for ownership purposes.

<sup>89</sup> See *2006 Video Status Report*, at ¶ 72.

<sup>90</sup> See *id.* at ¶¶ 76-78. DBS licensees must reserve four percent of their channel capacity for noncommercial programming. See 47 U.S.C. § 335(b)(1); see also 47 C.F.R. § 25.701(f).

The last three years has also seen the entry of new competitors into the video market. For example, dominant local exchange carriers, such as Qwest, Verizon, and AT&T, now serve 936 communities in 47 states<sup>91</sup> and are actively moving forward in their deployment of nationwide service.<sup>92</sup> Several cellular telephone companies, including Verizon Wireless, Sprint, Cingular, and Qualcomm, are now distributing video programming via cell phones. These services offer full length movies on demand<sup>93</sup> and “television-like” video for news updates, sports highlights, celebrity news, stock market quotes, and weather information from well established content providers such as Discovery Channel, Weather Channel, Fox News, and Nickelodeon.<sup>94</sup> Such providers are also creating original video programming. For example, Verizon Wireless struck a deal earlier this year with Sport’s Illustrated to run video segments of popular columnist Rick Reilly.<sup>95</sup> In any event, each of these new competitors controls access to its video distribution system and accordingly must also be considered a separate and independent source of viewpoint diversity. These examples show that in the modern media environment there are many different media platforms, controlled separately by a variety of entities, through which the public can

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<sup>91</sup> See Fiber-to-the-Home Council, U.S. Optical Fiber Communities List, *available at* [http://www.ftthcouncil.org/?t=143&||web\\_records::\\_R\\_CategoryID=5](http://www.ftthcouncil.org/?t=143&||web_records::_R_CategoryID=5) (last visited August 21, 2006).

<sup>92</sup> Indeed, in this past year those carriers extensively lobbied Congress and the FCC for the establishment of a nationwide franchise in order to expedite service. See, e.g., H.R. 5252; *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, FCC 05-189 (2005).

<sup>93</sup> See Sprint Streams Movies to Cell, MediaPost Publications, September 6, 2006, *available at* <http://publications.mediapost.com/index.cfm?fuseaction=Articles.san&s=47733&Nid=23067&p=383412> (last visited September 6, 2006).

<sup>94</sup> See *2006 Video Status Report*, at ¶ 133.

<sup>95</sup> See, e.g., Brian Steinberg, Ready For Their Close-Up, *The Wall Street Journal*, September 5, 2006, at A15.

obtain local and national news and entertainment programming, and accordingly, there is no need to establish local television ownership restrictions in order to protect viewpoint diversity.<sup>96</sup>

4. Fundamentally, there is no logical basis for any ownership rule based on viewpoint diversity

Although Sinclair has demonstrated that the wide availability of news and entertainment programming on the Internet and through non-broadcast media platforms ensures viewpoint diversity, fundamentally viewpoint diversity cannot be a legitimate basis for justifying local television ownership restrictions. The Commission equates viewpoint diversity with diverse ownership or control of sources of local news.<sup>97</sup> Yet, the FCC's broadcast rules do not require that television stations (or any FCC licensee for that matter) actually provide any news content. Thus, under the 1999 Local Television Ownership Rule, the owner of a local television station, which provides absolutely no news content, could be prohibited from buying another station, which also provides no news content. In contrast, the owner of a cable television system, with a twenty-four hour local news channel would be permitted to purchase a local television station with the market's most popular news channel. Such a result illustrates that any ownership restriction would be arbitrary and capricious.

Moreover, the Commission has never explained affirmatively why it places such a high value on local news when, in fact, any possible "viewpoint" expressed in such programming is quite limited. In its prior comments, Sinclair provided survey data demonstrating that approximately seventy-eight percent of a typical local news broadcast is comprised of national

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<sup>96</sup> The last few years has also seen the proliferation of DVD rental companies, such as Netflix, which the Commission has acknowledged compete with "broadcast television, cable television and DBS for the consumer's time and money." *See 2006 Video Status Report*, at ¶ 142. The Commission reports that Netflix is projected to have 5 million subscribers by the end of 2006.

<sup>97</sup> *See 2002 Biennial Review*, at ¶¶ 175-77.

news, commercial advertisements, weather forecasts, sports, and other non-local news content, leaving approximately twenty-two percent of the newscast for potential viewpoint-oriented local news content.<sup>98</sup> Accordingly, if a station, like a typical Fox affiliate, broadcasts one hour of news a day, at most approximately thirteen minutes would be potential viewpoint-oriented content – a mere 0.9% of the twenty-four hour broadcast day. Moreover, local news consists primarily of crime reports, traffic conditions, and information on local events, such as school closings, new businesses, high school sports, and county fairs—none of which conceivably expresses any type of “viewpoint.” For these reasons, viewpoint diversity simply cannot be a legitimate basis for justifying the retention of any local television ownership restriction.

B. Local television broadcasters compete fiercely for local advertising dollars with non-broadcast outlets

As Sinclair previously demonstrated, broadcast television advertising is not a relevant market for purposes of assessing the impact on competition from a proposed combination of television stations.<sup>99</sup> Sinclair’s prior survey of sales managers revealed that advertisers view as substitutes cable systems, daily newspapers, and radio stations and also, to a slightly lesser extent, direct mail, weekly newspapers, and outdoor advertising.<sup>100</sup> These facts remain true and, and in and of themselves, require that the Commission repeal its local television ownership restrictions.

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<sup>98</sup> See 2003 Sinclair Comments, at Exhibit 13.

<sup>99</sup> See 2003 Sinclair Comments, at 14-18.

<sup>100</sup> See *id.* at Exhibit 10. Moreover, given the advancement in satellite technology and the growing abundance of satellite capacity, it is not unrealistic to expect in the not-too-distant future that DBS providers will also sell local advertising.

The FCC cannot continue to draw, for purposes of its ownership rules, a distinction between advertising on broadcast television stations and non-broadcast outlets such as, in particular, cable television.<sup>101</sup> The FCC's own data shows that cable operators obtain substantial revenues from sales of local advertising and that virtually all television viewing households now have access to a cable system.<sup>102</sup> In 2005, local advertising on cable systems amounted to an aggregate of \$4 billion and has grown more than 12% per year since 2002.<sup>103</sup> In any given market, Sinclair estimates that a local cable operator generates from local advertising as much revenue as, if not more than, a top four-ranked television station in that market. Thus, in Columbus, Ohio, Sinclair estimates that Time Warner, which operates the local cable system, generated approximately \$30 million in local advertising sales in 2005, the same as the ABC affiliate in the market, which Sinclair owns.<sup>104</sup> The substantial amount of these figures shows that cable operators have every incentive to respond to changes in local market conditions resulting from a merger of local television stations.<sup>105</sup>

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<sup>101</sup> While Sinclair believes that no local television ownership rule is justifiable in the modern media marketplace, if the Commission nonetheless decides to establish such a rule, it cannot continue to draw a distinction between television broadcast stations and cable systems and, at a minimum, must treat each cable operator in a DMA as a source of competition for local advertising in establishing and calculating compliance with any numerical limit.

<sup>102</sup> See *2006 Video Status Report*, at ¶ 30.

<sup>103</sup> See *id.* at ¶ 43 Table 4.

<sup>104</sup> See *BIA Investing in Television 2006 Market Report 2<sup>nd</sup> Edition* (2006).

<sup>105</sup> See *2002 Biennial Review*, at ¶¶ 145, 191. In the *2002 Biennial Review*, the Commission conjectured without any support that cable operators have no incentives to respond to local market conditions because they provide only national programming or regional programming. Even assuming *arguendo* that a cable operator provides no local programming, that does not mean that the cable operator is not a competitive outlet for local advertising.

Additionally, advertisers have in recent years dramatically increased their expenditures for Internet advertisements, demonstrating their increasing substitutability with local broadcast television advertisements. Indeed as discussed above, the Internet is rapidly becoming the primary source of news and a legitimate alternative for entertainment programming, including broadcast network programming.<sup>106</sup> One source estimates that advertisers spent \$2.7 billion on local online advertising in 2005, \$1.2 billion of which went to newspapers and only \$0.1 billion to local television stations.<sup>107</sup> More generally, Internet advertising has grown roughly 48% from \$5.6 billion in December 2002 to \$8.3 billion in December 2005.<sup>108</sup>

In the last few years, Internet giants, such as Google and Yahoo, have made it clear that they intend to enter the local advertising market.<sup>109</sup> Google recently unveiled a targeted advertising service permitting local businesses to offer printable coupons to consumers who use

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<sup>106</sup> See *supra* Part III.A.

<sup>107</sup> See Allison Romano, Bring It On-Line, Broadcasting and Cable, December 12, 2005, available at <http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6344830> (last visited August 28, 2006).

<sup>108</sup> See TNS Media Intelligence Reports, available at <http://www.tns-mi.com/news/02282006.htm> and <http://www.tns-mi.com/news/03082004.htm> (last visited August 28, 2006).

<sup>109</sup> See, e.g., Dawn Kawamoto, Yahoo launches local-search engine, CNET News.com, October 4, 2004 (reporting the launch of localized search services by Yahoo and Google), available at [news.com/2102-1024\\_3-5394882.html](http://news.com/2102-1024_3-5394882.html) (last visited August 28, 2006).

Google Maps.<sup>110</sup> YouTube recently announced that it is expanding its advertising capabilities to include video ads.<sup>111</sup>

The relative growth of Internet advertising and decline in local broadcast television advertising is only likely to continue. As noted by one analyst, advertising on the Internet has fundamental advantages.<sup>112</sup> Internet advertisements are targeted and more cost efficient—ads can be generated based on keyword searches and assessed on a per click basis. In contrast, television advertisements are expensive, can be fast forwarded or ignored, and could be targeting the wrong audience.<sup>113</sup> The Commission must recognize these rapidly changing developments in establishing rules that could be potentially in effect for years.<sup>114</sup>

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<sup>110</sup> See Riva Richmond, Google Maps to Let Businesses Localize Coupons, *The Wall Street Journal*, August 15, 2006, at B2; see also Brooks Barnes, CBS's Core Broadcast Revenue Slips, *The Wall Street Journal*, August 4, 2006, at A13 (explaining that the softness in broadcast revenues for CBS is due in part to “ad prices [remaining] most flat amid a shift of marketing money to the Internet”).

<sup>111</sup> See Kevin J. Delaney, YouTube to Sell Advertisements in Video Format, *The Wall Street Journal*, August 22, 2006.

<sup>112</sup> See, e.g., The Ultimate Marketing Machine, *The Economist*, July 6, 2006, available at [http://www.economist.com/business/displaystory.cfm?story\\_id=7138905](http://www.economist.com/business/displaystory.cfm?story_id=7138905) (last visited August 28, 2006).

<sup>113</sup> Indeed, even cable operators are better able to target consumers through niche programs and geographically through cable system zoning capabilities. See, e.g., <http://www.choosethepower.com> (discussing the advantages of Time Warner's cable advertising system) (last visited September 5, 2006).

<sup>114</sup> Although the Commission must review its rules periodically, this has proven historically to be a very lengthy process. As discussed above, the 1999 Local Television Ownership Rule took eight years to establish, and despite being found arbitrary and capricious by the D.C. Circuit in 2002, it is still in effect more than four years later. See *supra* note 34 and accompanying text.

Moreover, as a fundamental matter, as the Commission has recognized, its “duty as an agency runs to consumers, not advertisers.”<sup>115</sup> Even assuming *arguendo* that a same-market combination would result in higher advertising prices to businesses, this does not mean that local viewers will be subject to inferior programming as a result of such combination. Indeed, the FCC concluded in the *2002 Biennial Review* that same-market combinations generally improved audience ratings to the benefit of local viewers.<sup>116</sup> The FCC’s competition justification simply does not lend itself to the free over-the-air television business model and, accordingly, must be rejected as a basis for local television ownership restrictions.

- C. The FCC has unequivocally and correctly concluded that same-market combinations result in more programming responsive to the needs and interests of communities, promoting the goal of localism, and there is no reason to revisit this conclusion

As explained above, the incredible number of local news sources available online and through non-broadcast media platforms renders any concern about localism moot. In any event, the Commission has already unequivocally and correctly concluded that “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,”<sup>117</sup> and the Third Circuit in *Prometheus* affirmed that conclusion.<sup>118</sup> The Commission offers no reason in the *FNPRM* why this conclusion should be revisited, and Section 202(h) requires no periodic assessment of the ownership rules on the basis of localism. Accordingly, there is no

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<sup>115</sup> *2002 Biennial Review*, at ¶ 68.

<sup>116</sup> *See id.* at ¶ 150.

<sup>117</sup> *2002 Biennial Review*, at ¶ 164.

<sup>118</sup> *See Prometheus*, 373 F.3d at 415.

reason to change the Commission’s determination that same-market combinations foster localism.<sup>119</sup>

With respect to the FCC’s incorporation of the comments from its localism proceeding, the FCC should recognize that such hearings generate only one-sided debates. Members of citizen groups and the public, who comprise the vast majority of the attendees of such events, tend to be unaware of the economic benefits provided through common ownership or joint operations of stations and present only uninformed speculation and baseless fears about large corporations. As the National Association of Broadcasters has stated, “[t]hese meetings tend to draw a particular group of people” with a more extreme viewpoint than most.<sup>120</sup>

Similarly, email campaigns instigated by organizations with specific agendas are not evidence of broad public support for the advocated policies. As Sinclair noted in its comments in the Commission’s localism proceeding, many such filings are simply form emails from individuals with no real knowledge of the subjects on which they opine and who have merely “cut and pasted” the recommended text posted on the organization’s website.<sup>121</sup> Accordingly, the Commission cannot simply tally the number of comments in favor of a position and conclude that that is the public interest. Indeed, such an act would be an abdication of the FCC’s responsibility to engage in reasoned decision-making.<sup>122</sup> Moreover, such a process would suffer

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<sup>119</sup> As an additional matter, all television stations have the public interest responsibility of serving the needs and interests of their local communities, independent of the FCC’s media ownership rules. Accordingly, the goal of fostering localism provides no basis for regulating media ownership.

<sup>120</sup> Communications Daily, October 5, 2006, at 9.

<sup>121</sup> See Reply Comments, MB 04-233, at 3 (January 3, 2005).

<sup>122</sup> See, e.g., *USTA v. FCC*, 359 F.3d 554, 566 (D.C. Cir. 2004).

from a self-selection problem—only viewers seeking change are likely to participate, while viewers who are content with news and entertainment programming currently provided by broadcasters have little incentive to participate. Ironically, these email campaigns demonstrate the power of the Internet in protecting different viewpoints and the complete lack of need for the FCC to regulate local television ownership, contrary to the very position of some of these organizations.

#### **IV. THE CONTINUED REGULATION OF LOCAL TELEVISION OWNERSHIP UNFAIRLY AND IRRATIONALLY IMPAIRS THE ABILITY OF TELEVISION STATIONS TO COMPETE EFFECTIVELY IN THE MODERN MEDIA MARKETPLACE**

As the Commission has recognized, its local television ownership regulations prevent stations from achieving welfare enhancing efficiencies.<sup>123</sup> At the same time, station owners are facing even more competition for viewers from cable networks and other multichannel video program distributors, which are not as creatively constrained by the FCC's programming rules and can offer more innovative, controversial content. By contrast, broadcast networks have been increasingly forced to err on the side of caution in the face of ambiguous FCC content policies and potential substantial forfeiture amounts.<sup>124</sup>

These competitors are also able to offer a substantially greater variety of video programming and typically can cost-effectively bundle packages of other communications services to consumers, such as broadband and telephony.<sup>125</sup> Moreover, the distribution of

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<sup>123</sup> See 2002 Biennial Review, at ¶ 140.

<sup>124</sup> See, e.g., Wayne Friedman, WB Won't Wage FCC Content Fight, MediaPost Publications, March 24, 2006, available at [http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art\\_aid=41416](http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=41416) (WB edits broadcast program out of concern of violating FCC indecency rules).

<sup>125</sup> See, e.g., 2006 Video Status Report, at ¶¶ 50, 83.

broadcast network programming online has also greatly diminished one of the primary assets of local broadcast television stations, exclusive geographic transmission rights. In the face of these changes, the television broadcast industry has seen declining advertising revenues, and investors are uneasy about the future of the television broadcasting business.<sup>126</sup> Indeed, NBC has stated recently that it “is slashing its news budget and abandoning high-cost dramas in the 8 p.m. hour, paring expenses in traditional television as viewers and advertisers flock to new kinds of media.”<sup>127</sup> In the last few years, a number of local broadcasters similarly have been forced to shut down independent local news operations for cost reasons<sup>128</sup> or otherwise faced substantial financial difficulties.<sup>129</sup>

As an example of the inherent unfairness of the Commission’s rules, in Columbus, Ohio, Sinclair owns ABC affiliate WSYX(TV), the third-ranked station, and has provided programming pursuant to a grandfathered LMA to Fox affiliate WTTE(TV), the fourth-ranked

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<sup>126</sup> See Julia Angwin, *After Riding High with Fox News, Murdoch Aide has Harder Slog*, *The Wall Street Journal*, October 3, 2006, at A1 (“The entire [broadcast television] industry is in a slump as TV stations across the U.S. struggle with increased competition from Internet and cable television.”); Brooks Barnes, *CBS’s Core Broadcast Revenue Slips*, *The Wall Street Journal*, August 4, 2006, at A13; Clair Atkinson, *Broadcast flatlines in 2005*, *Advertising Age*, August 22, 2005, at p. 1 (“[A]d-skipping technology and increased competition from cable and the Internet . . . are slowing [broadcast advertising] growth rates.”).

<sup>127</sup> Brooks Barnes, *The Wall Street Journal*, *NBC Universal to Slash Costs in News, Prime-Time Programs*, October 19, 2006, at A1.

<sup>128</sup> See, e.g., Dan Trigoboff, *CBS Drops News in Detroit*, *Broadcasting & Cable*, November 25, 2002, available at <http://www.broadcastingcable.com/article/CA261311.html> (last visited September 6, 2006); Gail Shister, *Days After Mass Layoffs, WPHL News Staff “Still In Shock”*, available at <http://www.tvjobs.com/cgi-bin/news/archive.cgi?action=display&Article=382> (last visited September 6, 2006).

<sup>129</sup> See, e.g., John M. Higgins, *Granite Faces Debt Default*, *Broadcasting & Cable*, March 14, 2006, available at <http://www.broadcastingcable.com/article/CA6316075.html> (last visited September 6, 2006).

station in the market. Sinclair has on two occasions unsuccessfully sought FCC permission to acquire WTTE(TV).<sup>130</sup> But in this same market, Sinclair must compete with two multimedia powerhouses, the Dispatch Printing Company (“Dispatch”) and Time Warner.

Dispatch has been described by the trade press as a “media dynasty” and is essentially the Goliath of the Columbus market. Dispatch owns CBS affiliate WBNS-TV, the top-ranked station in Columbus whose audience share alone exceeds the combined share of WYSX(TV) and WTTE-TV. Dispatch also owns the Columbus Dispatch (the only daily newspaper), the Ohio News Network (a 24-hour state-wide cable news channel, which also makes some of its programming available on the Internet), and two Columbus-based radio stations. Yet, no FCC rule prohibits (or should prohibit) Dispatch’s ownership interests.

Time Warner owns the dominant cable system, an extremely popular Internet access service and content provider, CNN and Headline News (as well as other cable channels like HBO, Cinemax, TBS, TNT, Cartoon Network, and Turner Classic Movies), and the CW Network. Time Warner is free to start a local cable news channel, and the media powerhouse can legally buy a top four-ranked station in the Columbus market – the very step that is denied Sinclair.

This example is not unique or extreme. In many markets, ownership restrictions prohibit broadcasters from obtaining common control of two stations and achieving critical efficiencies necessary to compete on a level playing field with large multimedia corporations. Such a rule is both irrational and unfair and, accordingly, should be eliminated.

## **V. THE TOP FOUR RULE IS ARBITRARY AND CAPRICIOUS AND CANNOT BE JUSTIFIED AS NECESSARY IN THE PUBLIC INTEREST**

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<sup>130</sup> See BTCCT-20020718ABB; BTCCT- 20031107AAF.

In this proceeding, the Commission seeks to address the issues remanded to the FCC in *Prometheus* and also to fulfill its statutory obligation to periodically review “all of its ownership rules . . . to determine whether any of such rules are necessary in the public interest as the result of competition.” Section 202(h) of the Telecommunications Act of 1996 (emphasis added). Accordingly, it must re-evaluate and justify anew in this rulemaking proceeding the continuing necessity of its Top Four Rule.<sup>131</sup> Moreover, even if mandatory reexamination of the rule were not necessary, prudence would suggest reevaluation of this rule in light of the plethora of voices and intense competition in the modern media marketplace.

The Top Four Rule is arbitrary and capricious and should be eliminated. The rule is based on conjecture that a combination of top four-ranked stations in a local market would create or enhance market power.<sup>132</sup> But, as Sinclair has demonstrated, that analysis is based on an outdated framework that assumes that the relevant market consists only of local television stations, when in reality local broadcasters face intense competition for viewers from a vast number of sources, including cable programming networks and Internet content providers, and for advertising dollars from a wide variety of media outlets, including cable operators, newspapers, radio stations, and Internet websites.<sup>133</sup>

The Top Four Rule is premised primarily on competition theory, but there is simply no evidence that mergers or joint operations of two top-four stations harm competition. In fact, more generally, the FCC has never provided any evidence that having less than a certain number

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<sup>131</sup> See *FNPRM*, at ¶ 18 (requesting comment on how changes in its rules would impact the need for a top four-ranked restriction).

<sup>132</sup> See *2002 Biennial Review*, at ¶ 197.

<sup>133</sup> See *supra* Part III.

of independently operated television stations in a market (such as six) results in high advertising rates or otherwise harms viewers. Yet, there are many real world examples of markets with only a handful of television stations (e.g., Helena, Montana; St. Joseph, Missouri; Mankato, Minnesota). Given the Commission's responsibility to justify its ownership restrictions under Section 202(h), the Commission must, at a minimum, conduct studies of those markets and attempt to validate its conjectures or, alternatively, concede that its rules cannot be justified.

Sinclair fully expects that such studies will show that mergers or joint operations of two top-four stations have not harmed competition. For example, for a number of years in Columbus, Ohio, Dayton, Ohio, and Charleston, West Virginia, Sinclair has owned a top four-ranked station and programmed another top four-ranked station pursuant to a grandfathered LMA. To Sinclair's knowledge, no advertiser or competitor has ever raised a complaint or expressed a concern about any anticompetitive result of those LMAs. In fact, for each of the proposed acquisitions, Sinclair submitted the requisite Hart-Scott-Rodino antitrust filing, and neither the Antitrust Division of the Department of Justice nor the Federal Trade Commission took action to prohibit the agreement.

The ability of stations under digital operations to multicast and affiliate with more than one broadcast network further erodes one of the FCC's policy bases for the Top Four Rule, "to separate ownership of local stations carrying the programming of Big Four networks."<sup>134</sup> As an example, WTAP in Parkersburg, West Virginia recently began airing NBC, Fox, and My Network programming.<sup>135</sup> Similarly, shifts in local viewer preferences can also circumvent the FCC's policy goal because the rule considers only the current ratings information at the time of

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<sup>134</sup> *2002 Biennial Review*, at ¶ 196.

<sup>135</sup> See <http://www.wtap.com/station>.

the filing of the application. In the Albuquerque-Sante Fe, New Mexico market, for example, the CBS affiliate, which is a top four-ranked station in the market, recently applied to acquire the local Fox affiliate after that station dropped in ratings to the number five spot.<sup>136</sup> Under the FCC's rules, if the acquired station's ranking were to improve later, the combined ownership of the two stations would be perfectly legal.<sup>137</sup> Indeed, the Commission itself has argued that market share is simply too "fluid" a measure to be a basis for its ownership regulations.<sup>138</sup>

Importantly, even if the Commission were to change its rule to explicitly prohibit the local consolidation of the four major broadcast networks (ABC, CBS, Fox, and NBC), such a rule would also be irrational. First, it ignores the fact that network affiliations are private contractual matters over which the FCC has no jurisdiction – stations may drop or add network affiliations at any time, and the Commission has no involvement in the process.

A network shake-up a few years ago in Jacksonville, Florida (DMA rank 52) illustrates this point. In Jacksonville, Florida, Post-Newsweek's station WJXT(TV) dropped its CBS network affiliation after it was unable to reach an agreement on network compensation. Clear Channel station WTEV-TV dropped its UPN affiliation and picked up CBS; and Clear Channel's Fox affiliate, WAWS(TV), picked up UPN, now My Network TV (which, like CBS, is owned by Viacom), which the station airs on a digital subchannel.<sup>139</sup> Meanwhile, the Gannett Co., Inc.

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<sup>136</sup> See BALCT-20060726AUB (July 26, 2006).

<sup>137</sup> See 47 C.F.R. § 73.3555(b)(2)(i). Sinclair does not object to the proposed acquisition but highlights the application to demonstrate the arbitrary and capricious nature of the Top Four Rule.

<sup>138</sup> See *2002 Biennial Review*, at ¶ 193.

<sup>139</sup> See *My Network TV Tops 91%, Signs CBS Stations*, Media Post Publications, July 13, 2006, available at [http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art\\_aid=45518](http://publications.mediapost.com/index.cfm?fuseaction=Articles.showArticle&art_aid=45518) (last visited September 1, 2006).

owns WTLV(TV), Jacksonville, the NBC affiliate, and WJXX(TV), Orange Park, the ABC affiliate. As a result, in Jacksonville, Florida, five network affiliations are in the hands of two owners—Clear Channel (CBS, Fox, and My Network TV) and Gannett (ABC and NBC).<sup>140</sup> Moreover, Clear Channel is in full compliance with the FCC's regulations even though it now owns the third and fourth-ranked stations in the market, which is plainly inconsistent with the Top Four Rule. The FCC cannot rationally reconcile this situation with a rule that prohibits only assignments or transfers of top four-ranked stations.<sup>141</sup> Further, the existence of such markets is additional evidence that the FCC must consider waivers of its local television ownership rule, pending resolution of this proceeding.

Second, Fox affiliates are unlike those of the other three major broadcast networks. Even though many Fox stations air local newscasts, the percentage of Fox affiliates that actually originate (rather than simply rebroadcast) news is far less than the 85% associated with affiliates of the other three major networks.<sup>142</sup> As an example, Sinclair owns or programs 20 Fox affiliate stations but only five of the Fox affiliates (25%) actually produce their own news.<sup>143</sup> Additionally, most Fox affiliates do not broadcast more than one hour of local news a day compared with an average of more than two hours per day for the other major broadcast

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<sup>140</sup> See BIA Investing in Television 2006 Market Report 2<sup>nd</sup> Edition (2006).

<sup>141</sup> Sinclair does not object to the ownership interests of Clear Channel or Gannett in Jacksonville, Florida, and merely uses this market as an example of the arbitrary and capricious nature of the Top Four Rule.

<sup>142</sup> See 2002 Biennial Review, at ¶ 198.

<sup>143</sup> Twelve other Fox stations air local newscasts, but they are produced by other stations pursuant to contractual arrangements, such as LMAs.

networks' affiliates.<sup>144</sup> Fox local news is also aired at different times to correspond to the different Fox network programming schedule,<sup>145</sup> and thus a merger could result in additional local newscasts, contrary to the Commission's conclusion otherwise.<sup>146</sup>

More generally, the Fox network on average provides its affiliates only approximately two hours of programming per weekday,<sup>147</sup> compared to approximately 12 hours/day for ABC, 10 hours/day for CBS, and 10.5 hours/day for NBC.<sup>148</sup> ABC, CBS and NBC also provide their affiliates several hours of national news each day, whereas Fox provides only *Fox News Sunday*, a one-hour weekly program.<sup>149</sup> For these reasons, none of the Commission's prior justifications for a Top Four Rule have any merit, and accordingly, the Commission should eliminate the rule.

## **VI. THE SCARCITY DOCTRINE NO LONGER PROVIDES A BASIS FOR INTRUSIVE GOVERNMENT REGULATIONS ON LOCAL TELEVISION OWNERSHIP**

As discussed above, the media landscape has changed dramatically in the last few years. These changes in the video marketplace undermine the scarcity justification for intrusive broadcast regulations, and government intervention to ensure diversity, competition, and

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<sup>144</sup> For example, of Sinclair's Fox affiliates, only four stations have both morning and nighttime newscasts, and two of these stations have morning newscasts only because of their contractual relationships with affiliates of the other three major broadcast networks.

<sup>145</sup> For example, Fox nighttime newscasts air at 10 pm, rather than 11pm, and morning newscasts typically air when other affiliates are broadcasting daily network morning shows, such as *The Today Show*.

<sup>146</sup> See 2002 Biennial Review, at ¶ 198.

<sup>147</sup> On Saturday and Sunday, the Fox network provides one extra hour of prime time or evening programming, as well as additional sports programming on Sunday afternoons.

<sup>148</sup> See 2003 Sinclair Comments, at pp. 44-45.

<sup>149</sup> Affiliate stations which desire news distribution services, like those provided by CNN, must subscribe to services provided by a separate Fox division.

localism are simply not needed or constitutionally sound.<sup>150</sup> Accordingly, the FCC should take the opportunity in this proceeding to send the Supreme Court its requested signal for re-evaluation of the out-dated scarcity doctrine.<sup>151</sup>

Indeed, the FCC's repeated inability to promulgate a local television ownership rule that can survive judicial scrutiny is evidence that there is no real scarcity-based justification for any ownership restriction. A brief review of the recent history of the rule demonstrates this point. In the 2002 *Sinclair* case, the D.C. Circuit held that the FCC "failed to demonstrate that its exclusion of non-broadcast media from the eight voices exception is 'necessary in the public interest'" and suggested that on remand the Commission might adjust not only its definition of "voices" but also the numerical limit.<sup>152</sup>

In the 2002 *Biennial Review*, the FCC, in a departure from the previous rule, abandoned the "eight voices" test which was designed to protect "viewpoints" and created a new local television ownership rule based on the purported need to protect television advertising competition, despite the FCC's own recognition that its "duty as an agency runs to consumers, not advertisers."<sup>153</sup> To preserve viewpoint diversity, the Commission created cross-media ownership limits derived from a so-called "Diversity Index."<sup>154</sup>

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<sup>150</sup> See, e.g., *Red Lion Broad. v. Co. v. FCC*, 395 U.S. 367 (1969); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978).

<sup>151</sup> See *FCC v. League of Woman Voters*, 468 U.S. 364, 376 n. 11 (1984).

<sup>152</sup> *Sinclair*, 284 F.3d at 165.

<sup>153</sup> 2002 *Biennial Review*, at ¶ 68; at ¶ 339 ("[T]he Commission is not charged with protecting competition in the advertising market.").

<sup>154</sup> See *id.* at ¶ 391.

In 2004, the Third Circuit found numerous flaws in the Commission's local television ownership rule and Diversity Index and required the FCC to justify the numerical limits established in those rules.<sup>155</sup> In the *FNPRM*, issued in July 2006, the FCC requested support for its local television ownership rule and admitted that the Diversity Index is inaccurate, yet the FCC proposed no justification for any numerical limits and offered no alternative of any kind.<sup>156</sup>

It is now ten years after Congress ordered the FCC to review its ownership regulations to determine whether they are necessary in the public interest as a result of competition, and the FCC has been unable to justify any local television ownership rule. In this past decade, new media platforms have emerged and competition for viewers and advertisers has intensified, leaving many television stations struggling to survive. Technology is fast passing the FCC by. It is time for the FCC to realize that it cannot develop a local television ownership rule that is necessary in the public interest because such a rule is simply no longer necessary.

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<sup>155</sup> See *Prometheus*, 373 F.3d at 409-12.

<sup>156</sup> See *FNPRM*, at ¶ 32.



