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

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

REPLY COMMENTS OF SMALLER MARKET TELEVISION STATIONS

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SUMMARY

The evidence in this proceeding's record is clear and unrefuted: the present duopoly rule threatens the health of the public's over-the-air broadcasting service in smaller markets. As commenters have detailed, dozens of smaller-market stations have dropped or sharply curtailed their local newscasts, eliminated long-running public affairs shows, or drastically cut back other valuable locally oriented services.

The comments also support an approach to regulating television station combinations on the local level that distinctly considers diversity, competition and localism. The Commission should acknowledge that sources other than television stations contribute to viewpoint diversity, it must consider those sources on the basis of availability rather than popularity or share, and it must recognize, guided by experience and common sense, that diversity needs are smaller in smaller markets. As commenters also note, a range of sources, including national sources, contribute to local diversity, and any revised rule should take those sources into account. An evaluation of competition must take the local advertising market as its basis for measure, and include every media outlet competing with television stations for local dollars. And any assessment of localism must take into account that station combinations, as the Commission has repeatedly recognized and the *Prometheus* Court has acknowledged, allow television broadcasters to better serve their communities through increased local programming, better news, and improved service.

In addition, broadcast commenters have demonstrated that the present rule's "top four" restriction rests on a faulty foundation: a presumed "cushion of audience share" separating the fourth- and fifth-ranked stations in a market. As comments note, the restriction completely precludes station combinations in smaller markets, 91 to be specific, where relief is often most needed, and is therefore inconsistent with both the Commission's public interest mandate under Section 202(h) and the *Sinclair* and *Prometheus* decisions.

Commenters who dispute the above-mentioned points have failed effectively to rebut them. Those who claim the Internet plays a tiny role in providing local information ignore statistical data finding that more than 30% of people go online for local news. Comments arguing that newspaper and television station websites merely repeat the viewpoints found on the traditional outlets disregard the new environment of "hyperlocal," interactive, collaborative online newsgathering and commentary. Data offered in support of the contention that duopolies fail to improve the amount of local news actually point in the opposite direction. Most importantly, *no commenter* has disputed the fact that the present duopoly rule hurts smaller market broadcasters' ability to compete with new media and to serve their communities.

The present duopoly rule harms diversity, competition and localism in smaller markets. The public in these markets cannot wait for relief until the next quadrennial review, because the present and future health of smaller market stations is suffering long-term damage. The time for the Commission to act is now.

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In smaller market communities across the country, it has become clear that the Commission's present duopoly rule[1] is not in viewers' best interests. ABC affiliate KTKA-TV, the third-highest rated station in Topeka, Kansas, shuts down its nightly newscast for four years.[2] Stations in Evansville, Indiana, Marquette, Michigan, Kingsport, Tennessee, Meridian,

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[1] As in its initial comments, the Coalition uses the term "present rule" to refer to the "top four/eight remaining voices" duopoly rule remanded by *Sinclair Broadcasting Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) and currently in effect, and the term "new rule" to refer to the rule remanded by *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004).

[2] Dan Trigoboff, *The News Not Out of Topeka*, BROADCASTING & CABLE, p. 12 (Apr. 22, 2002).

Mississippi, Portland, Maine and seventeen other markets in DMAs ranked 50 or smaller eliminate their newscasts for good.[3] KOTA in Rapid City, South Dakota wins a regional Emmy for its local investigative reporting while its president tells the Commissioners that local stations "do not have the kind of resources to invest" in local programming.[4] All in all, more than half of the nation's television stations lose money on their local news operations.[5]

No commenter in this proceeding disputes the fact that the present duopoly rule continues to prohibit *any* television station combinations in 154 markets, where stations are operating under the most financial duress and, therefore, where the public's locally responsive service is most under siege.[6] The new rule, adopted by the Commission in 2003 but stayed by the *Prometheus* Court, likewise denied relief to the public in 91 of those same markets. The question for the Commission to answer now is whether a duopoly rule that ignores the challenges to the public's free, universal over-the-air television in America's smaller communities and deprives small market stations of the resources to provide the best possible service to those communities is in the public interest.

The Coalition of Smaller Market Television Stations ("Coalition"), the undersigned groups with 111 television stations in smaller markets, respectfully submits its Reply Comments

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[3] Aaron Moore, *Smaller TV Stations Dropping Local News*, MEDIA LIFE (July 8, 2002); Media General Comments at Appendix 3 (Statement of James K. Gentry, Ph.D.), Attachment B, MB Docket No. 02-277 (Jan. 2, 2003); Belo Comments at 17-19, MB Docket No. 02-277 (Jan. 2, 2003); Gray Comments at 14.

[4] KOTA, *Shad Olson Wins Local Emmy*, *available at* www.kotatv.com; FCC Localism Public Hearing, Rapid City, SD, Comments of Bill Duhamel, President, Duhamel Broadcasting.

[5] NBC Universal Comments at 24 (citing Pew Research Center Project for Excellence in Journalism, *State of the Media 2006*).

[6] The rule permits waivers but the standards for the specified waivers are dauntingly stringent, the financial markets are put off by the delay, cost and uncertainty of waivers, and the economic stress in smaller markets is the rule, not the exception.

in the above-referenced proceeding. In its initial comments responding to the *Further Notice of Proposed Rule Making*,[7] the Coalition advocated an approach to developing a new duopoly rule that distinctly considers each of the Commission's three policy goals of diversity, localism, and competition, urged the FCC to provide the public served by smaller market broadcasters needed relief from the present duopoly rule, and demonstrated how neither the present nor the new rule could survive the requirements of Section 202(h) of the Telecommunications Act and the court-imposed strictures of the *Prometheus* and *Sinclair* decisions. The initial comments filed by others in this proceeding further support this approach, and comments filed by those urging retention of the present rule or calling for increased regulation of station combinations fail to undercut the case for duopoly reform.

I. THE RECORD SUPPORTS THE COALITION'S RECOMMENDED APPROACH TO REFORMING THE DUOPOLY RULE.

The Coalition's initial comments proposed a framework for considering each of the Commission's three policy goals -- diversity, localism and competition. Commenters have provided additional support for the Coalition's suggested approach, and the opponents of duopoly reform have not rebutted those recommendations.

A. Diversity

The Coalition's initial comments showed that (1) sources for diverse viewpoints in a media market extend beyond local television stations to include Internet sites, newspapers, cable

[7] *See 2006 Quadrennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; 2002 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996; Cross-Ownership of Broadcast Stations and Newspapers; Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets; Definition of Radio Markets*, Further Notice of Proposed Rule Making, MB Docket No. 06-121, July 24, 2006 ("*Further Notice*").

services, news weeklies and magazines, and radio stations providing news or informational programming; (2) availability of sources of diversity, not their popularity or share, should be the critical measure; (3) reach (as opposed to share) can be a relevant factor in assessing diversity sources; (4) smaller markets have fewer diversity needs than larger markets; and (5) national content often contributes to local diversity.

1. *Sources other than local television stations contribute to diversity.* The Commissioners deliberating about the important issues at stake in this proceeding might ask themselves what sources shape their views on local or national issues. It is unlikely that a single source or even a single medium provides them the information on which they base their views. And so, the Third Circuit was stating a truism of which we are all aware, if we stop to think about it -- that "broadcast media are not the only media outlets contributing to diversity in local markets."[8] Consumers Union's arguments that diversity should be evaluated solely in terms of local television stations defy reality.[9]

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[8] *Prometheus Radio Project*, 373 F.3d at 414.

[9] Comments of Consumers Union, Consumer Federation of America and Free Press (collectively "Consumers Union"), at 99 ("TV has come to dominate mass media in political discourse"). Consumers Union's methodology for measuring market concentration as to *cross-media combinations* purports to take other sources of diversity into account, *see generally id.* at "Study 21: Building a Reasonable Measure of Market Structure," pp. 396-399, but it makes clear that as to *duopolies*, local television stations should be the only sources of diversity the Commission should consider. *See id.* at 399 ("For the purposes of evaluating TV-TV mergers, the FCC did the right thing, when it did not include non-broadcast voices. … [the reason the Commission should not include other kinds of media outlets for purposes of the duopoly rule] is now clear and supported overwhelmingly by the empirical evidence in the record. TV has a unique impact on politics and policy debates and all TV markets are highly concentrated. For the purposes of the *cross-media* rules, however, the Commission must count all voices.") (emphasis in original). Consumers Union here commits the very error -- treating sources of diversity differently depending on whether the relevant rule regulates intra-medium or cross-media ownership -- that the D.C. Circuit identified in *Sinclair*.

Therefore, in assessing the impact on diversity of a proposed station combination, the Commission should use a universe of diversity sources, applicable to the market in question, which includes newspapers, news weeklies and news magazines, radio stations that provide news or information, local cable news and PEG channels, and the Internet. Consumers Union's own studies by and large concede that these are the relevant sources of information, though, as we will see, they improperly discount or ignore many of them on the basis of their popularity.

The newest, exceedingly fertile source of diversity is the Internet. Although the opponents of reasonable duopoly reform struggle mightily to deny its materiality, it is now abundantly clear that, even if it were not the case in 2003, publicly accessed Internet sites undeniably contribute to local diversity by providing independent content on issues of local concern.[10] Gannett and others have forcefully demonstrated why a website addressing issues of local concern should be considered a separate and effective source of diversity. The Internet affords the public new opportunities to access information and viewpoints (and present its own views) that are unrivaled in the history of media and communication.[11]

Consumers Union argues that the Internet "plays a small role in providing news and information about local public affairs," and that even that small role is minimized because those

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[10] *See* Gannett Comments at 18-20; Hearst-Argyle Comments at 22-25; Jeff Howe, "Gannett to Crowdsource News," WIRED, Nov. 3, 2006 (stating goals of Gannett crowdsourcing initiative are to "prioritize local news over national news; publish more user-generated content; become 24-7 news operations, in which the newspapers do less and the websites do much more; and finally, use crowdsourcing methods to put readers to work as watchdogs, whistle-blowers and researchers in large, investigative features").

[11] *See* Chuck Salter, *Hyper-Local Hero*, FAST COMPANY, Nov. 2006, at 94 (detailing "hyperlocal" multimedia journalism websites that "allow readers to do far more than they can with print," such as "click on a map to assess hurricane damage," "chat with the subject of a local story or its reporter," or offer information on local events that "rarely make headlines but loom large in [the residents of local communities'] everyday lives."); COMMUNICATIONS DAILY, Oct. 18, 2006 (stating Des Moines-based WHO-TV's site allows anchors to "invite viewers to submit questions for [political] candidates online").

people who do go online for local information visit the sites of local television stations and newspapers; the Internet should therefore not factor significantly into the Commission's measure of viewpoint in local markets.[12] However, even when the consumer of local information goes to the site of the local television news station or newspaper when using the Internet, the material found there, including various viewpoints, does not merely track the information and viewpoints found on the news broadcast or in the pages of the paper. Rather, the station and newspaper sites provide online forums, blogs, opinion pieces, multimedia content, and other viewpoints that do not -- indeed, could not -- appear in the traditional outlets.[13] As Consumers Union's own pleading states, "many newspapers are enthusiastically adding new audio and video options to their web sites, from newscasts to stories to commentary."[14] These are the very kinds of content that the Commission has found contribute to diversity.[15] Those publicly accessible sites not

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[12] *See, e.g.*, Consumers Union Comments at 11.

[13] *See Visit to Hearst-Argyle TV station websites spiked during a recent Hawaiian earthquake*, COMMUNICATIONS DAILY, Oct. 30, 2006.

[14] Consumers Union Comments, p. 169 (quoting Rachel Smolkin, *Adapt or Die*, AM. JOURN. REV., June/July 2002 at p. 2).

[15] *See* Report and Order and Notice of Proposed Rulemaking, *2002 Biennial Regulatory Review -- Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Communications Act of 1996* at ¶ 32 ("Although all content in visual and aural media have the potential to express viewpoints, we find that viewpoint diversity is most easily measured through news and public affairs programming. Not only is news programming more easily measured than other types of content containing viewpoints, but it relates most directly to the Commission's core policy objective of facilitating robust democratic discourse in the media.") ("*2003 Order*"). Consumers Union's argument seems to be that since the websites are "owned" by the hosting station or newspaper, they should not count as a different "voice" for diversity purposes, regardless of whether the content on the online outlet differs from the conventional outlet and even if the website hosts online forums and alternative commentaries. But this preoccupation with "voices" is both outdated and beside the point. The more meaningful focus should be on sources of diversity and there is simply no gainsaying that these websites are sources of diversity apart from the newspapers or television stations that may be operated by the same company.

hosted by traditional media outlets also provide access to independent viewpoints and information on local issues and affairs.[16]

Free Press, itself -- a co-filer with Consumers Union -- states in another context that "[s]oon all media -- TV, telephone, radio and the Web -- will be delivered via the Internet over a broadband connection" and that community use of the Internet "increases the number of voices in the public sphere. Using local networks, communities can offer citizens numerous advanced media services for everything from public safety and political forums to church services and Internet radio stations."[17] The Internet can't be one thing in one context and another thing in another; it either "increases the number of voices in the public sphere" via local networks or it

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[16] *See, e.g.*, Gannett Comments at 19 (stating 36% of Americans use the Internet for local news, and "a growing number of [online] sources cater to hyper-local (*e.g.*, neighborhood) civic issues. Highly localized websites, blogs and online citizen journalism have proliferated."). In many cases, independent sites' reporting on issues of local concern have spurred traditional outlets' coverage of those same issues. For example, the *Spokane Spokesman-Review*, the largest newspaper in the Inland Northwest, and the *Idaho State Journal* reported on assertions regarding the personal life of Idaho Senator Larry Craig only after an independent blogger broke the story and generated intense interest among Idaho voters in the weeks leading up to the 2006 elections, where Craig was campaigning heavily for the Republican gubernatorial candidate. As the paper's interactive blog stated, "if our reporters had uncovered this information, it's unlikely we would run a story. However, because this information is already circulating through other media, it's a different situation." The *Spokesman*'s managing editor Gary Graham maintained that "we can't ignore [the story and the public's ensuing interest in it] … [i]f we start ignoring that kind of discussion in a media context, we take ourselves down a slippery slope." *See* http://www.spokesmanreview.com/blogs/briefing/archive.asp?postID=4167; *see also* Hearst-Argyle Comments at 23 (discussing how Mark Foley scandal first broke on website).

[17] Free Press, *Community Internet: Broadband as a Public Service, available at* http://www.freepress.net/communityinternet/.

doesn't.[18] The Supreme Court has made clear how it comes out on this issue by commenting that the Web offers viewpoints "as diverse as human thought."[19]

2. *Availability, not popularity or share, should be the critical measure.* As various commenters have pointed out, availability of information and viewpoints, not popularity or share, is the appropriate measure for whether a particular source of diversity should be counted for purposes of assessing diversity.[20] Share is, of course, relevant in evaluating the effect of a station combination on competition. By conflating competition and diversity in its ill-fated Diversity Index, the Commission's *2003 Order* made share relevant to diversity, and the *Prometheus* Court followed along. From the Federalist Papers and the debate over ratification of the First Amendment, the Founders made clear that the public's access to minority or fringe views should be vigorously protected.[21] But that is not the same as saying that they are entitled to the same size audience as majoritarian views or that the government should intervene to assure comparable exposure.

In the book *The Tipping Point* Malcolm Gladwell illustrated how one day's new idea, aspiring for popular support and in the hands of the right small set of advocates, can become the

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[18] The *Prometheus* Court may have stated that "local government [websites] are not, themselves, 'media outlets' for viewpoint diversity purposes," *see Prometheus*, 373 F.3d at 372, but the Coalition doubts it would make the same comment as to a local League of Women Voters website's local election endorsements page, or as to a local government *candidate's* website.

[19] *ACLU v. Reno*, 521 U.S. 844, 868 (1997).

[20] *See, e.g.*, Coalition Comments at 23-24; Gannett Comments at 32-34; NAB Comments at 55.

[21] *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640, 660 (2000) ("The fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view.").

next day's widely held wisdom.[22] A recent article in *Market Wire* found that according to Nielsen BuzzMetrics, the most popular blog posts of 2006 in terms of "linked-to" statistics were not columns by popular writers posted on major media sites, but pieces initially posted on independent sites such as livejournal.com, sifry.com, michellemalkin.com and crooksandliars.com.[23] Other "less popular" sources for viewpoints such as newsweeklies have regularly broken stories that have spurred follow-up coverage in more traditional outlets.[24]

The Commission has also understood and properly embraced this point:

> [T]he fact that [certain] viewpoints may reflect popular opinion or have widespread appeal is not a ground for government intervention in the marketplace of ideas. Indeed, the very notion of a marketplace of ideas presupposes that some ideas will attract a following and achieve wide currency, while others quietly recede having failed to conquer the hearts and minds of the citizenry.[25]

3. *Reach, as opposed to share, can be a relevant factor*. While popularity or share is not relevant to assessing diversity sources, reach is. When the *Prometheus* Court was concerned that the Commission's *2003 Order* gave as much weight to a community college television station as to the *New York Times* and its co-owned radio station in the New York City DMA, the proper solution to that concern was to correct for differences in geographic reach, not to assess these two sources of diversity in terms of popularity. A public radio station with a coverage area

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[22] *See* MALCOLM GLADWELL, THE TIPPING POINT 7 (2002) ("Ideas … spread just like viruses do."). *See also, e.g.*, Fox Comments at 15-16 ("Ideas do not have to be popular or widely-held to be distributed in the modern media marketplace. Ideas that may at first be shared by only a few can gain currency and spark a movement of thousands or even millions of citizens -- regardless of whether the traditional media find the idea newsworthy").

[23] *See* "18 Blogs Responsible for the 100 Most Popular Posts of 2006," MARKET WIRE, Dec. 28, 2006, *available at* http://www.marketwire.com/mw/release_html_b1?release_id=198495.

[24] *See, e.g.*, Ryan Lucas, *New Warsaw Archbishop Quits in Wake of Disclosures*, WASH. POST, Jan. 8, 2007 at A11 (allegations Polish archbishop was involved with communist-era secret police first appeared in weekly).

[25] *2003 Order* at ¶ 352.

limited to northern New Jersey should not be accorded as much diversity weight as WCBS-TV, which covers the entire New York DMA. But public television station WNET-TV, with an audience that is a fraction of WCBS-TV's but with comparable coverage, should be given the same weight as WCBS-TV.

And the same considerations apply to the Internet, except that instead of taking into account the geographic extent of a newspaper's circulation area, websites might be discounted because of less than full broadband penetration in a particular market. So-called "private" websites that either are not accessible to the general public or do not contain "public" content should not count at all.

4. *Smaller markets have fewer diversity needs.* Past discussions of how to redesign the Commission's duopoly rule have proceeded on an unexamined and faulty presumption -- that every media market requires the same number of diversity sources in order to have sufficient sources of diversity. The present rule effectively bars station combinations in any market with fewer than nine independently owned stations, since it assumes that at least eight independent television station voices must remain in a market after any proposed duopoly is created.[26] However, there is *no* support for the proposition that New York City (DMA #1; duopolies allowed under eight-remaining-voices provision of present rule) and Spokane, Washington (DMA #79; duopolies allowed under eight-remaining-voices provision of present rule) both need a minimum of eight independent television stations to have adequate diversity. The present rule ignores the fact that large markets have more numerous and more complex local issues requiring

[26] The top-four test embedded in both the present and new duopoly rule proposed in 2003 barred combinations in all markets with fewer than five stations.

more source diversity than smaller markets. Accordingly, the Commission's threshold for local diversity in smaller markets should be lower.

For example, transportation issues in a market such as New York City, with three international airports, a transit authority with jurisdiction over subways, trains and buses transporting over six million people a day, commuter ferries, and twelve thousand taxicabs,[27] are more multifaceted than transportation issues in a smaller market like Montgomery, Alabama, with one regional airport, a bus system with fifteen routes and a handful of taxi companies serving the entire town. Likewise, the New York City DMA requires a range of diversity sources to adequately inform the public of the conduct and activities of the 35 representatives in the U.S. House whose districts are within its viewing area; the Montgomery DMA, a market that the present rule assesses has the same minimum diversity needs, covers only 4 representatives' districts. Any new duopoly rule should take into account that fewer sources of diversity are needed in Montgomery than in New York.

5. *National sources contribute to diversity at the local level.* As the Coalition pointed out in its initial comments, national diversity sources also contribute to the discussion of local issues. *See* Coalition Comments at 23 ("Immigration, environmental protection, privacy concerns, protection against terrorists and economic issues have national and local facets. For example, if a candidate for Congress claims that NAFTA, an agreement supported by his or her incumbent opponent, is the reason a manufacturing plant in the district has closed, then a significant local issue (job loss) has a national component (Congress's passage of an

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[27] In Quincy, Illinois (a market in which two members of the Coalition operate television stations), the currently "hot" transportation issue is whether to permit a third *taxicab*, not *company*, to operate in the city.

international treaty).”). National programming on AIDS or underage drinking will be highly relevant to these issues in local communities. National public service announcements effectively address local issues as well. Carriage of a governor’s speech in an out-of-market state capital is also relevant locally.

This fact -- that non-local diversity sources contribute to local diversity -- should be taken into account in the Commission’s determining how many sources of local diversity are sufficient.

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As is apparent from the above discussion, one could perform a monumentally complicated analysis of diversity sources each time a station combination is proposed in a particular market. That approach, however, should be avoided like the plague.

Stations run on dedication, experience, community responsiveness, creativity, and their commitment to public service. But they also cannot operate without sufficient financial resources. The financial markets simply will not stand for the uncertainty, delay and costs of a duopoly test that requires a highly refined, case-by-case, socio-political analysis for each proposed combination. At the same time, the public in smaller markets loses big time in diversity terms if a station goes dark or eliminates local news or other local services in order to stay afloat financially. The Commission therefore needs to fashion a test for diversity that takes account of the above five factors but is simple and clear and provides predictability. The Coalition believes this can be accomplished.

The *Prometheus* Court recognized the utility and importance of a bright-line test, accepting the Commission’s rationale for employing such a rule “as opposed to other regulatory approaches such as a case-by-case analysis."[28] The availability of the waiver request process and petitions to deny should take care of the few outlier situations where the bright-line duopoly test is either too strict or too lenient in particular circumstances.

B. Localism

The record evidence convincingly demonstrates that station combinations in smaller and mid-sized markets provide localism benefits.[29] The Coalition's initial comments proposed that a new local ownership rule should presume that station combinations in smaller markets would serve the goal of localism. In particular cases where a station combination would not serve the interests of localism, petitions to deny could make this case, and the transfer or assignment applications could be denied on this basis.

The proposed presumption that station combinations would serve the goal of localism is supported by other comments in this case. It is also supported by comments in the Commission's recent localism inquiry, which the Media Bureau summarized and placed in this docket.[30] They illustrated the many ways in which local television stations air programming

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[28] *Prometheus Radio Project*, 373 F.3d at 431. The *Prometheus* panel was unanimous on this point. *See id.* at 472 (Ambro, J., concurring in part and dissenting in part) (accepting Commission's reliance on "the efficiencies and predictability of bright line rules" over case-by-case analysis, which it recognized "was fraught with regulatory problems, such as high administrative costs and a lack of planning and investment predictability for media owners").

[29] *See, e.g.*, Belo Comments at 22-27; Granite Comments at 6-7; Gannett Comments at 46; NAB Comments at Attachment H, pp. 9-10; *see also* Jesse Noyes, *Ch. 56 may get morning newscast*, BOSTON HERALD, Nov. 23, 2006 (duopoly begins broadcasting hourlong 10pm newscast on acquired station and seriously considers adding local morning news show as well).

[30] *Further Notice* at ¶ 9 ("The Media Bureau will compile a summary of the comments in the localism proceeding and submit it into this docket. The Commission will consider the evidence received in MB Docket No. 04-233 as it moves forward with this rulemaking").

responsive to the local interests and needs of their communities.[31] Stations noted that their markets demand local coverage[32] and that locally focused programming allows them to distinguish themselves from national networks and cable and satellite providers.[33] They also host candidate debates during campaign season,[34] conduct voluntary ascertainment meetings in their communities,[35] and target underserved groups by airing Hispanic, African American, and Asian American community forums.[36] However, as the Coalition's initial comments pointed out, financial straits threaten the ability of smaller market broadcasters to provide such important local services. Reasonable duopoly reform is needed to protect and enhance local service in these markets.

C. Competition

Commenters from every facet of the television station industry have shown that broadcasters compete with a range of both "old" and "new" media players for local advertising dollars.[37] The record clearly shows that a sharply increasing share of local television stations' ad revenues is moving to cable systems and the Internet. Cable's local advertising revenues -- cable systems can sell advertising across virtually all of their channels, upwards of 100, compared to a

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[31] *See* Memorandum from Thomas Horan, Legal Advisor, Media Bureau to Marlene H. Dortch, Secretary, Submission for the Record, MB Docket Nos. 04-233 and 06-121 (Oct. 20, 2006).

[32] *See id.* at 2 (Summary of Alaska Broadcasters Association Comments).

[33] *See id.* at 17 (Summary of Belo Comments).

[34] *See id.* at 179 (Summary of WAVE-TV Louisville, KY Comments).

[35] *See id.* at 185 (Summary of WISC-TV Madison, WI Comments).

[36] *See id.* at 175 (Summary of Disney/ABC Comments).

[37] All broadcaster comments; Coalition Comments at 19-21; *see also* John M. Higgins, *Stations Log Record Windfall*, BROADCASTING & CABLE, Nov. 6, 2006 (estimating that cable systems political advertising revenues have increased nearly 50% since 2004).

television station's one channel -- are expected to double between 2001 and 2009. Local online advertising has grown by nearly 200% between 2001 and 2005, and is growing faster than national online advertising; as technology advances to allow for more on-line local ad targeting and local search portals, those dollars will continue to move to new media platforms.[38] A measure for evaluating the effect of a station combination on competition in the local advertising market that ignores broadcasters' most vigorous competitors in that market blinks reality. The aggregate share of the combining stations' local advertising revenue should be measured against a universe of all media that compete against them for local advertising dollars.[39]

II. THE RECORD EVIDENCE DEMONSTRATES THAT THE PRESENT AND NEW DUOPOLY RULES HARM THE PUBLIC SERVED BY SMALLER MARKET STATIONS WHOSE HEALTH AND VIABILITY ARE AT INCREASING RISK.

A. Smaller Market Local Television Stations Face Worsening Financial Strains.

In its initial comments, the Coalition detailed the financial challenges facing local broadcast stations in smaller markets. Smaller market stations, the Coalition explained, are particularly hard-hit by disappearing network compensation (and the current reality or future prospect of negative network compensation), continuing heavy digital transition costs, and the accelerating migration of local ad dollars to other media platforms such as cable and the Internet.[40] Other parties pointed to these challenging economic conditions and documented how

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[38] *See* NBC Universal Comments at Appendix, p. 2.

[39] *See* Coalition Comments at 21 note 55 (citing *Sinclair*, 284 F.3d at 164).

[40] *See generally* Coalition Comments at 6-10. Cable clustering, where one multiple system operator sells ads across several of its cable systems in individual markets, and interconnecting, where new technologies allow for the sale of ads on multiple separately owned cable systems, were cited as factors contributing to cable's inroads into local advertising. *See* NBC Universal Comments at 7. Of course, the upsurge in local Internet advertising has largely occurred since the record was compiled in the 2002 proceeding. *See id.* at 10-11.

smaller market stations' financial prospects have grown worse since the 2002 ownership proceeding.[41]

Consumers Union contends that broadcasters' claims of financial straits are unfounded, arguing that the sales of national newspaper chains like Knight-Ridder, networks like Univision, "big-city" television stations with "profit margins of more than 40%," and "stations in mid-size markets [with] margins that exceed 30%" indicate strong profitability across the media sector.[42] But the relief the Coalition seeks is for the weaker stations in smaller markets where none of these conditions applies and whose financial straits are documented by the unrebutted evidence in the record.[43]

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[41] *See, e.g.*, Cascade Comments at 3-4; Gannett Comments at 41-43; Granite Comments at 3-6; Gray Comments at 12-14; NAB Comments at Attachment F, p. 3 ("not only are smaller markets more challenged in the advertising marketplace simply because they have fewer eyeballs to sell to prospective advertisers, but also, the viewers they do have are valued less by advertisers on a per household basis than are those in larger markets"); *id.* at Attachment H; NBC Universal Comments at Appendix, pp. 3-5 (cable largest player for locally-targeted TV advertising in some markets and is gaining share); *see also TV Station Glut Pushing Values Down*, COMMUNICATIONS DAILY, Nov. 2, 2006 (quoting Chairman Jim Hoak of smaller market station group Hoak Media stating "in some of [the smallest markets] there's no way that a CW or a MyNetworkTV affiliate can survive -- let alone maybe even a weak ABC, CBS, NBC or Fox").

[42] *See generally* Consumers Union Comments, "Study 9: Local Media and the Failure of Big Media's Conglomerate Model," at 153-156, 162-167.

[43] Indeed, even the strongest stations in the smallest of markets are suffering significant losses; over half of all ABC, NBC and CBS affiliates in markets ranked 176 and higher lost money in 2005, with one-quarter of those losing more than a half million dollars. *See NAB/BCFM Television Financial Report, 2006 Edition*, Table 34, p. 69.

In addition, Consumers Union's contention that the argument in favor of station combinations relies on a failed business model is completely blind to the numerous examples in the record, discussed below, where a duopoly or joint operating agreement jumpstarted a weaker station, thereby improving its service to its community. *See* Belo Comments at 22-25; Coalition Broadcasters Comments at 23-33, MB Docket No. 02-277 (Jan. 3, 2003).

B. Station Combinations Serve the Public Interest.

As stated, as the majority of initial comments point out and as the Commission and the *Prometheus* Court have both recognized, station combinations serve the public interest.[44] The comments provide examples of where a station combination resulted in preserved or increased local news and public interest programming, or allowed a once-struggling station to survive.[45] Comments in this proceeding, as well as those filed in 2003, have shown how station combinations have delivered benefits to the public such as broadcasting news on a fledgling station, offering more locally focused programming, or providing access to new weather forecasting and storm-tracking technologies, and how duopolies and joint operating arrangements are assisting weaker stations to navigate the DTV transition.[46]

On the other hand, commenters in favor of prohibiting local station combinations submitted data that was flawed, incomplete, or contrary to their claims. Consumers Union and the Office of Communication of the United Church of Christ, National Organization for Women, Media Alliance, Common Cause and Benton Foundation (collectively "UCC") rely on a study by University of Michigan researchers (the "Michigan Study") that they assert found, despite the Commission's contrary conclusions in 1999 and 2003, that "duopoly stations aired significantly

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[44] *See* Belo Comments at 22-25; Gannett Comments at 43; *see also Prometheus Radio Project*, 373 F.3d at 415 ("consolidation" in local television markets "can improve local programming"); *2003 Order*, Statement of FCC Commissioner Jonathan Adelstein, Dissenting, at 24 (common ownership may be appropriate "in the smallest of markets where proven localism gains may outweigh the diversity harms"); Charley Daniels, *Local Production Enjoying a Renaissance Among Stations*, TELEVISION WEEK, July 25, 2005 (Belo Seattle duopoly allows both stations to run far more content targeted at local interests).

[45] *See, e.g.*, Belo Comments at 22-25; Coalition Comments at 10-13; Gannett Comments at 44.

[46] Coalition Comments at 11; Coalition Broadcasters Comments at 22-23, MB Docket No. 02-277 (Jan. 3, 2003).

less local news than non-duopoly stations" and that "common ownership did not increase the local news on the weaker station" in a duopoly.[47] However, the Michigan Study's findings, on their face, point in the opposite direction.[48] In those DMAs where duopolies were allowed, the Michigan Study showed that weaker stations in duopolies actually *increased their broadcast of local news by more than 16%* after combining with a stronger station over a seven-year period. It also showed that weaker stations in duopolies cut their local public affairs programming *55% less* than non-duopoly stations in duopoly markets over the same period of time.[49]

Consumers Union also points to a June 2004 draft of a Commission Working Paper on localism that relied on data from 1998 as evidence that "locally owned broadcast stations provide more local and community news than non-locally owned stations."[50] But in the first place, the

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[47] Consumers Union Comments at 306-29; UCC Comments at 51-53.

[48] *See* Coalition Request for Underlying Data, MB Docket No. 06-121 (Dec. 7, 2006).

[49] *See* Michigan Study, Table 2A; *id.* at Table 3A. In its response to the Coalition's Request, Consumers Union states that "[t]he Coalition does not purport to show that the absolute increase in the number of hours [of news aired by weaker stations in duopolies] is statistically significant." Comments of Consumers Union on Coalition Request, MB Docket No. 06-121 (Dec. 12, 2006), p. 6. The statistic of a 16% increase in local news would seem to speak for itself and clearly rebuts Consumers Union's claim that "Napoli and Yan [the Study's authors] have shown that duopolies do not provide more local news and public affairs programming." Consumers Union is correct in stating that it cited numerous other sources in its "717-page initial comments," but *on the narrow issue of whether duopolies result in increased local news programming*, the Michigan study relied on by Consumers Union supports a conclusion opposite from the one Consumers Union cited it for.

Moreover, without access to the underlying data and in light of the voluminous evidence of improved public service from stations under duopolies and joint operating arrangements, the study is entitled to no weight.

[50] Consumers Union Comments at 10 (citing draft FCC Working Paper, "Do Local Owners Deliver More Localism? Some Evidence from Local Broadcast News" (draft of June 17, 2006)); *see also id.* at 303-304. Consumers Union questions whether the Working Paper was "publicly released only after it was leaked to U.S. Senator Barbara Boxer two years after it was drafted" because the Commission "was reticent to concede" the Working Paper's conclusions. The Commission has denied this charge. Moreover, the Working Paper has now been placed in

(continued…)

issue in this proceeding is not whether a locally owned station provides better local service than a non-locally owned station, but rather whether common ownership of two stations in a market -- irrespective of that owner's location -- can serve the public interest. As one commenter in the localism proceeding put it, "the key question isn't 'Are the broadcast stations owned out of state?' but rather, 'Are the general managers and management involved in, know and care about their community?' "[51] Moreover, no commenter has proposed a local television ownership rule that requires owners to be based in their station's community of license. As to local production of programming, the Commission has, consistent with the realities of the broadcast business, flatly rejected station regulations based on a presumed connection between the responsiveness of their programming to local concerns and whether it is locally produced.[52]

In the second place, the draft Working Paper did not show, as claimed by Consumers Union, that local owners aired more local news in totality than other stations and therefore "localism and diversity are harmed by concentration of local markets."[53] The study did *not* conclude that locally-owned stations broadcast a higher quantity of local newscasts than non-

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the docket for this proceeding although it is only a draft. *See* Letter from Chairman Kevin J. Martin to Sen. Barbara Boxer (Sept. 15, 2006).

[51] *See supra* note 31 at 42 (Summary of Comments of Mark Conzemius, Director, Catholic Foundation for Eastern South Dakota).

[52] *See* Notice of Inquiry, In the Matter of Localism, MB Docket No. 04-233 (July 1, 2004), at ¶ 14 ("We have previously found that programming that addresses local concerns need not be produced or originated locally to qualify as 'issue-responsive' in connection with a licensee's program service obligations").

[53] Consumers Union Comments at 61. Indeed, the Coalition's initial comments showed that, because of its narrow data set and circumscribed definition of what constitutes "local" news, the Working Paper's findings were far more modest, if not irrelevant. *See* Coalition Comments at 18 note 47. For example, under the Working Paper's definition of "local" (i.e., "the story takes place within the DMA"), a report on a Senate speech by Sen. Boxer proposing the bill that became the California Wild Heritage Wilderness Act would not be considered a "local" story.

locally owned stations. Nor did it find that, overall, locally owned stations broadcast more local news stories. Instead, it found that within a station's most watched half-hour of local news, a station that was locally owned had a higher percentage of local as opposed to area, regional, national or international stories. It is not clear that this statistic correlates at all with the public interest.

In the third place, data on which Consumers Union or UCC rely, whether it be the Michigan Study or financial information on large-scale media transactions, inevitably fail to address the beneficial effects of duopolies in smaller markets, because duopolies have not been allowed in 154 predominantly smaller markets under the present rule.[54] Smaller market stations urgently need duopoly relief in order to continue to serve their communities of license, and nothing submitted by the advocates for maintaining the present rule refutes that point. As the CEO of Cascade Broadcasting, an owner of two CW-affiliated stations in smaller markets, stated, "[t]he 'public interest' argument that single or small group owners significantly contribute to diversity and competition is largely a fiction. We lack economic parity and opportunity, and face significant challenges to our very survival."[55]

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[54] As the Commission noted in its 2003 Order, Consumers Union's proposed reform of the present duopoly rule "does not . . . adequately address record evidence of differences in the economics of broadcast stations in smaller markets." *2003 Order* at ¶ 207. The Commission should arrive at the same conclusion today.

[55] Cascade Comments at 2.

C. The "Top Four" Restriction Undermines the Commission's Policy Goals in Smaller Markets and Should Therefore Be Eliminated.

The Commission's across-the-board restriction on combinations among the top four stations in a market withholds relief in the small markets where that relief is often most needed.[56] Commenters have shown how the duopoly rule in smaller markets results in less local programming in those markets rather than more.[57]

At the same time, commenters have convincingly illustrated that the top four restriction relies on an arbitrary premise: a "cushion of audience share percentage points separat[ing] the top four and the remaining stations."[58] As commenters have made clear, such a "cushion" does not exist.[59] Because the top four restriction denies relief to the public served by those stations that most need it, harms the Commission's public interest goals in the 91 smaller markets that have four or fewer stations, and relies on an arbitrary distinction between fourth- and fifth-ranked stations in a given market, the Commission should eliminate it.

III. THE PRESENT DUOPOLY RULE CANNOT WITHSTAND THE STATUTORY MANDATE OF SECTION 202(h) OR THE DIRECTIVES OF THE *PROMETHEUS* AND *SINCLAIR* DECISIONS.

As the Commission's *Further Notice of Proposed Rule Making* acknowledged, any retention, modification, or revocation of the duopoly rule is subject to three distinct mandates: the statutory requirements of Section 202(h) of the Telecommunications Act and the remand directives of the *Prometheus* and *Sinclair* decisions. As both the Third and D.C. Circuits have found, Section 202(h) imposes a burden on the Commission above and beyond its normal charge

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[56] *See* Block Comments at 3-4; Cascade Comments at 2-4; Coalition Comments at 13 note 29; Granite Comments at 7.

[57] *See* Coalition Comments at 9-10.

[58] *2003 Order* at ¶ 195.

[59] *See* NAB Comments, Attachment K; Hearst-Argyle Comments at 35-46.

under administrative law: it "requires the Commission periodically to justify its existing regulations, an obligation it would not otherwise have."[60] The *Sinclair* Court found that a rule "strik[ing] … an appropriate balance between permitting stations to take advantage of the efficiencies of television duopolies while at the same time ensuring a robust level of diversity" would be a "quintessential" exercise of the Commission's line-drawing authority entitled to substantial deference on judicial review, but remanded the present rule for its failure to account for media outlets other than local television stations.[61] The present rule continues to suffer from the fundamental flaw identified in *Sinclair*. Finally, the *Prometheus* Court found that combinations generally bring localism benefits to the markets they serve. By barring any television station combinations in 156 of the country's 210 television markets (mostly small markets), regardless of whether they would serve the public interest, the present rule is also inconsistent with *Prometheus*.

* * *

The Coalition continues to support steps to increase minority and female ownership of broadcast stations. Coalition members are generally sympathetic, with exceptions, to a number of proposals advanced by the Minority Media and Telecommunications Council to promote a pro-minority and female station ownership environment. However, the Coalition members believe, as does MMTC, that a revival of the tax certificate program, in some form or other, could be a major source of progress. An example of such an initiative from the 108th Congress

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[60] *Prometheus Radio Project*, 373 F.3d at 395.

[61] *Sinclair*, 284 F.3d at 162 (quoting *Review of the Commission's Regulations Governing Television Broadcasting*, Report and Order, FCC 99-209 (Aug. 6, 1999)).

is the Telecommunications Diversification Ownership Act of 2003,[62] introduced by Sen. McCain in the Senate and by Reps. Rangel and Rush in the House. By creating incentives for sellers to transfer their stations to minority and women buyers, the legislation would promote greater ownership diversity.

*   *   *

In the midst of the rhetoric about big media, the needs of viewers in small markets have been overlooked. But as the Commission's attempt to reform the present duopoly rule reaches its fifth year, evidence mounts that the rule harms smaller communities. While a larger-market duopoly or LMA increases the locally focused programming on its stations, a smaller-market station drops its long-running, award-winning local public affairs program. Losing money on its once-profitable news programming, a small-market station eliminates its local evening news broadcast and replaces it with nationally syndicated or even infomercial programming. An existing owner in a smaller market is unable to afford the start-from-scratch costs of establishing a Spanish-language programming service, and an emerging immigrant community goes unserved. Diversity, localism, and competition all suffer. And the need for duopoly reform increases every day.

The Communications Act charges the Commission to distribute broadcast services "among the several States and communities as to provide a fair, efficient, and equitable distribution" of those services.[63] The survival and health of free, over-the-air broadcasting in *all* of America's communities must, therefore, be of concern to the Commission. But as this

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[62] *See* S. 267, 108th Cong. (2003); H.R. 2044, 108th Cong. (2003); H.R. 2604, 108th Cong. (2003).

[63] 47 U.S.C. § 307(b).

proceeding has shown, the present and new duopoly rules undercut this service in smaller markets. Statutory and case law therefore obliges the Commission to reform the rule in this proceeding.

Respectfully submitted,

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WACH, Columbia, SC
KGBT-TV, Harlingen, TX
KXRM-TV, Colorado Springs, CO
WPDE-TV/WWMB, Florence, SC
WPBN-TV, Traverse City, MI
WTOM-TV, Cheboygan, MI
WHOI, Peoria, IL
KVII-TV, Amarillo, TX
KRCG, Jefferson City, MO
WFXL, Albany, GA
KHQA-TV, Hannibal, MO
WLUC-TV, Marquette, MI
KTVO, Kirksville, MO

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KVOA-TV, Tucson, AZ
KOAA-TV, Pueblo, CO
KSBY, San Luis Obispo, CA
KATC, Lafayette, LA
KRIS-TV, Corpus Christi, TX
KPAX-TV, Missoula, MT
KTVQ, Billings, MT
KRTV, Great Falls, MT
KXLF-TV, Butte, MT

Fisher Communications, Inc.
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Joseph L. Lovejoy, CFA, Vice President, Strategic Planning & Development

KLEW-TV, Lewiston, ID
KBCI-TV, Boise, ID
KVAL-TV, Eugene, OR
KCBY-TV, Coos Bay, OR**
KPIC, Roseburg, OR**
KEPR-TV, Pasco, WA**
KIMA-TV, Yakima, WA
KIDK, Idaho Falls, ID

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WRGB, Schenectady, NY
WTVC, Chattanooga, TN
WLAJ, Lansing, MI
KFDM, Beaumont, TX
KTVL, Medford, OR

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KXAN-TV, Austin, TX
KXAM-TV, Llano, TX
WDTN, Dayton, OH
WALA-TV, Mobile, AL

WBPG, Gulf Shores, AL
WLUK-TV, Green Bay, WI
WUPW, Toledo, OH
WAND, Decatur, IL
WANE-TV, Fort Wayne, IN
WTHI-TV, Terre Haute, IN
WLFI-TV, Lafayette, IN

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WISC-TV, Madison, WI
KAPP, Yakima, WA
KVEW, Kennewick, WA
WKBT, La Crosse, WI

Quincy Newspapers, Inc.
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WSJV, Elkhart, IN
KWWL, Waterloo, IA
WXOW-TV, La Crosse, WI
WQOW-TV, Eau Claire, WI**
WREX-TV, Rockford, IL
WAOW-TV, Wausau, WI,
WYOW, Eagle River, WI**
KTIV, Sioux City, IA
WVVA, Bluefield, WV
KTTC, Rochester, MN
WGEM-TV, Quincy, IL

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WTVR-TV, Richmond, VA
WTOL, Toledo, OH
KOLD-TV, Tucson, AZ
KHNL, Honolulu, HI
KHBC-TV, Hilo, HI**
KOGG, Wailuku, HI**
KFVE, Honolulu, HI

KFVS-TV, Cape Girardeau, MO
KSLA-TV, Shreveport, LA
WIS, Columbia, SC
WAFF, Huntsville, AL
WLBT, Jackson, MS
WAFB, Baton Rouge, LA
WBXH-CA, Baton Rouge, LA
WTOC-TV, Savannah, GA
WFIE, Evansville, IN
KLTV, Tyler, TX
KTRE, Lufkin, TX**
WSFA, Montgomery, AL
WTVM, Columbus, GA
WECT, Wilmington, NC
KCBD, Lubbock, TX
WALB, Albany, GA
WPGX, Panama City, FL
WLOX, Biloxi, MS
WDAM-TV, Hattiesburg, MS
WDFX-TV, Dothan, AL
KPLC, Lake Charles, LA
KAIT, Jonesboro, AR

Drewry Communications
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KXXV, Waco, TX
KFDA-TV, Amarillo, TX
KSWO-TV, Lawton, KS
KWES-TV, Odessa, TX
KWAB-TV, Big Spring, TX**

Schurz Communications, Inc.
/s/ Franklin D. Schurz, Jr.
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KYTV, Springfield, MO
WSBT-TV, South Bend, IN
WAGT, Augusta, GA
KWCH-TV, Wichita-Hutchinson, KS
KBSD-TV, Ensign, KS**
KBSH-TV, Hays, KS**
KBSL-TV, Goodland, KS**

January 16, 2007

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