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

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

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036

Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman

David Gunzerath, Ph.D.
Theresa Ottina
NAB Research and Planning

January 16, 2007

Executive Summary

In response to the Federal Communications Commission's most recent notice of proposed rulemaking regarding broadcast ownership regulation, the National Association of Broadcasters ("NAB") urged the Commission to approach its review of the local ownership restrictions with an eye toward maintaining the vibrancy of America's radio and television stations. The Commission must have fair and rational rules so that local broadcasters can continue to provide the many vital, free services that all Americans have come to expect. NAB also explained that in this review the Commission must adhere to the deregulatory standard set by Congress in Section 202(h) of the Telecommunications Act of 1996, and that First Amendment principles are fully consistent with relaxation of the local ownership rules, which presently single out broadcasters from among the numerous competitors in today's media marketplace for substantial speech burdens.

On the merits, NAB and other commenters demonstrated, with ample record evidence, that technological and competitive developments have dramatically and irrevocably altered the media landscape. In fact, these changes continue to transform the industry at a breathtaking pace, even during the course of this latest proceeding examining the ownership rules. Commenters further established that the intense competition that exists in this multi-source environment has rendered the current broadcast ownership restrictions not just obsolete but affirmatively harmful to the public interest.

Thus, the overwhelming weight of the record evidence now shows that the local ownership regulations are simply not necessary to promote the Commission's traditional goals of competition, diversity, and localism. Modern-day competition has fragmented audiences and eroded the advertising revenue that is critical to free, over-the-air broadcasting. Because current ownership limits inhibit broadcasters' ability to respond to changing market forces by creating more efficient ownership structures, many stations (especially those in smaller markets) are today facing grave economic difficulties.

The evidence also establishes that concerns of "undue consolidation" are unfounded; the "information" industry is by all objective standards unconcentrated, relative to other American businesses, and the broadcast sector of that industry is actually the *least* concentrated of the sectors. Permitting more flexible ownership arrangements would enable struggling broadcasters to offer competitive advertising packages and to take advantage of cost-saving efficiencies and economies of scale to better position themselves in the modern marketplace, thereby supporting increasingly costly high-quality local news and public affairs programming and, ultimately, the public interest.

In addition, the record makes clear, as the FCC previously found, that common ownership enhances localism and does not necessarily harm diversity (and indeed may even enhance certain types of diversity). Not only do consumers enjoy access to a wide variety of diverse programming from an ever-increasing number of new providers, but studies consistently have found that common ownership has *increased* the diversity of programming offered by local stations. In short, those who would deny the radical changes that have taken place in the broadcast industry since the ownership rules were adopted, or the benefits that joint ownership can bring in the way of more choices, better programming, and innovative services for consumers, would deny both reality and the public interest.

For all these reasons, it is critical that the Commission act promptly to give local stations a full and fair opportunity to compete in the contemporary media marketplace, rather than forcing them to languish under the burden of outdated and increasingly irrelevant ownership restrictions. In fact, the failure to relax the broadcast ownership rules could result in *decreased* local news and other important local services as stations on the brink of economic survival are forced to curtail such costly programming in order to remain on the air. In light of overwhelming evidence that competition has dramatically transformed the media marketplace, Section 202(h) and basic principles of administrative law require that the Commission take prompt and final action to bring the broadcast ownership rules into the 21st century. As set forth in NAB's opening comments and further supported below, the Commission must: (1) reject the invitation of some commenters to reduce the current ownership levels in local radio markets and instead continue the relaxation of such limits; (2) reform the television duopoly rule to allow more freely the formation of duopolies in markets of all sizes; and (3) repeal the restrictions on cross-ownership of radio stations, television stations, and newspapers.

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To: The Commission

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits this reply to certain comments on the Commission's *Further Notice of Proposed Rulemaking* in this

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[1] NAB is a nonprofit trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the FCC and other federal agencies, and the Courts.

proceeding.[2] In the *Further Notice*, the Commission initiated a comprehensive reexamination of its broadcast ownership rules in light of changing marketplace conditions, as required by the statutory directive in Section 202(h) of the Telecommunications Act of 1996 (the "1996 Act," or "Act"). The Commission also sought comment on how to address the issues raised by the United States Court of Appeals for the Third Circuit in *Prometheus Radio Project v. FCC*,[3] which affirmed some of the Commission's decisions made in its 2002 review of the ownership rules[4] and remanded other decisions for further agency justification or modification.

At the outset, it bears emphasis that the operative legal standard established by Congress for this proceeding favors regulatory relaxation over maintenance of the status quo. The Third Circuit, as well as the D.C. Circuit, have confirmed that Section 202(h) sets a deregulatory standard of review. The values embodied in the First Amendment are also consistent with relaxation of the local ownership restrictions. Rules that single out broadcasters alone among the numerous competitors in today's media marketplace for substantial speech burdens, as the present local ownership restrictions do, run counter to First Amendment principles. And, in any event, it is certainly not true, as some

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[2] *2006 Quadrennial Regulatory Review – Review of the Comm'ns Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996*, Further Notice of Proposed Rulemaking, 21 FCC Rcd 8834 (2006) ("*Further Notice*").

[3] *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *cert. denied*, 545 U.S. 1123 (2005).

[4] *2002 Biennial Regulatory Review – Review of the Commn's Broad. Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecomms. Act of 1996,* Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13,620 (2003) ("*2002 Biennial Review Order*").

commenters suggest, that the First Amendment *requires* these restrictions on broadcast speech.

On the merits, NAB and other commenters demonstrated, with ample record evidence, that technological and competitive developments have dramatically and irrevocably altered the media landscape. In fact, these changes continue to transform the industry at a breathtaking pace, even during the course of this latest proceeding examining the ownership rules. Commenters further established that the intense competition that exists in this multi-source environment has rendered the current broadcast ownership restrictions not just obsolete but affirmatively harmful to the public interest.

Thus, the overwhelming weight of the record evidence now shows that the local ownership regulations are simply not necessary to promote the Commission's traditional goals of competition, diversity, and localism. Modern-day competition has fragmented audiences and eroded the advertising revenue that is critical to free, over-the-air broadcasting. Because current ownership limits inhibit broadcasters' ability to respond to changing market forces by creating more efficient ownership structures, many stations (especially those in smaller markets) are today facing grave economic difficulties.

The evidence also establishes that concerns of "undue consolidation" are unfounded; the "information" industry is by all objective standards unconcentrated, relative to other American businesses, and the broadcast sector of that industry is actually the *least* concentrated of the sectors. Permitting more flexible ownership arrangements would enable struggling broadcasters to offer competitive advertising packages and to take advantage of cost-saving efficiencies and economies of scale to better position themselves in the modern marketplace, thereby supporting increasingly costly high-quality local news and public affairs programming and, ultimately, the public interest.

In addition, the record makes clear, as the FCC previously found, that common ownership enhances localism and does not necessarily harm diversity (and indeed may even enhance certain types of diversity). Not only do consumers enjoy access to a wide variety of diverse programming from an ever-increasing number of new providers, but studies consistently have found that common ownership has *increased* the diversity of programming offered by local stations. In short, those who would deny the radical changes that have taken place in the broadcast industry since the ownership rules were adopted, or the benefits that joint ownership can bring in the way of more choices, better programming, and innovative services for consumers, would deny both reality and the public interest.

For all these reasons, it is critical that the Commission act promptly to give local stations a full and fair opportunity to compete in the contemporary media marketplace, rather than forcing them to languish under the burden of outdated and increasingly irrelevant ownership restrictions. In fact, the failure to relax the broadcast ownership rules could result in *decreased* local news and other important local services as stations on the brink of economic survival are forced to curtail such costly programming in order to remain on the air. In light of overwhelming evidence that competition has dramatically transformed the media marketplace, Section 202(h) and basic principles of administrative law require that the Commission take prompt and final action to reform the local broadcast ownership rules. As set forth in NAB's opening comments and further supported below, the Commission must: (1) reject the invitation of some commenters to reduce the current ownership levels in local radio markets and instead continue the relaxation of such limits; (2) reform the television duopoly rule to allow more freely the formation of duopolies in markets of all sizes; and (3) repeal the restrictions on cross-ownership of radio stations, television stations, and newspapers.[5]

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[5] On December 29, 2006, the Media Bureau released additional staff reports and studies on media ownership, localism, minority ownership and other "related issues" in response to a Freedom of Information Act ("FOIA") request. *See FCC Media Bureau Posts Staff Reports and Studies on Media Ownership Webpage*, Public Notice (Dec. 29, 2006). The additional documents are available at http://www.fcc.gov/ownership/additional.html (last visited Jan. 4, 2007). Given the detailed economic and statistical analysis contained in many of these admittedly draft studies and the timing of their release, NAB is currently analyzing the materials and plans to submit a further analysis of the materials in this docket as appropriate. A preliminary review, however, indicates that certain of the documents are relatively complete drafts and confirm many of the arguments set forth by NAB and other commenters regarding the need for regulatory relief. For example, the paper entitled "Summary of Ideas on Newspaper-Broadcast Cross-Ownership" concludes that it might be appropriate for the FCC to eliminate the restriction entirely and permit cross-ownership that complies with the broadcast ownership rules. *See* Leslie M. Marx, *Summary of Ideas on Newspaper-Broadcast Cross-Ownership* (June. 15, 2006), *available at* http://www.fcc.gov/ownership/materials/newly-released/newspaperbroadcast061506.pdf. In addition, the "Financial Health of the Newspaper Industry" study confirms that the newspaper industry has experienced a significant drop in advertising revenues due to intense competition, while confronting increasing costs. *See Financial Health Of The Newspaper Industry* 2 (June 2006), *available at* http://www.fcc.gov/ownership/materials/newly-released/financialhealth060006.pdf (stating profit margins fell from 12.4% in 2000 to 9.8% in 2005, while costs rose by 6.3% from 1992 to 2000, and by 15.6% from 2000 to 2005). The paper notes that, as a result of these trends, Wall Street analysts have "sounded alarm bells" regarding the financial viability of many newspapers. *Id*. at 2-3.

This is not to say, however, that all of the recently-released studies, and the conclusions they reach, are valid. Indeed, some of the materials are admittedly in crude draft form. *See, e.g.*, *Localism Paper* 1, 5 (July 2, 2004), *available at* http://www.fcc.gov/ownership/materials/newly-released/localismpaper070204.pdf (noting that author is awaiting receipt of additional material that will need to be incorporated into the document, and stating that a portion of the text is a "compilation of notes that require consolidation"). Others expressly recognize, moreover, that their analyses are tentative and may include various statistical flaws. *See, e.g.*, *FCC Market Structure and Music Diversity Paper* 1, 5-6, 19-20 (August 2005), *available at* http://www.fcc.gov/ownership/materials/newly-released/radiomarketstructure081506.pdf (stating that the paper's conclusions "are tentative," noting that the authors "can make no

I. THE COMMUNICATIONS ACT AND CONSTITUTION REQUIRE REFORMATION OF THE BROADCAST OWNERSHIP RULES, AND NOTHING IN ADMINISTRATIVE LAW PREVENTS FINAL ACTION ON THE RULES.

A. The D.C. and Third Circuits Have Confirmed that Section 202(h) Sets a Deregulatory Standard of Review.

The D.C. and Third Circuits have confirmed that the plain language of Section 202(h) of the 1996 Act[6] mandates that the Commission repeal or modify ownership regulations that are no longer necessary in the public interest as a result of competition.[7] Section 202(h) compels the Commission to: (1) review all of its ownership rules quadrennially, (2) determine if the ownership rules "are necessary in the public interest as the result of competition," and (3) "repeal or modify any regulation it determines to be no longer in the public interest."[8] It is indisputable, as both circuits have found, that Section 202(h) "was enacted in the context of deregulatory amendments" to the Communications Act.[9] The apparent argument of some commenters that the statute is not deregulatory at

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definite statement regarding the relationship between concentration and diversity" based on their findings, listing potential problems with the data set employed, and acknowledging the possibility that the study's results suffer from "omitted variable bias").

6 Telecommunications Act of 1996, Pub. L. No. 104-104 § 202(h), 110 Stat. 56, 111-12 (1996) (as amended by Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004)).

7 *See* Comments of NAB at 4-5.

8 1996 Act § 202(h).

9 *Prometheus*, 373 F.3d at 394; *see Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).

all[10] cannot be squared with the statute's plain language and purpose or the decisions of the Third and D.C. Circuits.

The *Prometheus* court explicitly found that Section 202(h) is deregulatory, because it "requires the Commission to periodically justify its existing regulations, an obligation it would not otherwise have."[11] Likewise, the D.C. Circuit found that Section 202(h)'s mandatory review is "designed to continue the process of deregulation" that the 1996 Act began.[12] Section 202(h) expressly obligates the Commission to take into account competitive technological and marketplace developments in its periodic review proceedings and requires that rules "no longer in the public interest" must be "repeal[ed] or modif[ied]."[13]

Indeed, Section 202(h) enhances the Commission's existing duty, as a federal regulatory agency under the Administrative Procedure Act ("APA"), to assess the effectiveness of its rules and make changes as necessary.[14] To read Section 202(h) as

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[10] *See, e.g.,* Comments of Center for Creative Voices in Media, Center for Digital Democracy, CCTV Center for Media and Democracy, Common Cause, Media Alliance, National Hispanic Media Coalition, New America Foundation, Prometheus Radio Project, and U.S. Public Interest Research Group ("Center for Creative Voices in Media") at 2-3.

[11] *Prometheus*, 373 F.3d at 395; *see also* Comments of NAB at 5.

[12] *Sinclair,* 284 F.3d at 159 (quoting *Fox TV Stations, Inc. v. FCC,* 280 F.3d 1027, 1033, *op. modified in part on reh'g,* 293 F.3d 537 (D.C. Cir. 2002)).

[13] *Prometheus*, 373 F.3d at 394 (quotations omitted).

[14] *See, e.g., Bechtel v. FCC,* 10 F.3d 875, 880 (D.C. Cir. 1993) (stating that the Commission has a "duty to evaluate its policies over time to ascertain whether they work – that is, whether they actually produce the benefits the Commission originally predicted they would" (quoting *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992))); *Am. Trucking Ass'ns v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967) ("Regulatory agencies do not establish rules of conduct to last forever; they are supposed,

imposing no deregulatory obligation, as proposed by commenters such as the Center for Creative Voices in Media,[15] would render the rule meaningless, in contravention of fundamental canons of statutory interpretation.[16] Section 202(h) only has meaning when properly read to impose an additional deregulatory mandate.

B. Relaxation of the Unnecessary and Asymmetric Local Ownership Rules Is Fully Consistent with the First Amendment.

For the reasons explained below, relaxation of the current local broadcast ownership restrictions would be fully consistent with the principles of the First Amendment. *First*, the First Amendment places a heavy burden on government to justify regulation that treats similarly situated speakers differently.[17] As the Supreme Court has explained, "differential treatment, unless justified by some special characteristic of the

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within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.").

[15] Comments of Center for Creative Voices in Media at 2-3.

[16] *See, e.g., Motor & Equip. Mfrs. Ass'n v. EPA*, 627 F.2d 1095, 1108 (D.C. Cir. 1979) (rejecting an interpretation that would render a provision "mere surplusage" because "[i]t is axiomatic that a statute must be construed . . . so that no provision will be inoperative or superfluous"); *United States v. Cooper*, 396 F.3d 308, 312 (3d Cir. 2005) ("It is a well known canon of statutory construction that courts should construe statutory language to avoid interpretations that would render any phrase superfluous." (citing *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (internal quotation marks omitted)))); *see also* Comments of Clear Channel Communications, Inc. ("Clear Channel") at 6.

[17] *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment [and] we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-42 (1994) ("*Turner I*"); *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987).

press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional."[18] Thus, in the absence of a compelling justification, the Commission cannot validate a one-sided regulatory burden that inhibits a local station's ability to speak to its chosen audience,[19] or that imposes costs that do not apply to similarly situated speakers. In short, such rules "discriminate among media," and therefore "present serious First Amendment concerns."[20]

The current regime involves asymmetrical regulations that place a significant regulatory burden only on local broadcasters without a compelling justification.[21] The available evidence belies the notion that the asserted purposes of the broadcast ownership rules—the promotion of competition and protection of diversity and localism—have been or ever will be achieved by the Commission's asymmetrical regulation of local stations.[22]

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[18] *Minneapolis Star & Tribune Co.*, 460 U.S. at 585.

[19] The Supreme Court has explained that the First Amendment fully protects "speech distribution" facilities or activities. *See, e.g.*, *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 674 (1998) ("When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity."); *CBS, Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 110 (1973) (explaining that, under the First Amendment, television broadcasters enjoy the "widest journalistic freedom" consistent with their public interest responsibilities); *see also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981) ("The First Amendment protects the right of every citizen to reach the minds of willing listeners and to do so there must be opportunity to win their attention." (citation and quotations omitted)).

[20] *Turner I*, 512 U.S. at 659.

[21] *See* Comments of NAB at 47; Comments of Freedom of Expression Foundation at 24.

[22] *See infra* Section III (demonstrating that common ownership increases diversity and enhances localism); *see also Horton v. City of Houston*, 179 F.3d 188, 195 (5th Cir. 1999) (invalidating City's fee requirement designed to serve localism where City "ha[d] not provided any evidence linking the amount charged to non-local producers and the promotion of localism"); *Chi. Cable Commc'ns v. Chi. Cable Comm'n*, 879 F.2d 1540, 1550 (7th Cir. 1989) (recognizing that even though Commission had demonstrated

Given the widespread availability of a plethora of alternative media sources, including the Internet, there can be no dispute that the public has ready access to diverse viewpoints on local, national, and even international issues. In view of broadcasters' competitive challenges and shrinking audience and advertising shares, the Commission must adopt a level playing field and eliminate disparate rules that handicap only one speaker.[23] In sum, the Commission can no longer maintain its disparate regulation of local stations consistent with the commands of the First Amendment.

Second, the First Amendment prevents government from imposing burdens on speakers because of the content of their message.[24] The First Amendment protects expression without regard "to the truth, popularity, or social utility of the ideas and

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substantiality of interests served by restrictive rules, "their validity also depends on whether these restrictions were no greater than is essential to the furtherance of that interest" (citations and internal quotation marks omitted)).

[23] Indeed, commenters explained that Wall Street has placed diminished value on the long-term prospects of broadcast industry stocks because of the asymmetric regulatory burdens placed on this one type of media outlet. *See* Richard T. Kaplar & Patrick D. Maines, The Media Institute: Policy Views, *Media Consolidation, Regulation, and the Road Ahead* 6-7 (Feb. 2006) (paper submitted as Comments of The Media Institute) ("Comments of The Media Institute").

[24] *See, e.g.*, *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 818 (2000) ("It is rare that a regulation restricting speech because of its content will ever be permissible."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."); *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 126 (1991) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." (citation and quotations omitted)); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (stating that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content" (citations omitted)).

beliefs which are offered."[25] Hence, "regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content" violate the First Amendment.[26] This bedrock First Amendment principle applies with equal force to broadcasters.[27]

Accordingly, the Commission's analysis of the level of diversity in local markets should not focus on the popularity or unpopularity of the programming content, ideas or viewpoints offered by various outlets.[28] It would turn First Amendment principles on their head to conclude that widely available voices are not pertinent to diversity simply because they are not as popular as the government believes they should be, or because the idea or content is less appealing to consumers and has not yet achieved "mainstream"

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[25] *NAACP v. Button*, 371 U.S. 415, 445 (1963); *see also Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 689 (1959) (explaining that First Amendment guarantees are "not confined to the expression of ideas that are conventional or shared by a majority," and they protect "expression which is eloquent no less than that which is unconvincing").

[26] *Turner I*, 512 U.S. at 642.

[27] *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 378 (1984) ("[W]e have . . . made clear that broadcasters are engaged in a vital and independent form of communicative activity."); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1232 (10th Cir. 1999) (explaining that because "[e]ffective speech has two components: a speaker and an audience" and thus "[a] restriction on either of these components is a restriction on speech" (citation omitted)); *Turner I*, 512 U.S. at 640-41 (stating that "laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse," and "so are always subject to at least some degree of heightened First Amendment scrutiny" (citation and quotations omitted)).

[28] *See* Comments of Fox Entertainment Group, Inc. and Fox Television Holdings, Inc. ("Fox") at 23-24. *See also* Maurice Stucke and Allen Grunes, *Antitrust and the Marketplace of Ideas*, 69 Antitrust L. J. 249, 275-77 (2001) (authors note serious difficulties in governmental efforts to analyze the "marketplace of ideas" and "protect diversity," including the "risk that the government will inject its values and preferences into the media by valuing certain programming more than others" and the "arguably . . . meaningless" nature of the "historical market shares" of traditional media outlets such as broadcast stations and newspapers in today's "dynamic marketplace of ideas").

acceptance. Any regulation justified on the basis of diversity should instead, consistent with the First Amendment, focus on the number of alternative outlets that offer information and entertainment to the public. In other words, it is the *opportunity* afforded to consumers that properly counts, not the *choices* that they *themselves* make.[29]

The failure to sufficiently account for these fundamental principles underlying the Constitution's protection of the freedom of speech led some commenters to the erroneous conclusion that the burdensome broadcast ownership rules are compelled by the First Amendment. Such a proposition is clearly wrong. Despite the unnecessary and constitutionally problematic free speech restrictions the current rules impose on local stations, some commenters proffer the striking theory that the First Amendment actually

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[29] *See* Comments of NAB at 54-57; *see also* Comments of The Newspaper Association of America ("NAA") at 89-92, Comments of Belo Corp. ("Belo") at 17, Comments of Gannett Co., Inc. ("Gannett") at 32-33, Comments of Smaller Market Television Stations at 23. As NAB has also stressed, outlets with small viewership, listenership, and readership can easily have considerable importance in the marketplace of ideas, especially in the Internet age. *See* Comments of NAB at 54-55. Those who insist a handful of traditional media outlets that, at least currently, have relatively larger audiences somehow control which ideas and viewpoints ultimately gain widespread acceptance, would deny the ever-growing influences of numerous competing outlets and the Internet. They also fail to engage in any analysis of how ideas and viewpoints are actually diffused, accepted, changed or rejected, and how factors and individuals other than the media are intimately involved in this process. For example, mass communication scholars have long pointed out that interpersonal communication with "opinion leaders" (including friends, colleagues and family members) greatly influence the diffusion and acceptance of ideas among people as a whole. *See* Elihu Katz & Paul Lazarsfeld, *Personal Influence: The Part Played by People in the Flow of Mass Communications* (1955). More recent thinkers have focused on the influential roles played by small numbers of certain types of people ("connectors" with wide social circles or especially knowledgeable "mavens") in the spread of social phenomena. *See* Malcolm Gladwell, *The Tipping Point: How Little Things Can Make a Big Difference* (2000). Thus, media outlets with quite small audiences can easily be the source of new ideas that gain widespread acceptance, especially if "opinion leaders" are among their audience.

requires the suppression of broadcasters' speech.[30] Such a proposition is antithetical to the very purpose of the First Amendment. As a general matter, the First Amendment was designed as a bulwark *against* government intrusion into the marketplace of ideas: "It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. . . . The citizen is entitled to seek out or reject certain ideas or influences without Government interference or control."[31] That is, "[t]he fundamental purpose behind the First Amendment is to promote and protect the free expression of ideas, unfettered by government intrusion."[32]

The First Amendment simply is not a source of government authority to enact regulations that some commenters, in their own self-interest, might deem desirable. As one court explained, the First Amendment only "'protects individuals' 'negative' rights to be free from government action and does not create 'positive' rights-requirements that the government act.'"[33] The Supreme Court has in fact expressly rejected the suggestion that

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[30] *See* Comments of Center for Creative Voices in Media at 6-7; Comments of Consumers Union at 8-9; *see generally id.*, Study 3 at 23-56 (Ben Scott, *A Broad, Positive View of the First Amendment*).

[31] *Playboy Entm't Group*, 529 U.S. at 817; *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 634 (1984) (O'Connor, J., concurring in part) ("A ban on specific group voices on public affairs violates the most basic guarantee of the First Amendment – that citizens, not the government, control the content of public discussion.").

[32] *S. Christian Leadership Conference v. Supreme Court of La.*, 252 F.3d 781, 795 (5th Cir. 2001).

[33] *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 319 (6th Cir. 1998) (quoting Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 Geo. L.J 45, 67 (1997)); *see also* Lillian R. Bevier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 Colum. L Rev. 1258, 1277 (1994)

government may restrict the speech of powerful or influential entities or persons because such speech may be "too" persuasive or dominate public debate.[34]

In sum, the First Amendment in no way *requires* the federal government to enact ownership regulations at all—let alone restrictions that favor the interests of some speakers at the expense of others, as here.[35] The argument of these commenters, that the First Amendment requires the Commission to prevent local broadcasters from speaking to their chosen audience, should be soundly rejected.

C. Administrative Law Does Not Mandate Continuing this Proceeding Indefinitely with Endless Rounds of Notice and Comment.

Consumers Union's bare assertion (at 25) that the "Commission must . . . release a further notice of proposed rulemaking providing the public with detailed proposals for any media ownership rule changes" before promulgating final rules is unsupported by the law.

Contrary to Consumer's Union's claim, administrative law does not mandate continuing this proceeding indefinitely with a "'revolving door'" of notice and comment

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(explaining that the First Amendment "is a source of negative rights against the government, not a repository of positive entitlement to government favors").

[34] *See First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789-91 (1978) (invalidating, under First Amendment, statute restricting business corporations from making contributions or expenditures to influence vote on referendum proposals, noting that the fact speech is persuasive "is hardly a reason to suppress it"); *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (explaining that "the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment").

[35] *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974) ("'Government-enforced right of access inescapably dampens the vigor and limits the variety of public debate.'" (quoting *N.Y Times v. Sullivan*, 376 U.S. 254, 279 (1964))).

rounds.[36] As the Third Circuit held in *Prometheus*, under the APA, an agency's notice is sufficient if it "'would fairly apprise interested persons of the 'subjects and issues' before the agency.'"[37] So long as this requirement is met, the Commission is not required to initiate a new comment cycle even if the agency adopts a rule that is "substantially different" from its initial proposals.[38] Similarly, the D.C. Circuit has held that an agency provides adequate notice for any rules that are a "logical outgrowth" of the original proposal,[39] and an additional round of notice and comment only is necessary if it "'would provide the *first* opportunity'" for interested parties to comment on an issue.[40] If the Commission's final rule is "not wholly unrelated or surprisingly distant" from its initial suggestion, the initial notice satisfies the APA's requirements.[41]

Thus, Consumer Union's naked assertion should be rejected. Indeed, retaining the outmoded local ownership restrictions any longer is neither in the public interest nor consistent with the First Amendment or with Section 202(h)'s mandate that the

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36 *Prometheus*, 373 F.3d at 412; *see Cmty. Nutrition Inst. v. Block*, 749 F.2d 50, 58 (D.C. Cir. 1984) ("Rulemaking proceedings would never end if an agency's response to comments must always be made the subject of additional comments."); 5 U.S.C. § 553(b).

37 *Prometheus*, 373 F.3d at 411 (quoting *Am. Iron & Steel Inst. v. EPA*, 568 F.2d 284, 293 (3d Cir. 1977)); *see id.* at 416 (upholding Commission decision to allow triopolies because the notice "provided a sufficient 'description of the subjects and issues involved' in the Commission's decision").

38 *Am. Iron & Steel Inst.*, 568 F.2d at 293.

39 *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000) (citing *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991)).

40 *Ariz. Pub. Serv. Co.*, 211 F.3d at 1299 (quoting *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1274 (D.C. Cir. 1994)).

41 *Ariz. Pub. Serv. Co.*, 211 F.3d at 1299.

Commission evaluate the changing competitive landscape and review and revise its broadcast ownership rules accordingly every four years.

II. THE RECORD CONFIRMS THAT THE MEDIA MARKETPLACE IS ROBUSTLY COMPETITIVE, ENCOMPASSING A PROLIFERATION OF OUTLETS AND VIRTUALLY UNLIMITED CONTENT FOR CONSUMERS.

NAB's opening comments extensively documented that technology and competitive alternatives fundamentally have altered the way consumers obtain news, information, and entertainment programming. The majority of commenters strongly supported that assessment of today's media marketplace, and submitted numerous studies and other evidence further demonstrating this burgeoning competition and the seemingly endless supply of new media voices.[42] In the face of this overwhelming evidence, a few commenters assert that local media markets are not competitive and that traditional media have a stranglehold on local news and information.[43] A handful of commenters also

[42] *See, e.g.,* Comments of The Media Institute at 1 (The advent of the Internet, Internet radio, satellite radio, broadband video, television downloads, IPTV, cell phone video, iPods, and other music services has offered consumers incredible choice. Google and Yahoo! are preparing to offer Internet video as well as VoIP service.); Comments of Bonneville International Corporation ("Bonneville") at i, 6-7 (The media marketplace continues to evolve and expand, allowing for an endless array of voices and viewpoints. The current media market includes a broad array of local television stations; hundreds of video channels on cable, satellite, and IPTV services; thousands of local radio stations; satellite radio; and the Internet.); Comments of Cox Enterprises, Inc. ("Cox") at 10-12; 20-23; Comments of Clear Channel at 7-8; Comments of the Adam Thierer, Progress & Freedom Foundation ("PFF") at 53, 57-58; Comments of Nexstar at 6-10; Comments of NAA at 23-45; Comments of Tribune Company at 27-79; Comments of Fox at 18-54; Comments of NBC Universal, Inc. and NBC Telemundo License Co. ("NBC") at 7-11; Comments of Sinclair Broadcast Group at 12-32.

[43] Comments of Consumers Union at 10; *Id.*, Study 7 at 117-33 (Mark Cooper, *Media Usage: Traditional Outlets Still Dominate Local News and Information*) ("Consumers Union Study 7, *Media Usage*"); Comments of United Church of Christ ("UCC") at 40-42; Comments of AFL-CIO at 52-54; Comments of Communications Workers of America, The Newspaper Guild/CWA, and National Association of Broadcast

attempt to discount the impact of the Internet on the media landscape and essentially urge the Commission to disregard the Internet in its competitive analysis.[44] In particular, this small contingent of commenters tries to persuade the agency that the Internet is essentially a non-entity in the local news and information marketplace.[45] Such arguments blink reality.

Claims that broadcasters somehow control local media markets are at odds with the objective facts. The current marketplace bears no resemblance to the market that existed when the local ownership restrictions were enacted. When the broadcast ownership regulations were first adopted, for example, home computers did not exist, "UHF TV was barely a force, and cable was little more than a community antenna hookup that brought in distant broadcast signals. . . . Everything was 'analog,' although no one called it by that name then."[46] Today's digital world has blurred the distinctions among newspapers, television, and radio and forced "traditional media companies [to]

Employees and Technicians/CWA ("CWA") at 17-27; Comments of Rachel Stilwell at 32-33, 72.

[44] *See, e.g.,* Comments of AFL-CIO at 38-41; Comments of CWA at 17-29; Comments of Consumers Union at 10-13; Comments of UCC at 40-44; Comments of the American Federation of Television and Radio Artists ("AFTRA") at 7-8.

[45] *See* Comments of AFL-CIO at 38-41; Comments of Consumers Union at 11-13, Comments of Center for Creative Voices in Media at 3-4; Comments of CWA at 18, 23; Comments of Adam Marcus at 24-26; Comments of Nancy Stapleton at 3-4; Comments of UCC at 42-43.

[46] Comments of The Media Institute at 4-5; *see also* Comments of Media General at 43 ("When the FCC adopted the 1975 Rule, the only electronic outlets in existence were television and radio broadcast stations and cable television systems. Since then, the number of local radio and television stations in the nation has grown by over 75 percent, with radio stations increasing from 7,785 as of January 1, 1975, to 13,748 as of March 31, 2006, and television stations increasing from 952 to 1,752 over the same period."); Comments of Tribune Company at 2-3, 16-34.

transform their culture, operations, and strategic thinking to respond to seismic shifts in the media marketplace."[47] In this competitive digital world, "consumers are increasingly relying on non-traditional platforms for entertainment, news, social interactions, shopping, and other daily activities."[48] The record is replete with evidence regarding the competitive marketplace, the "breathtaking" pace of change in this digital world,[49] and the fact that the current local ownership rules no longer serve the agency's stated goals of competition, diversity, or localism.[50]

The record also underscores the dramatic pace of change by highlighting fundamental aspects of today's media landscape that did not even exist or were in the

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[47] Newspaper Ass'n of Am. & Am. Society of Newspaper Editors, *Growing Audience: Understanding the Media Landscape* 6, *available at* http://www.growingaudience.com/downloads/GALandscapeExecSummary.pdf ("*Growing Audience Study*"); *see also* Jon Ziomek, The Aspen Inst., *Journalism, Transparency, and The Public Trust* 1 (2005), *available at* http://www.aspeninstitute.org/atf/cf/%7BDEB6F227-659B-4EC8-8F84-8DF23CA704F5%7D/JOURTRANSPTEXT.PDF ("Communications technology now offers consumers so much information that news has become, for some, almost an irritant. For others, new communications technologies and applications offer a broader array of news sources, as well as the ability to take a more active role in the production, dissemination, and vetting of news and information of public interest.") ("*Journalism, Transparency, and The Public Trust*").

[48] Universal McCann, *The New "Digital Divide": How the New Generation of Digital Consumers are Transforming Mass Communication* 3 (August 2006), http://universalmccann.com/downloads/papers/The%20New%20Digital%20Divide.pdf.

[49] Comments of CBS Corp. ("CBS") at 1.

[50] As The Media Institute explains, while "today's media marketplace is an extremely competitive environment" the "old media have to play by the government's rules at a time when they must compete with a much broader range of unregulated media." Comments of The Media Institute at 3.

most nascent stages of development at the time of the *2002 Biennial Review Order*.[51] At the time of the last review, there was no YouTube, no video iPods, Internet blogs had yet to make a major appearance in the marketplace, cable and telephone companies focused largely on video and voice services (respectively), and cellphones were used almost exclusively to make telephone calls.[52] Today, in sharp contrast, YouTube is a "powerful tool[]"[53]that Google recently acquired for more than $1.65 billion,[54] Apple has been selling its fifth-generation video iPod for more than a year, and cable and telecommunications companies are both offering bundles of video, voice, broadband and wireless services.[55] And cellphones now widely offer music, Internet access, and video services that include local content.[56]

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[51] *See, e.g.*, Comments of Gannett at 14 ("Since 2003, the number of independent media offerings available to consumers has proliferated at a staggering pace."); Comments of Media General at 44 ("[S]ince July 2003, new subscription and non-subscription video services, some utilizing the Internet and others utilizing platforms like telephone lines and mobile spectrum, are becoming a reality for more and more consumers and advertisers. The changes since July 2003 have been staggering and add innumerable choices of available media for consumers and advertisers."); Comments of Bonneville at 7-11 (Since the 2003 Order, the Internet has seen an exponential growth of media services, including blogs, RSS feeds, content tagging, podcasts as well as the growth of audio and video feeds and webcasting content directly to consumers.).

[52] *See* Comments of CBS at 1.

[53] Paul Farhi, *Blundering Pols Find Their Oops On Endless Loop Of Internet Sites,* Wash. Post, Nov. 3, 2006, at C01 ("*Blundering Pols Article*").

[54] Comments of Hearst-Argyle Television, Inc. ("Hearst-Argyle") at 9 (Google's purchase of YouTube indicates the speed at which the marketplace for Internet video is changing.).

[55] Comments of CBS at 1.

[56] Comments of Cox at 17-18; *see also* Matt Richtel, *YouTube Coming Soon to Cellphones*, N.Y. Times, Nov. 28, 2006, at C3 (announcing debut of service distributing YouTube videos on Verizon Wireless phones).

The Internet: Attempts to discount the effect of the Internet on the media landscape are unavailing. Regardless of whether the Internet was of substantial competitive significance in 2003—which NAB submits it was—it is clear that the Internet has experienced exponential growth since the *2002 Biennial Review Order*[57] and is today a fundamental source of news and information for Americans. As reported in the opening comments, some 50 million Americans now turn to the Internet for news on any given day.[58] Among younger Americans under the age of 34, 46% consider the Internet to be their primary source of news, which is *higher* than the percentage that rely on broadcast television.[59] As would be expected, the record also indicates that reliance on the Internet for news and information inevitably will continue to increase in the future as children and young adults age. An astounding "59% of 6-11 year-olds used the Internet

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[57] *See, e.g.,* Comments of Gannett at 17 ("[T]he ubiquity of the Internet has advanced considerably since 2003."); *Id.* at 18 ("The Internet unquestionably has attained greater prominence as a source of news and information, including at the local level, over the past several years."); Comments of Cox at i, 20-23 (The dramatic growth of the Internet has led directly to the entrance of innumerable new voices in the media marketplace. The Internet offers consumers access to both traditional media outlets, albeit in web form, and alternative content, like blogs and personal web pages.); Comments of Fox at 10 (The Internet is a source of constantly updated information available 24 hours a day, 7 days a week. Consumers also have access to the Internet through their wireless phones.); Comments of Media General at 44; Comments of Tribune Company at 16-26.

[58] *See* Comments of NAA at 47 (citing Pew Internet & American Life Project, *Online News: For Many Home Broadband Users, The Internet Is A Primary News Source* i (Mar. 22, 2006), *available at* http://www.pewinternet.org/pdfs/PIP_News.and.Broadband.pdf); *See also, id.* ("Nearly one-third of all Americans reportedly now receive news through the Internet regularly." (citing Pew Research Center for the People & the Press, *News Consumption and Believability Study* (July 30, 2006), *available at* http://people-press.org/reports/pdf/282.pdf)).

[59] *See Growing Audience Study* at 3.

during the past 30 days."[60] Thirty-nine percent of 18-34 year-olds—nearly half of whom *already* consider the Internet to be their primary source of news and information—expect to increase their use of the Internet for news over the next three years.[61]

Indeed, the evidence of the growing use of the Internet for news and information has continued to accumulate even since the opening comments were filed in October. A November 20, 2006, Pew Internet and American Life Project study found that 40 million Americans (or 20% of the total population) rely on the Internet as their primary source of science news and information.[62] Among all adults, the use of the Internet for this category of news and information is second only to television, with 41% of adults relying upon television as their primary source of science news.[63] Among young adults under 30, the import of the Internet is undeniable: 44% of adults 18-29—one of the most coveted age brackets for advertisers—with broadband access use the Internet as their primary source of science news, with only 32% of young adults obtaining this type of news

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[60] *See id.*

[61] *Id.* at 4; *see also* Comments of NAA at 44-45.

[62] *See* John Horrigan, Pew Internet & American Life Project, *The Internet as a Resource for News and Information about Science* (Nov. 20, 2006), *available at* http://www.pewinternet.org/pdfs/PIP_Exploratorium_Science.pdf ("*Pew November 2006 Internet Study*").

[63] *Id.* at 2.

primarily from television.[64] Moreover, the study found that the Internet is a research tool for science and news for some 128 million Americans.[65]

According to a study recently released by the University of Southern California ("USC") Annenberg School's Center for the Digital Future, 77.6% of Americans age 12 and older now go online.[66] The average number of hours online increases as broadband penetration rises and as the use of telephone modems to access the Internet declines (to only 37% of Internet users).[67] The report confirms that the Internet is an "important source of information and entertainment for the vast majority of users, consistently outranking television."[68] Among users 17 and older, 65.8% "consider the Internet to be a very important or extremely important source of information for them – up from 56.3% in 2005."[69] And 35.5% of Internet users report spending less time watching television since they began using the Internet.[70]

Opponents of deregulation attempt to discount the import of the Internet by claiming that Internet users "overwhelmingly go to web sites of traditional media -- local

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[64] *Id.* at 8. Other studies confirm young adults' pervasive reliance on the Internet. *See, e.g., Journalism, Transparency, and The Public Trust* at 3 ("Young people are turning away from mainstream journalism in all of its forms except one—the Internet.").

[65] *Pew November 2006 Internet Study* at ii.

[66] Center for the Digital Future, USC Annenberg School, *Highlights: 2007 USC-Annenberg Digital Future Project* 1, *available at* www.digitalcenter.org/pdf/2007-Digital-Future-Report-Press-Release-112906.pdf.

[67] *Id.* at 1.

[68] *Id.* at 2.

[69] *Id.*

[70] *Id.*

newspapers, local TV and national TV"[71] -- which, opponents claim, does not add much to local diversity. Even if such claims regarding the "overwhelming" reliance on websites of "traditional media" were true, which NAB disputes, the record refutes allegations that such websites do not add to diversity. To this end, the record makes clear that the content on websites of local broadcasters and newspapers is considerably different from the material available via the traditional media formats in part due to the expansive and unique nature of the Internet.[72] For example, NAA's comments explained that *The Spokesman-Review* newspaper's website not only webcasts its daily news meetings and posts original source materials, but it also offers editor blogs and chatrooms where readers are able to ask questions and criticize or praise news coverage and content.[73] Belo similarly detailed that the websites operated by *The Dallas Morning News* (DallasNews.com) and WFAA-TV (WFAA.com) offer far more extensive information online, often combining print, audio and video to provide material that is not available in any other forum.[74] Belo also noted that its websites offer unique local content, such as MyHighSchool, which provides separate websites for each of the 150 local high schools and includes sports, videos and other information for each particular

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[71] *See, e.g.,* Comments of Consumers Union at 11; *Id.* at Study 8, Mark Cooper, *The Internet and Local News and Information* ("Consumers Union Study 8, *Internet, Local News & Info*"); Comments of CWA at 21-29; Comments of AFL-CIO at 40-41; Comments of UCC at 42-43.

[72] *See, e.g.,* Comments of NAA at 55-59; Comments of Belo at 12-13; Comments of Gannett at 28-29.

[73] Comments of NAA at 57-58.

[74] Comments of Belo at 12-13.

high school.[75] Further, Gannett explained that its websites offer extensive information that is not available via its traditional media, including real-time updates and videos for current local events (such as the recent immigration rallies), which render its websites "a valuable local news source" for consumers in their own right.[76] The record thus makes clear that broadcasters' and newspapers' websites do *not* "merely republish[]"[77] content available in local newspapers and on local television stations, but, instead, offer unique and diverse local information that responds to the unique needs of local communities.

Indeed, the record provides substantial evidence of the incredible breadth of local news and information now available to consumers on the Internet.[78] Broadcasters representing markets ranging from New York City[79] (the largest DMA) to Billings, Montana[80] (the 170th DMA) offered dozens of examples of locally oriented websites

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75 *Id*. at 12.

76 Comments of Gannett at 29.

77 *See* Comments of Gannett at 28-29; *see also* Comments of Belo at 12-13.

78 No one can seriously dispute that the Internet provides virtually unlimited amounts of national and international news and information. Moreover, these vast sources of "national" information are highly relevant to questions of diversity *within* local markets because, after all, many important "national" issues have clear local aspects and effects, and thus obviously concern consumers within particular localities. For example, the war in Iraq, terrorism, the economy, and energy and environmental issues such as global warming and alternative fuels are national or even international in scope, yet clearly concern local communities and audiences. *See* Comments of NAB at 56-57. News sources with national reach that provide information on such vital issues to consumers within local markets without doubt contribute to the diversity of information and opinion in these markets.

79 *See* Comments of NBC at 20-21.

80 *See* Comments of Bonneville at 10.

vying for consumer attention in their markets.[81] For example, one commenter reported that the New York market *alone* has at least 55 locally-oriented news websites, only a handful of which are affiliated with traditional media outlets such as newspapers and broadcast stations, while the much smaller Charlotte, North Carolina market (the 27th DMA) has more than a dozen such locally oriented news websites.[82] Further, independent media companies that provide online local news in markets throughout the country have blossomed in recent years. By way of example, one party noted that sites operated by the Independent Media Center ("IMC") have multiplied by more than seven times in the last two years alone. There were just eight domestic IMC sites in 2004; now there are 60.[83] The record also provides specific examples of locally oriented sites in numerous markets, such as:

- Boston (*e.g.*, Universal Hub, at www.universalhub.com),
- Dallas (*e.g.*, Dallas Blog, at www.dallasblog.com),
- Washington, D.C. (*e.g.*, DCist, at www.dcist.com),
- Denver (*e.g.*, Coyote Gulch, at radio.weblogs.com/0101170),
- Pittsburgh (*e.g.*, Pittsburgh Dish, at pittsburghdish.typepad.com/pittsburgh_dish/),

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[81] *See* Comments of Belo at 11; Comments of Cox at 22-23; Comments of Entravision Holdings, LLC ("Entravision") at 6-9; Comments of Fox at 14-15; Comments of Gannett at 19-20; Comments of Hearst-Argyle at 12-13, 20-22; Comments of Media General at 52-54; Comments of Tribune Company at 20-26.

[82] Comments of NBC at 20-21.

[83] *See* Comments of Media General at 54. *See also* Bob Tedeschi, *Anytown, Online*, nytimes.com (Jan. 14, 2007) (across U.S., entrepreneurs and citizens are creating town-specific, and even neighborhood specific, web sites offering information, news and opinion, where the public can read and contribute items).

- St. Louis (*e.g.*, the St. Louis Independent Media Center, at www.stlimc.org),
- Hartford, Connecticut (*e.g.*, Connecticut Local Politics, at connecticutlocalpolitics.blogspot.com),
- Albuquerque, New Mexico (*e.g.*, Duke City Fix, at www.dukecityfix.com),
- Las Vegas (*e.g.*, The Las Vegas Blog, at www.lasvegas.com/index.php), and
- Asheville, North Carolina (*e.g.*, ashvegas, at ashvegas.squarespace.com/).[84]

In addition, "[i]n the brief three years since the FCC's *2003 Order*, these web journals and blogs have gained a prominent place in the delivery and consumption of news and opinion regarding important issues, whether they be national or local."[85] As one commenter pointed out, there were 60 times more blogs in January 2006 than there were three years earlier, and there were 1.2 million new blog posts every day as of February 2006.[86] Overall, there reportedly are now more than 45 million blogs worldwide, a number that is expected to double every six months.[87] Commenters also make clear, with specific examples, that the blogosphere includes many sites that are

[84] *See* Comments of Belo at 11; Comments of Bonneville at 9-10; Comments of Entravision at 7; *see also* Comments of Media General at 52-54 & App. 9-14 (Local Internet Sites chart); Comments of Tribune Company at 20-26, 44-46, 53-55, 62-64, 70-72, 78-79; Comments of NAA at 54-64.

[85] Comments of Tribune Company at 23; *see also* Comments of Hearst-Argyle at 23; Comments of Bonneville at 8-10; Comments of Tribune Company at 22-25; Comments of Media General at 52-54.

[86] *See* Comments of Bonneville at 8 (citing Posting of Dave Sifry to Technorati Weblog, *State of the Blogosphere, February 2006 Part 1: On Blogosphere Growth* (Feb. 6, 2006), http://technorati.com/weblog/2006/02/81.html.).

[87] Comments of Tribune Company at 22.

focused on regional, local, or "even hyperlocal"[88] issues. In addition to those listed above, the many examples offered in the record include "several blogs [that] cover state and local politics from both sides of the aisle [in Minnesota], including Minnesota Democrats Exposed, Centrisity, Checks & Balances, Power Liberal, MN Publius, Minnesota Campaign Report, Craig Westover, The Wind Beneath the Right Wing, and Residual Forces."[89]

Several opponents of deregulation attempt to trivialize the impact of blogs on the information marketplace by declaring that they "simply do not undertake the reporting and editing functions that typify journalism as traditionally defined."[90] This broad assertion, which is not backed up with any empirical evidence or substantive analysis, is not true in many cases. Indeed, commenters provided numerous examples of blogs, including many of those noted above, that appear to function and report local news and information based on the same journalistic standards as traditional media outlets. Moreover, the evidence continues to accumulate that blogs now play a key role in breaking and developing important news stories and in impacting the content of traditional media outlets.[91] In any case, blogs should not have to function in exactly the

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[88] *Id*. at 24-25.

[89] *Id*. at 23-24.

[90] Comments of Consumers Union at 12; Consumers Union Study 8, *Internet, Local News & Info*; *see also* Comments of UCC at 43 (suggesting that Americans do not consider blogs as a valuable news source).

[91] *See*, *e.g.*, Noam Cohen, *Bloggers Take on Talk Radio Hosts*, nytimes.com, Jan. 15, 2007 (San Francisco radio station preempted three hours of programming to respond to bloggers who had criticized commentary by several of the station's talk show hosts and who had urged advertisers to examine their support for the station); Tom Zeller Jr., *Blogs Take Lead in Reporting Polling Problems, With Supporting Evidence on YouTube*, N.Y.

same way as traditional media in order to be credited as legitimate informational sources. The fact that blogs and other online news sources play a somewhat different role than traditional print publications or broadcasters is part of what makes their contribution to the news and information marketplace so important and truly diverse.

Given its skyrocketing growth, the almost infinite amount of information it places at the fingertips of consumers, and its capacity to provide up-to-the minute news, it is not surprising that the Internet has become a particularly influential source of local and national political news. Indeed, recent surveys indicate that 43% of likely voters (35% of all Americans) use the Internet to obtain political news.[92] Similarly, an August 2006 Pew Internet report found that on a typical day, 26 million Americans were using the Internet for news and information about the then-upcoming midterm elections, an increase of over two-and-a-half times since the 2002 mid-term elections.[93] The impact of the Internet on politics became indelibly clear during the November 2006 midterm elections. The consensus seems to be that YouTube had a "huge impact" on the outcome of the elections.[94] Its effect was so great that it gave rise to what mainstream media dubbed

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Times, Nov. 8. 2006, at P11 (documenting the use of blogs to report on voting machine malfunctions in the 2006 election, with links posted on YouTube); Mike Shields, *Reuters to Syndicate Blogs Via Pluck*, Mediaweek, Nov. 14, 2006 (reporting that Reuters plans to begin syndicating news from over 2,800 blogs).

[92] *See* Associated Press, *AP Poll: Voters Turning to Web for Political News*, Ed. & Publisher, Oct. 29, 2006**.**

[93] John Horrigan, Data Memo, Pew Internet & American Life Project, *26 Million Americans Were Logging [on] for News or Information about the Campaign on a Typical Day in August, the Highest Such Figure Recorded by the Pew Internet Project* (Aug. 2006), *available at* http://www.pewinternet.org/pdfs/PIP_Politics%20Aug06_Memo.pdf.

"YouTube politics."[95] As Republican Strategist Scott Reed explained, "YouTube has put every campaign on notice that someone's watching" and "has been a real wake-up call to a lot of candidates who shoot from the lip when there isn't a big TV affiliate standing in the room."[96]

Just last month, Time Magazine drove home the point of the tremendous impact of the Internet by naming every American ("You") as the "Person of the Year," in light of the fact that individuals now "control the Information Age" due to the Internet. According to Time, the Internet became a "tool for bringing together the small contributions of millions of people and making them matter" and gave them each the power to "seiz[e] the reins of the global media," "found[] and fram[e] the new digital democracy," and "beat[]the pros at their own game."[97] Similarly, the director of the USC Annenberg School of Communications, Center for the Digital Future recently concluded that the Internet has now emerged "as the powerful personal and social phenomenon we

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94 *Wrap Up – 2006 Election on the Web,* BuzzWebster,http://www.politicsonline.com/blog/archives/2006/11/wrap_up_2006_el.php (Nov. 11, 2006).

95 *Blundering Pols Article*; *accord* David Carr, *Online Player In The Game of Politics,* N.Y. Times, Nov. 6, 2006, at C01 (noting YouTube's "disruptive effect on politics") ("*Online Player Article*").

96 *Online Player Article.* YouTube's influence is not limited to the Internet. On November 28, 2006, Verizon Wireless announced that wireless subscribers will be able to view YouTube on their cell phones. *See* Yuki Noguchi, *Hello, Cellphone? YouTube Calling*, Wash. Post, Nov. 28, 2006, at D01.

97 Lev Grossman, *Time's Person of the Year: You*, Time, Dec. 25, 2006, at 40-41.

knew it would become" and that Americans are using the Internet "as a comprehensive tool … to touch the world."[98]

In sum, with such powerful evidence that the Internet is a competitive substitute for the news and information provided by traditional media, including local broadcasters, claims that the Commission should discount the Internet are untenable.[99] It would be arbitrary and capricious for the Commission to ignore this evidence.

Alternative Video Services: Competition for video services is similarly thriving. In addition to competition from YouTube highlighted above, other Internet outlets are offering broadcast-like video services via broadband platforms such as MobiTV.[100] TiVo will be introducing features to allow viewers to use its DVRs to watch video programming from the Internet on their televisions.[101] Moreover, broadcasters also face significant competition from cable and satellite video providers. Since the advent of cable and satellite television, viewers have migrated steadily from broadcast to these

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[98] Press Release, USC Annenberg School, Center for the Digital Future, *Online World As Important to Internet Users as Real World?*, *available at* http://www.digitalcenter.org/pdf/2007-Digital-Future-Report-Press-Release-112906.pdf.

[99] Academic studies have confirmed marketplace evidence that the Internet has had a "significant displacement effect" on broadcast television and newspapers for daily news. John Dimmick, Yan Chen and Zhan Li, *Competition Between the Internet and Traditional News Media: The Gratification-Opportunities Niche Dimension*, 17 J. Media Econ. 19, 31 (2004). *See also* Comments of NAB at 51-54. But even if the Internet were merely regarded as a complement to traditional sources of news and information for some consumers, the influence of the Internet in the marketplace should not be discounted. Because consumers have widely available alternative sources of news, information and entertainment via the Internet, diversity- and competition-related concerns raised by the common ownership of broadcast outlets must necessarily be lessened.

[100] Comments of Hearst-Argyle at 11.

[101] *See* Saul Hansell, *Coming Soon Via Your TiVo: Internet Video on Television*, N.Y. Times, Nov. 14, 2006, at C3.

other providers.[102] While only 13% of households subscribed to cable in 1975, this number has skyrocketed to almost 70% of households today.[103] The number of channels available on cable systems also has increased dramatically, with the vast majority of households able to receive at least 54 channels,[104] including cable news channels that provide exclusive local coverage to communities.[105] Satellite television or DBS is also a significant competitive presence, accounting for 27.7% of all MVPD subscribers.[106]

This record evidence comports fully with the Commission's own findings. Indeed, earlier this year, the FCC found that broadcast television's ability to compete has suffered in recent years: "[B]roadcast television stations' audience shares have continued to fall as cable and DBS penetration, the number of cable channels, and the number of broadcast networks continue to grow."[107] The Commission's *Twelfth Annual Video Competition Report* also identified 531 satellite-delivered national programming networks—which represented an astounding increase of 143 new satellite-delivered

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[102] Comments of Media General at 43.

[103] *Id.*

[104] *Id.*

[105] Comments of Cox at 17-18 (Cable operators have created cable news channels and weather outlets to serve local communities.).

[106] Comments of Media General at 44.

[107] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503, 2550 (¶ 93) (2006) ("*Twelfth Annual Report*"); *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13,698 (¶ 201) (stating that "the ability of local stations to compete successfully in the delivered video market [has been] meaningfully (and negatively) affected, [particularly] in mid-sized and smaller markets").

networks over the previous year.[108] The ever-increasing number of available sources of video programming has fundamentally altered the environment in which broadcasters compete by placing them in the midst of an increasingly fragmented market.

Alternative Audio Services: The record also reflects dramatic increases in audio competition.[109] Commenters established that subscription to the XM and Sirius satellite radio services has increased dramatically since the FCC last examined the broadcast ownership rules.[110] XM and Sirius have more than 11 million subscribers today,[111] and analysts predict that they will have 20 million subscribers by 2009.[112] Further, Sirius just announced that it plans to offer video service in cars by late 2007,[113] further blurring the lines among all media.

What is more, weekly Internet radio audiences increased by 50% between January 2005 and January 2006, and more than 9.2 million American consumers have downloaded a podcast.[114] A November 22, 2006, Pew Internet and American Life

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[108] *Twelfth Annual Report*, 21 FCC Rcd at 2575 (¶ 157); *see also* Comments of CBS at 9; *Id.* at 9 n.22 (noting that although some of the increase was due to internal data corrections, it nonetheless shows significant growth).

[109] *See, e.g.,* Comments of NAB at 12-22; Comments of CBS at 10; Comments of Media General at 49; Comments of Clear Channel at 10-17; Comments of Tribune Company at 30-32.

[110] *See, e.g.,* Comments of NAB at 85-86; Comments of CBS at 10; Comments of Clear Channel at 11; Comments of NAA at 27-28.

[111] Comments of Clear Channel at 11.

[112] Comments of The Media Institute at 5.

[113] Reuters, *Sirius Plans to Offer TV Service in Cars By 2007*, USA Today, Dec. 1, 2006, at 5B.

[114] Comments of CBS at 10.

Project study reports that the rise in use of podcasts has skyrocketed since January 2006—while 7% of online users had downloaded a podcast in early 2006, this number increased to 12% of online Americans in a matter of months.[115] This study also found that the "array of individuals and mainstream media institutions that now provide podcasts also has expanded dramatically. For example, in November 2004, Podcast Alley, a podcast directory website, listed fewer than 1,000 podcasts for download. Today Podcast Alley catalogs more than 26,000 different podcasts, totaling more than 1 million episodes."[116] Moreover, the record reflects that there are a growing number of locally oriented podcasts.[117] In fact, the podcast directory service podcast.net currently lists nearly 1,200 local and regional podcasts available in the U.S.[118] Due to this thriving competition, the radio industry has experienced increasing audience fragmentation and decreases in audience share over the past several years.[119]

All of the above-described dramatic and fast-moving changes in the information industry simply cannot be gainsaid. Indeed, these changes have been so profound as to lead media industry observers to proclaim that "consumers are in control" of the future of

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[115] *See* Mary Madden, Data Memo, Pew Internet & American Life Project, *12% of Internet Users Have Downloaded a Podcast* (November 2006), *available at* http://www.pewinternet.org/pdfs/PIP_Podcasting.pdf.

[116] *Id*. at 1.

[117] *See, e.g.*, Comments of NAA at 30, 30 n.119; Comments of NAB at 20.

[118] http://www.podcast.net/cat/8.

[119] *See* Comments of NAB at 74; *see also id.* at Attachment D, *Aggregate Shares of Top 5 Stations in Top 100 Arbitron Markets: Spring 2006 vs. Spring 2001 and Spring 1996*; Comments of Clear Channel at 10-17, 50-52; Bear, Stearns & Co., *Radio 2007: The Year of No Excuses?* 8 (Jan. 5, 2007) (noting declines in radio listening, particularly among younger listeners, from 1999-2006) ("*Year of No Excuses*?").

media.[120] Those who wish to defend long antiquated local ownership restrictions must deny this revolutionary technological growth; but, as set forth above, such a position is simply counter-factual and contrary to the well developed record in this proceeding.

III. THE RECORD CONFIRMS THAT RELAXATION OF THE BROADCAST OWNERSHIP RULES WILL PROMOTE COMPETITION, DIVERSITY, AND LOCALISM.

A. Competitive Concerns Support Relaxation of the Local Ownership Restrictions.

As explained above, there can be no reasonable doubt that the current media marketplace is robustly competitive, and indeed exploding at the seams with consumer choices for both delivery mechanisms and content. The record therefore makes clear that broadcast stations are unable to obtain or exercise any undue market power. Consequently, the old competitive rationale for ownership limits uniquely applicable to local stations – to prevent broadcasters from exercising undue market power to the detriment of consumers – is plainly no longer viable.[121]

In fact, competitive concerns today counsel in favor of relaxation of the local ownership limits. As a result of the increased number of outlets and choices for content, service to the public has continued to improve while the advertising market has become more challenging for broadcasters. The primary competition-related concern is now the ability of local broadcasters to earn advertising revenues sufficient to compete effectively in a digital, multichannel, and increasingly fragmented environment. Traditional media

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[120] FMQB, *Bridge Ratings Looks to the Future With 2007 Predictions*, Jan. 2, 2007, *available at* http://fmqb.com/Article.asp?id=327659 ("*FMQB Bridge Ratings Article*").

[121] *See* Comments of NAB at 27-28.

companies, moreover, will only "continue to struggle in maintaining their audiences, as consumers turn to new, less-established" outlets, especially "online."[122]

As the Progress and Freedom Foundation's comments show, the media marketplace is unconcentrated, by comparison to other American industries. Concentration in the information sector has actually declined over time and is lower today than it was twenty years ago; and the broadcast sector of the information industry is actually the *least* concentrated of the sectors.[123] By easing the broadcast ownership limits, the Commission can and should empower local broadcasters to structure themselves to meet the demands of the modern media marketplace as best they can, and thus offer more choices, better service and greater innovation to consumers.

Several commenters express disdain for the financial motives of so-called media conglomerates, erroneously assuming that the goals of earning profits and public service are mutually exclusive.[124] Seeking to maximize advertising (or other) revenue is no

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[122] *FMQB Bridge Ratings Article.*

[123] Comments of PFF at 62-63 (setting forth results of independent research by Eli Noam showing HHI concentration levels for the media industry and broadcasters in particular to be at levels considered "moderate concentration" and "unconcentrated," respectively, and also providing analysis by Benjamin Compaine showing "much lower overall concentration numbers"); *see also* Comments of NAB at 27 & Attachment E, *Percentage of Industry Revenues Earned by Top 10 Firms in the Sector* (graph shows radio and television broadcasting to be much less consolidated than other media sectors, including cable, DBS, satellite radio, movie studios and outdoor) ("NAB Attachment E, *Top 10 Firms' Industry Revenues*").

[124] *See, e.g.*, Comments of Mt. Wilson FM Broadcasters, Inc. ("Mt. Wilson FM") at 8 (boldly claiming that "[p]rofits and *profits alone* dictate the radio formats and content provided by the giant radio companies"); Comments of AFTRA at 20 (arguing that "giant media conglomerates are more than willing to sacrifice local content in the interest of cost-cutting"); Comments of Consumers Union at 19 (generalizing that "[p]rofit-maximizing behavior increases bias"); Comments of Center for Creative Voices in Media at 9 (asserting that "commercial broadcasters are excessively focused on maximizing

slight to the public interest, as these commenters suggest. By responding to market demands, broadcasters give consumers the services they want, including local news and informational programming, and thereby serve the public interest.[125] Moreover, economically viable broadcasters are better equipped to focus their efforts on developing high-quality local news, public affairs, and other local programming and services.[126]

Importantly, the stations regulated under the local ownership rules are explicitly licensed for commercial operations, not as non-commercial entities.[127] Indeed, broadcasters operate in a predominately privately-owned commercial system, wherein efficient operations and profitability are entirely appropriate considerations.[128] As the FCC stated in its *2002 Biennial Review Order,* it is *not* "troubling" that media outlets make decisions based on profitability, as the "need and desire to produce revenue, to control costs, to survive and thrive in the marketplace is a time honored tradition in the American media."[129] Accordingly, the vague assertions of pro-regulatory commenters

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profits, rather than serving the[ir] local communities"); Comments of CWA at 8 (dismissing the increased resources and efficiencies that result from co-ownership because "efficiency is not the policy goal").

[125] *See* Comments of PFF at 42-51.

[126] *See infra* Section III.C.2.

[127] *See* 47 C.F.R. § 73.3555(e) (providing that "[t]he ownership limits of this section are not applicable to noncommercial educational FM and noncommercial educational TV stations").

[128] *See FCC v. Sanders Bros. Radio Station*, 309 U.S. 470, 474-475 (1940) (observing that the Communications Act "recognizes that the field of broadcasting is one of free competition," and that Congress intended each licensee "to survive or succumb according to his ability to make his programs attractive to the public").

[129] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,759 (¶ 353); *see id.* ("Impair the ability of media outlets to profit and you choke off the capital to which their tap roots

regarding profit-seeking behavior by co-owned media properties in no way diminish the fact that broadcasters large and small serve the public interest every day.[130]

In short, the retention of a bundle of broadcast-only local ownership restrictions is outmoded and unjustified—and, ultimately, harmful to the continued ability of broadcasters to provide programming to serve local audiences, as discussed in further detail, in the context of each rule, below.

B. Common Ownership Enhances Diversity of Programming.

A few commenters assert that retention of the media ownership rules allegedly is necessary because joint ownership reduces diversity.[131] Contrary to these claims, researchers have concluded that "[t]here is *no* evidence" that the Commission's ownership policies have increased diversity.[132] In fact, as NAB's comments

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reach; strangle the press and the balance of our familiar rights and privileges wither and fall.").

[130] *See id.* at 13,759-60 (¶ 354). Interestingly, these commenters also fail to establish a causal link between common ownership of outlets and an alleged obsession with profits. In expressing their distaste for media conglomerates, the pro-regulatory commenters ignore sources of financial pressure affecting all broadcasters large or small, such as the increasingly competitive media marketplace, emergence of new technologies, and changes in consumer preferences. *See infra* Section IV.B.I. Indeed, small, stand-alone broadcast outlets may be even more concerned about profits and losses than the owner of a joint media operation because of the struggle of many stand-alone outlets to even survive in today's more competitive marketplace.

[131] *See* Comments of AFL-CIO at 18-20, 43-44, 59-61; Comments of AFTRA at 14-15, 20.

[132] Benjamin Compaine, *The Impact of Ownership on Content: Does It Matter?*, 13 Cardozo Arts & Ent. L.J. 755, 763 (1995) (emphasis added). *Accord* Benjamin Compaine, New Millennium Research Council, *The Media Monopoly Myth: How New Competition Is Expanding our Sources of Information and Entertainment* 6-9 (2005), *available at* http://www.newmillenniumresearch.org/archive/Final_Compaine_Paper_050205.pdf.

demonstrated, studies have found that the Commission's media ownership rules may be "*ineffective* in producing diversity"[133] and may be "counterproductive" in ensuring that "many points of view are heard."[134]

Whereas there is "no evidence" that the outmoded broadcast ownership rules have enhanced diversity as opponents claim, numerous studies repeatedly have concluded that *common ownership* has *increased* the diversity of programming and content.[135] One study, for example, found that programming diversity increased the most in markets with the highest levels of group ownership.[136] Additional independent studies examining different media sectors have similarly concluded that "increased concentration caused an increase in available programming variety,"[137] and that a "decrease in the number of

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[133] Mara Einstein, *The Financial Interest and Syndication Rules and Changes in Program Diversity*, 17 J. Media Econ. 1, 16 (2004) (emphasis added); *Id.* (analysis of television industry found that "consolidation" was "not having an effect on the diversity of content").

[134] *See generally* Comments of NAB at 43 (quoting David Haddock & Daniel Polsby, *Bright Lines, The Federal Communication Commission's Duopoly Rule, and the Diversity of Voices*, 42 Fed. Comm. L.J. 331, 348-49 (1990)). *See also* Stucke and Grunes, *Antitrust and the Marketplace of Ideas*, 69 Antitrust L.J. at 278 (explaining that "the marketplace of ideas left alone will do a better job in diversifying itself" than would government regulators because "[r]estrictions on ownership may actually stymie diversity rather than promote it").

[135] Comments of NAB at 40 (citing Comments of NAB, MM Docket No. 99-25, Aug. 2, 1999, at Attachment B, *Format Availability After Consolidation*; Comments of Clear Channel, MM Docket Nos. 01-317, 00-244, March 27, 2002 at Exhibit 6, Statement of Professor Jerry A. Hausman at 2-3, 11-14; Comments of NAB, MM Docket Nos. 01-317, 00-244, March 27, 2002 at Attachment A, BIA Financial Network, *Has Format Diversity Continued to Increase?* ("*Format Diversity*"); Bear Stearns Equity Research, *Format Diversity: More from Less?* (Nov. 2002)).

[136] *See Format Diversity* at 13-15.

[137] Comments of NAB at 40 (quoting Steven Berry & Joel Waldfogel, *Mergers, Station Entry, and Programming Variety in Radio Broadcasting* 25 (Nat'l Bureau of Econ.

owners in a market leads to an increase in separation between products."[138] Indeed, this 2001 newspaper study concluded that ownership "concentration appears to increase total content variety," thereby "benefit[ing] readers."[139]

Likewise, studies conducted in 2006 by BIA and Professor Jerry A. Hausman of the Massachusetts Institute of Technology confirm that the multiple ownership of radio stations in local markets has enabled group owners to offer more varied and more targeted programming to listeners. According to the BIA study, since 1996, the number of general and specific types of programming offered by radio stations in the average Arbitron market has increased by 16% and 36.4%, respectively.[140] Professor Hausman's study similarly found a positive correlation between common ownership and program diversity throughout the years 1993 to 2006.[141] In other words, during the "period of greatest consolidation," the average number of programming formats in a market

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Research, Working Paper No. 7080, 1999); *accord* Steven Berry & Joel Waldfogel, *Do Mergers Increase Product Variety? Evidence from Radio Broadcasting*, 116 Q. J. Econ. 1009 (Aug. 2001).

[138] *See* Comments of NAB at 45 (quoting Lisa George, *What's Fit to Print: The Effect of Ownership Concentration on Product Variety in Daily Newspaper Markets* 2 (29th TPRC Conference 2001, Report No. TPRC-2001-097, Aug. 1, 2001), *available at* http://arxiv.org/ftp/cs/papers/0108/0108014.pdf ("*What's Fit to Print*")).

[139] *What's Fit to Print* at 28.

[140] *See* Comments of NAB at 38-40; *Id.* at Attachment G, BIA Financial Network, *Over-the-Air Radio Service to Diverse Audiences* 5, 7 (Oct. 23, 2006) ("NAB Attachment G, *Over-the-Air Radio Service Study*"); *see also* Comments of Freedom of Expression Foundation at 13 (stating that consolidation in radio has increased diversity because owners of multiple outlets can take risks and offer greater variety).

[141] *See* Comments of Clear Channel, Exhibit 2, *Statement of Professor Jerry A. Hausman* at 2-4, 10 (Table 1) ("Clear Channel Exhibit 2, *Statement of Professor Hausman*").

increased by more than 45%—from 11.5 in 1993 to 16.7 in 2001.[142] Tellingly, Professor Hausman found that approximately 25% of the increase in format diversity during this period was "*directly attribut[able]* to increased levels of common ownership."[143]

It is not surprising that the evidence establishes that common ownership increases diversity, because it is in an owner's interest to diversify programming in order to attract the largest possible audience. Indeed, as Doctors Luke Froeb, Padmanabhan Srinagesh and Michael Williams found in a study submitted by Hearst-Argyle, merging media outlets have an incentive to differentiate, rather than homogenize, their programming "to reduce sales cannibalization."[144] "Since there are only a fixed number of listeners in each market, a multiple-station owner can attract more of those listeners by offering a more diverse (rather than less diverse) array of viewpoints among its stations."[145]

Nor is there any merit to claims that media outlet owners inhibit diversity by presenting only the viewpoint or political slant of the owner.[146] Indeed, a recent academic study by professors at University of Chicago, in conjunction with the National Bureau of Economic Research, completely refutes this claim, finding "that ownership

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[142] *See Id.* at 4, 10 (Table 1).

[143] *See* Comments of Clear Channel at 21 (emphasis added).

[144] *See* Joint Declaration of Luke Froeb, Padmanabhan Srinagesh and Michael Williams at 12-14 (¶¶ 22-25) (attached to Comments of Hearst-Argyle) ("*Hearst-Argyle Economists' Declaration*").

[145] Comments of The Media Institute at 6 (also noting that "it is very much in the interest of multiple-station owners to strive for as much viewpoint diversity as possible").

[146] *See* Comments of Consumers Union at 16; *Id.* at Study 5, Mark Cooper, *Media Ownership and Viewpoint*.

does *not* account for any of the variation in measured slant."[147] By comparing partisan language used in newspapers to language used by members of Congress, these researchers created an index for measuring ideological slant in news coverage and analyzed the determinants of political slant.[148] The study concluded that the political orientation of newspapers is driven more by the ideology of the targeted market than by ownership.[149] The study found that "newspapers' actual slant is close to the profit-maximizing level."[150] In other words, any slant is in direct response to *consumer* preferences—not the ideology of any particular owner.

Moreover, opponents of deregulation ignore the proliferation of broadcast outlets and the rise of new multichannel video and audio programming distributors and the Internet, which have produced an exponential increase in programming and service choices for consumers.[151] Even smaller markets have experienced a proliferation of media outlets, resulting in a wide array of outlets controlled by numerous separate owners across the country.[152] The diversity of audio and video programming is further

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[147] Matthew Gentzkow & Jesse M. Shapiro, *What Drives Media Slant? Evidence from U.S. Daily Newspapers* 5 (Nat'l Bureau of Econ. Research, Working Paper No. 12707, 2006) ("*Media Slant Study*") (emphasis added).

[148] *See id.*

[149] *Id*. at 43-44.

[150] *Id*. at 4.

[151] *See, e.g.,* Comments of Freedom of Expression Foundation at 8-15 (noting that there is no longer a lack of diversity in the media marketplace to justify a cross-ownership ban).

[152] *See* Comments of NAB at 8-9; *Id*. at Attachment A, Mark R. Fratrik, BIA Financial Network, *Media Outlets Availability by Markets* (Oct. 23, 2006) (documenting changes from 1986 to 2006 in the quantity and types of media outlets available in 25 randomly selected DMAs) ("NAB Attachment A, *Media Outlets Availability by Markets*"); *id*. at

significantly enhanced by the ease with which consumers routinely access radio and television stations located outside their local markets.[153]

Such studies and empirical evidence plainly demonstrate that there is no reasonable diversity-related basis for maintaining the decades-old local broadcast ownership restrictions in their current form. Reforming the regulations will in fact enhance diversity by permitting the marketplace to respond to competitive developments.[154] And, these new studies and evidence are consistent with Commission precedent that common ownership "would enhance the quality of viewpoint diversity by

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Attachment B, *Independent Radio Voices in Radio Markets* (assessing the number of independent radio voices in individual markets and concluding that approximately 37% of radio stations in Arbitron-rated markets are either standalone or duopoly stations) ("NAB Attachment B, *Independent Radio Voices Study*"); Comments of Tribune at 35-78 (detailing the very large number of independently owned media outlets in five separate markets); Comments of Media General at Appendices 9-14 (detailing available media outlets in six separate markets, including five small ones).

[153] *See* Comments of NAB at Attachment C, Mark R. Fratrik, BIA Financial Network, *A Second Look at Out-of-Market Listening And Viewing: It Has Even More Significance* (Oct. 23, 2006) (concluding that the levels of listening and viewing out-of market sources of programming have increased since 2003) ("NAB Attachment C, *Out-of-Market Listening Study*"). This study found that, on average, only about 67.2% of radio listening within a market is attributable to in-market listening of local commercial radio stations. *Id*. at 6 (Figure 1). Further, as of May 2005, there were 68 DMAs in which adjacent market television stations generated a reportable viewing share. *Id*. at 8. Out-of-market competition is most prevalent in smaller markets, with approximately one-third of the listening and two-thirds of the viewing in markets ranked 101 and higher going to out-of-market sources such as non-local broadcast stations, cable and satellite channels, satellite radio, and streaming audio. *See id*. at 7, 11.

[154] *See* Comments of The Media Institute at 2-3; *Id.* at 3 ("The marketplace will provide ample diversity if allowed to work.").

enabling such stations to invest additional resources in programming and other service benefits provided to the public."[155]

Finally, while NAB submits that the record conclusively demonstrates that restrictive ownership regulation is not necessary to promote diversity, should the Commission have any lingering diversity-related concerns, broadcast-only local ownership rules are not the solution. Rather, as NAB explained in its comments, trying to promote diversity through restrictions uniquely applicable to local broadcasters in the current competitive environment is wrong. Not only is broadcasting already the most diverse segment of the media industry, but alternative, more effective means of enhancing diversity exist.[156]

C. Common Ownership Promotes Localism.

1. Americans Continue to Rely on Their Local Broadcasters for Critical Local News and Information.

The record establishes that Americans continue to rely on their local broadcasters to provide a wealth of local news, emergency information, weather, sports, religious, and public affairs programming.[157] In addition to news and information provided within

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[155] *In re Application of Golden W. Broad. (Assignor) & KABC-AM Radio, Inc. (Assignee) For Assignment of License of KMPC(AM), L.A., Cal.*, Memorandum Opinion and Order, 10 FCC Rcd 2081, 2084 (¶ 11) (1995).

[156] For example, regulations better facilitating the use of statutory leased access rights for unaffiliated programmers to reach viewers via cable systems would clearly improve independent programmers' ability to compete in the video marketplace. *See* Comments of NAB at 46-47.

[157] *See e.g.*, Comments of NAB at 59-68; Comments of Clear Channel at 32-41; Comments of Belo at 13-17, 22-27. The studies submitted by Consumers Union, an opponent of deregulation, found that local television remains an important source for local news and public affairs programming. *See, e.g.*, Consumers Union Study 7, *Media*

regularly scheduled newscasts, broadcasters have invested millions of dollars in state-of-the-art equipment to ensure that their local communities have timely access to critical, and often life-saving, emergency information through live coverage and the Emergency Alert System ("EAS"). During the devastating 2005 hurricane season that included Hurricanes Katrina and Rita, for example, broadcasters made extraordinary efforts to air live news coverage and disseminate vital information regarding relief supplies, shelters and on-air counseling in affected areas, even as the waters rose and station facilities were deluged.[158] Broadcasters also pioneered the *AMBER PLAN: America's Missing: Broadcast Emergency Response*, which has helped locate over 300 missing children.[159]

More recently, during the 2006 election season, local broadcasters provided consumers with a wealth of local election coverage. A nationwide poll[160] found that an "overwhelming majority of American adults believe that local broadcasters provided 'the right amount' or 'too much' time covering the 2006 elections."[161] Broadcasters throughout the country provided free air time for local primary debates to select the

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Usage at 131 (asserting that "59 percent of those who said local TV is their most frequent source of local news also said it was the most important" source of local news).

[158] Comments of NAB at 61-62; Comments of Clear Channel at 33.

[159] Comments of NAB at 62-63.

[160] APCO Insight Poll, Nov. 3-5, 2006.

[161] *See* Press Release, NAB, *Nationwide Poll Shows Broad Approval of Broadcast Election Coverage* (Nov. 16, 2006), *available at* http:www.nab.org/AM/template.cfm?section=News_Room&Contentid=7289&template=/cm/contentdisplay.cfm (citing APCO Insight Poll). This survey also found that only 10% of Americans think that broadcasters are providing "too little time" covering elections. *See id*.

Democratic and Republican candidates.[162] After the primaries, local stations again offered free air time for candidates leading up to the election.[163] Such broadcasters provide a vital public service to communities by inviting the public to be a part of the political process and learn about candidates' views.[164] One debate, for example, was

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[162] *See KCRG, WOI, KCAU Air Live Gubernatorial Primary Debate*, Free Air Times (NAB, At Your Service), June/July 2006, at 1, *available at* http:www.nab.org/AM/template.cfm?section=newsletters3&contentid=6588&template=/cm/contentdisplay.cfm (local Iowa stations air live gubernatorial primary debate); *Nebraska Broadcasters Live Senate Debate Aired Statewide* ("*Nebraska Broadcasters Article*"), *WJAC Commits to Free Time for Candidates* [Pa.], *WLJA-FM Hosts Congressional Primary Debate* [Ga.], *KTOK-AM Produces Congressional Debate* [Okla.], *WLBT Jackson Broadcasts Thompson, Espy Debate* [Miss], *WPDE Myrtle Beach: 3 Debates Down, 4 to Go* [S.C.], *WCAS Senate, House Debates* [Vt.], Free Air Times (NAB, At Your Service), Aug./Sept. 2006, at 1, 3-4, *available at* http://www.nab.org/AM/AMtemplate.cfm?template=/cm/contentdisplay.cfm&contentid=7053 (local stations around the country air congressional primary debates).

[163] *Belo Corp.'s Texas-based Stations Air Live Gubernatorial Debate, Journal Broadcast Group Kicks Off Election Coverage, KROE-AM Hosts All the Candidates, et seq.*, Free Air Times (NAB, At Your Service), Oct. 2006, at 1-4, *available at* http://www.nab.org/am/amtemplate.cfm?template=/cm/contentdisplay.cfm&contentid=7126 (detailing election coverage of broadcasters across the country); Tara Copp, *Congressional Incumbents See No Reason to Debate,* Austin American-Statesman, Oct. 21, 2006, http://www.statesman.com/news/content/news/stories/local/10/21/21nodebate.html (reporting that incumbents "turned down several offers to face off [with their opponents] on local TV and radio stations").

[164] Claims that broadcasters do not provide sufficient campaign coverage are erroneous and based on fundamentally flawed data. For example, an October 2006 NewsLab "analysis" of local coverage in certain Midwest markets inexplicably *excluded* election debates, public affairs programming, morning news, midday news, 4 p.m. news as well as Saturday and Sunday morning public affairs shows. *See* John Eggerton, *Election Coverage Panned in NewsLab Study*, Broad. & Cable, Oct. 12, 2006, http://www.broadcastingcable.com/article/CA6380266.html?display=search+result&text=wisconsin; *Deja View From the Real World*, Broad. & Cable, Oct. 16, 2006, at 56. The Commission should disregard such flawed studies.

aired live on 32 radio stations and 15 local television stations to ensure that all viewers had the opportunity learn about the candidates' views.[165]

The ability of television and radio stations to continue to provide these important local news and programming services is currently under stress. Competitive pressures, eroding advertising revenues, and the artificial limits placed on broadcasters to respond to such pressures with flexible ownership structures are threatening stations' ability to offer vital local programming and other services to their communities.[166]

2. Common Ownership Encourages the Provision of Local News and Informational Programming.

The Commission has already found that the broadcast ownership restrictions may inhibit stations' ability to provide local news and informational programming and serve their local communities.[167] The Third Circuit, moreover, specifically upheld the FCC's

[165] *Nebraska Broadcasters Article* at 1

[166] As NAB has previously explained in detail, stations also serve their local communities by airing regionally and nationally produced programming responsive to the needs of local audiences. Programming and public service campaigns addressing issues of importance to the entire nation can clearly be important to particular communities, and such programs do not have to be locally produced to serve the public interest. *See* Comments of NAB at 68-70. Indeed, many of the most important and controversial issues facing Americans today are national in scope, and local stations obviously serve their audiences by offering programming relating to these issues. *See* Comments of NAB at 56-57.

[167] In 2003, the Commission found that the "efficiencies and cost savings realized from joint ownership may allow radio and television stations to offer *more news reporting generally, and more local news reporting specifically*, than otherwise may be possible." *2002 Biennial Review Order*, 18 FCC Rcd at 13,772 (¶ 383) (emphasis added). The Commission also concluded that the newspaper cross-ownership ban undermined localism by preventing efficient combinations that would allow for the production of high-quality local news. *See id.* at 13,754-55 (¶¶ 343-44). In addition, the Commission concluded that the current duopoly rule "does not promote, and may even hinder, program diversity and localism." *Id*. at 13,668 (¶ 133); *see id.* at 13,685-86 (¶ 169) (The current duopoly rule "is hindering [the Commission's] efforts to promote localism.").

finding that the newspaper/broadcast cross-ownership ban undermined localism,[168] as well as the conclusion that allowing for common ownership of local television stations can lead to improved local programming.[169] Even so, opponents of deregulation reiterate the argument already rejected by the Commission that common ownership undermines localism.[170] The evidence once again refutes such claims and provides no basis for altering the Commission's previous findings.

Numerous commenters detail the benefits of common ownership and how such efficiencies and cost savings will enhance local news and public affairs programming. Belo, for example, provided real-world examples of the benefits of its ownership combinations, which have enabled Belo to provide additional and high quality local news and information compared to standalone stations.[171] Gannett similarly explained how each of its three television duopolies have contributed to expanded local news coverage in their respective markets.[172] Likewise, Clear Channel explained how economies of

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[168] *See Prometheus*, 373 F.3d at 399 (finding that the Commission reasonably concluded that the cross-ownership ban undermined localism); Comments of NAB at 70.

[169] *See Prometheus*, 373 F.3d at 415-16.

[170] *See, e.g.,* Comments of Consumers Union at 15. Given claims that locally-owned stations somehow provide better service than remotely (and presumably group) owned stations, it is interesting to note that a 2003 study by the Project for Excellence in Journalism (which is cited in other contexts by Consumers Union) found otherwise. *See* Project For Excellence in Journalism, *Does Ownership Matter in Local Television News: A Five-Year Study of Ownership and Quality* 1, 4 (April 29, 2003), *available at* http://www.journalism.org/files/ownership.pdf ("PEJ Study") (finding that locally-owned television stations were "below average when it comes to overall quality" and local ownership was found to offer "little protection against newscasts being very poor").

[171] Comments of Belo at 22.

[172] Comments of Gannett at 46.

scale from common ownership enable broadcasters to devote significant resources to local services, including greater resources to local affairs programming.[173] Clear Channel also noted that common owners face proportionally lower risk in their efforts to promote localism.[174] Further, as Nexstar suggests, an economically viable station "is more likely to host or sponsor political debates and community forums and participate (or participate at a higher level) in local community activities."[175]

The comments also provide concrete examples of how common ownership has enhanced efficiencies and benefited localism. NAA, for example, documented extensively how the operational efficiencies and resource-sharing capabilities inherent in cross-ownership have allowed existing combinations to focus on developing quality local programming.[176] Cox noted that its cross-owned television stations, WSB-TV and WHIO-TV, produce more hours of local news each week than their local competitors, and WSB-TV produces the only local public affairs program in the Atlanta market.[177] Similarly, Gannett explained that, in Phoenix, it "melds the complementary strengths of print, broadcast, and online media" to bring heightened, in-depth local news and public

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[173] Comments of Clear Channel at 34; *see also* Comments of Nexstar at 13 (Common ownership permits stations to "eliminate redundancies through the sharing of equipment and personnel.").

[174] Comments of Clear Channel at 41.

[175] Comments of Nexstar at 13.

[176] Comments of NAA at 67-79. NAA notes that the public interest benefits of cross-ownership are "particularly pronounced" in smaller markets, where standalone stations often lack the resources of their larger counterparts. *Id.* at 67.

[177] Comments of Cox at 13, 15.

affairs programming to the market.[178] Moreover, as various commenters demonstrate via examples of their award-winning cross-owned outlets, common ownership improves both the quantity and *quality* of local programming.[179]

The record also reflects that stations that are financially stable have the means to invest in new technology and produce new programs. As a study examining various marketplace factors affecting the quantity of local news and public affairs programming found, "'[television] stations in larger markets tend to provide more local news programming than stations in smaller markets,' likely due to the 'greater revenue potential for stations in larger markets.'"[180] The relationship between financial viability and local public affairs programming specifically is even stronger. According to this study, "only station revenue emerges as an important explanatory factor."[181] Simply put, "stations in better financial standing are more inclined to incur the expense of providing

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[178] Comments of Gannett at 26.

[179] *See, e.g.*, Comments of Cox at 15-16 (documenting awards won by WSB-TV and *The Atlanta Journal-Constitution* in Atlanta, Georgia, and WHIO-TV and *Dayton Daily News* in Dayton, Ohio); Comments of Gannett at 27-28 (describing accolades received by KPNX-TV and *The Arizona Republic* in Phoenix, Arizona); Comments of Morris Communications Co., LLC ("Morris") at 14-20 (detailing the locally oriented, award-winning content produced by WIBW(AM), WIBW-FM, and *Topeka Capital-Journal* in Topeka, Kansas, and KGNC(AM), KGNC-FM, and *Amarillo Globe-News* in Amarillo, Texas).

[180] *See* Comments of NAB at 101 (quoting Philip M. Napoli, *Television Station Ownership Characteristics and Local News and Public Affairs Programming: An Expanded Analysis of FCC Data, Conclusion Section* (Paper Presented at the Annual Meeting of the International Communication Association (May 2003)) ("*Napoli Paper*")).

[181] *Napoli Paper*, Conclusion Section.

local public affairs programming."[182] These findings only confirm earlier studies establishing connections between station profitability and the provision of news and other non-entertainment programming.[183]

IV. THE PUBLIC INTEREST REQUIRES THAT THE COMMISSION ALLOW BROADCASTERS THE NECESSARY FLEXIBILITY TO MEET THE DEMANDS OF THE MODERN MARKETPLACE.

A. The Commission Should Continue to Relax the Local Radio Ownership Rules in Light of Current Competitive Conditions.

The unprecedented level of competition that has transformed the media marketplace, discussed in detail above,[184] renders it impossible for the Commission to produce concrete evidence that the current rules are necessary to prevent actual harm, as would be required to retain the local radio ownership restrictions intact under the applicable legal standards.[185] In the radio context there is overwhelming record evidence that existing combinations affirmatively serve the public interest. It is equally clear that relaxation of the local radio ownership rule will allow free radio to remain competitive and vibrant, and to continue to serve diverse audiences and local communities, in the sea of options available to today's consumers. By contrast, the record contains absolutely no verifiable evidence (as distinguished from unsupported assertions) of harm flowing from

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[182] *Id*.

[183] *See, e.g.*, Raymond Carroll, *Market Size and TV News Values*, 66 Journalism Quarterly 49, 55-56 (1989) ("*Carroll Article*"); R.E. Park, Rand Corp., *Television Station Performance and Revenues*, P-4577 (Feb. 1971) ("*Rand Paper*").

[184] *See supra* Section II.

[185] *See supra* Section I.

common ownership of radio stations. Therefore, it would be arbitrary and capricious for the Commission not to continue the process of deregulating local radio markets.

NAB and other commenters demonstrated that broadcasters need regulatory relief to cope with the threats posed by their unregulated competitors.[186] As NAB and others showed, local radio markets are vibrantly competitive,[187] and radio broadcasters face abundant and ever-increasing competition from a vast array of alternative sources of audio and entertainment programming.[188] Due to the competitive pressures that radio broadcasters are experiencing, "Lehman Bros. is … predicting 2007 will be radio's worst since '01."[189] Bridge Ratings 2007 predictions include a continued decline in radio listening among the young and projects that Internet radio listening will grow to reach over 72 million unique listeners.[190] Just as Congress did when it directed the relaxation of the local radio ownership rule in the 1996 Act, the Commission should recognize that

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[186] *See supra* Section II; Comments of NAB at 15, 18-20.

[187] Comments of NAB at 6-12; NAB Attachment A, *Media Outlets Availability by Markets*; NAB Attachment C, *Out-of-Market Listening Study*; NAB Attachment B, *Independent Radio Voices Study*; *see also* Comments of Clear Channel at 7-10; Comments of PFF at 53, 57-58; Comments of NAA at 24.

[188] Comments of NAB at 6-7, 15, 19; *see* Comments of Clear Channel at 10-17; Comments of CBS at 10; Comments of The Media Institute at 5; Comments of Media General at 49; Comments of Morris at 10; Comments of Tribune Company at 30-32; Comments of NAA at 15, 19-20.

[189] Inside Radio, *But Lehman Bros. is Still Siding with the Bears – Predicting 2007 Will Be Radio's Worst Since '01*, at 2 (Dec. 6, 2006); *see also Year of No Excuses?* at 1 (radio industry has seen real revenue declines in five of last six years).

[190] *FMQB Bridge Ratings Article.*

terrestrial radio broadcasters need regulatory relief to ensure that they can remain viable competitors in the increasingly competitive multimedia marketplace.[191]

The record also makes clear that jointly owned stations tend to experiment with innovative formats and to adopt digital HD radio technology more quickly, both of which are a boon to programming diversity.[192] As the initial comments in this proceeding show, consumers today have access to more varied audio programming than ever before, and this diversity of programming has only been enhanced by the post-1996 changes within local radio markets.[193] Moreover, the expanded choices available to radio listeners include substantially more programming specifically tailored to meet the needs and interests of minority groups. For example, there has been a 45.5% increase in the number of U.S. Spanish-language stations in the past six years, and today 72.1% of African-Americans in Arbitron-rated markets have access to three or more Urban programmed stations, an increase from 61.9% six years ago.[194] And, contrary to the claims of the United States Conference of Catholic Bishops,[195] broadcasters are offering consumers an array of religious programming.[196] According to BIA, 2,243 radio stations currently have

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[191] *See* Comments of NAB at 72-73.

[192] *See supra* Section III.B; Comments of Clear Channel at 30-32; Comments of NAB at 80-82; NAB Attachment G, *Over-the-Air Radio Service Study* at 15-16.

[193] *See supra* Section III.B.

[194] NAB Attachment G, *Over-the-Air Radio Service Study* at 8-12; *see also supra* Section III.B.

[195] *See* Comments of the U.S. Conference of Catholic Bishops at 3.

[196] *See, e.g.,* Press Release, Christian Music Planet News, *EMF Broadcasting Launches 200th Radio Station!* (Oct. 25, 2006), *available at*

religious programming formats, making such programming one of the most widely available types of radio programming.

As for localism, "the Commission has not emphasized localism as one of the justifications for the local radio ownership rule."[197] Nevertheless, the record firmly establishes that station groups are rolling out more news/talk stations and are otherwise providing substantial service to their local listeners.[198] Indeed, the number of news/talk stations has increased by 20.6% over the past six years, and more than 55% of the population in Arbitron metros has access to at least six news/talk stations.[199] The record therefore demonstrates that common ownership does not harm diversity or localism but, to the contrary, provides affirmative benefits to the public by increasing listening choices and enhancing local service.

Furthermore, as NAB and others demonstrated, there is no evidence whatsoever that providing increased flexibility to local radio broadcasters would result in competitive harm.[200] Indeed, a recent study conducted by two University of Pennsylvania professors confirms that ownership changes following the 1996 Act have *not* caused increases in

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http://www.christianmusicplanet.com/News/?i=127 (announcing the launch of EMF Broadcasting's – a Christian music broadcaster – 200th radio station).

[197] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,738 (¶ 304); *see also* Comments of PFF at 45 ("As long as citizens continue to demand local information, someone will provide it, especially in a completely deregulated media marketplace.").

[198] *See supra* Section III.B; Comments of Clear Channel at 22.

[199] NAB Attachment G, *Over-the-Air Radio Service Study* at 13-14.

[200] *See* Comments of NAB at 74-78; Comments of Clear Channel at 43-46; *see also* Clear Channel Exhibit 2, *Statement of Professor Hausman* at 5-7.

advertising pricing.[201] While this study observed increases in radio advertising prices, it found that "there is *no portion* of the change in ad prices that we can attribute to increased concentration."[202] Another recent study—this one conducted by two Department of Justice economists—empirically found that format changes provide radio stations, and specifically those in "smaller radio groups," with "opportunities to gain" listening shares by changing programming formats.[203] This study confirms that "format changes often do produce *substantial* and *significant* improvements in listening shares," thereby "counter[ing] or defeat[ing] the potential exercise of market power" by radio groups.[204] Accordingly, the record shows that market competition already constrains advertising rates, and that radio stations have effective tools at their disposal to counter healthy competitive pressure placed on them by other stations in their local markets, rendering it unnecessary to restrict local radio ownership in the name of competition.

Despite this overwhelming evidence, opponents of deregulation persist with the same failed arguments and baseless accusations regarding an alleged need to retain regulations because of programming diversity concerns that have been presented—and

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[201] See Joel Waldfogel & Julie Wulf, *Measuring the Effect of Multimarket Contact on Competition: Evidence From Mergers Following Radio Broadcast Ownership Deregulation,* 5 B.E. J. Econ. Analysis & Policy 1, Article 17 (2006).

[202] *Id.*; *see* Comments of Clear Channel at 46.

[203] Comments of NAB at Attachment I, Charles Romeo & Andrew Dick, *The Effect of Format Changes and Ownership Consolidation on Radio Station Outcomes,* 27 Rev. Indus. Org. 351, 354 (2005) ("NAB Attachment I, *Format Changes and Ownership Consolidation*").

[204] *Id.* at 375 (emphases added). The ease with which radio stations can and do change formats, and consequently make gains in their audience shares, is well-documented. *See, e.g.*, Comments of Clear Channel at 21-22; Comments of NAB at 76-78.

proven false—before.[205] Despite the Commission's admonition that "[n]ational radio ownership limits are outside the scope of" these periodic ownership reviews,[206] some commenters continue to complain of alleged homogeneity among stations in different

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[205] A few commenters also argue that local radio deregulation would decrease localism. *See* Comments of AFTRA at 16; Comments of Mt. Wilson FM at 15; Comments of UCC at 80-82. As noted above, however, the Commission has not considered localism a paramount justification for the radio limits. Nevertheless, station groups demonstrated that they advance localism in multiple ways—for example, by increasing their provision of local news and other locally-focused programming, *see supra* Section III.B, and by providing unparalleled public service and demonstrating high levels of responsiveness during recent emergencies, *see supra* Section III.C.1. On December 13, 2006, the Future of Music Coalition ("FMC") released a "new" study, which it has stated will be submitted in this docket and which argues that localism concerns justify tightening the radio ownership caps. *See* Peter DiCola, Future of Music Coalition, *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry* 70-81 (Dec. 2006), *available at* http://www.futureofmusic.org/images/FMCradiostudy06.pdf ("*FMC Radio Study*"). The *FMC Radio Study* even goes so far as to suggest use of a "Local Ownership Index" that would, if taken to its logical conclusion, essentially mandate local ownership of newly-licensed radio stations. *See id.* For the same reasons stated above, these concerns are irrelevant and refuted by abundant record evidence. Moreover, without actual proof—of which there is none—that local ownership is necessary to promote localism, adoption of the "Local Ownership Index" would clearly be arbitrary and capricious. *See, e.g.*, *Bechtel*, 10 F.3d at 880-81 (finding FCC's integration policy, which had preferred applicants seeking to build and operate new broadcasting station who promised that the station's owners would participate in management, to be arbitrary and capricious, due to lack of any evidence that local owners better serve local needs despite 28 years of experience with the policy); *Amendment of Section 73.3555, [formerly Sections 73.35, 73.240, and 73.636] of the Commission's Rules Relating to Multiple Ownership of AM, FM and Television Broadcast Stations*, 100 FCC 2d 17, 35 (¶ 53) (1984) (stating that the Commission had "no evidence indicating that stations which are not group-owned better respond to community needs, or expend proportionately more of their revenues on local programming"); *see also 2002 Biennial Review Order*, 18 FCC Rcd at 13,738 (¶ 304) ("[W]e see little to indicate that the local radio ownership rule significantly advances our interest in localism.").

[206] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,738 (¶ 304). Congress, moreover, expressly directed *elimination* of the FCC's previous limit on national radio ownership in the 1996 Act. *See* 1996 Act, § 202(a). In the face of this mandate, it is at best highly questionable whether the Commission could *ever* again regulate radio ownership on a national basis, and, given the current state of competition, it would certainly be impossible for the FCC to justify doing so today.

markets.[207] Others decry the alleged lack of availability of certain "niche" formats,[208] and practically beg the Commission to add, for example, a bluegrass station in West

[207] *See* Comments of AFTRA at 17. Even if true, NAB wonders about the relevance of this assertion. As previously explained, diversity *within* markets is the type of diversity that is most important to radio listeners. Consumers in local markets have much less interest in the diversity of songs played on stations in other markets than in the diversity of songs played by stations in their locality. *See* Comments of NAB at 79-80. So, even assuming that a station in Miami, Florida had a similar playlist as a station in Seattle, Washington, the individual listeners in either market would be unaffected. Significantly, the FCC's 2002 music diversity study concluded that "listeners in local radio markets may have experienced increasing song diversity" since 1996. *See* George Williams, Keith Brown & Peter Alexander, FCC Media Bureau, *Radio Market Structure and Music Diversity* 18 (Sept. 2002). The *FMC Radio Study* (at 18-49) also purports to find a substantial increase in national radio ownership concentration levels. As NAB has already shown, however, despite the ownership changes that have occurred in the radio industry since 1996, radio remains the least consolidated media sector and numerous stand-alone radio stations and local duopolies remain throughout local radio markets. *See* NAB Attachment E, *Top 10 Firms' Industry Revenues* and NAB Attachment B, *Independent Radio Voices Study*.

[208] *See* Comments of Future of Music Coalition at 11-12. In its comments, FMC purports to analyze programming formats for stations in station groups of varying ownership structures. These comments allegedly show that stations in smaller groups program the majority of gospel, Christian contemporary, and classical stations, whereas larger groups tend more to program country, adult contemporary, or top 40 stations. As an initial matter, it is highly debatable from a First Amendment perspective whether the Commission could justify favoring some musical formats over others, and NAB submits that it could not. *See, e.g., FCC v. WNCN Listeners' Guild*, 450 U.S. 582 (1981) (reversing D.C. Circuit decision that would have required FCC to analyze format changes in evaluating renewal applications); *Comm. to Save WEAM v. FCC*, 808 F.2d 113, 117-118 (D.C. Cir. 1986) (dismissing petition for review of decision denying petition to deny assignment application based on format change considerations). In any event, FMC fails to capture the full diversity of programming offered by stations. This is because FMC categorizes radio formats into the BIA general categories (of which there are only 19), rather than the more specific categories actually used in the industry (of which there are hundreds). *See* NAB Attachment G, *Over-the-Air Radio Service Study* at 3-7. Furthermore, because the analyses are static, they cannot measure whether ownership relaxation has led to increased radio programming diversity. Other statistical studies in the record confirm that it has. *See supra* Section III.B.

Virginia or a country station in Los Angeles.[209] Such requests must be rejected. Indeed, the Commission would run afoul of the First Amendment if it were to succumb to these requests and compel the establishment of such niche stations, for it is well settled that freedom of speech is "a term necessarily comprising the decision of both what to say and what *not* to say."[210] Moreover, even if it were not constitutionally suspect, it is extremely difficult to see how an administrative agency operating in Washington, D.C. could have sufficient knowledge to determine the needs and preferences of consumers in various markets scattered throughout the nation. At a bare minimum, it is clear that the broadcasters who actually serve these communities are in a superior position to evaluate their needs.

Aside from the fact that such stations offering these specific niche formats already exist,[211] broadcasters soundly refute these allegations with proof that station groups offer

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[209] *See* Comments of Future of Music Coalition at 12, 15 (listing zero bluegrass stations among station groups in specific Arbitron markets, including Huntington-Ashland, WV-KY); Comments of AFTRA at 17-18.

[210] *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 797 (1988); *see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) ("[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide 'what not to say.'" (citation omitted)); *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all. (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624, 633-34 & 645 (1943)); *Wooley*, 430 U.S. at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'" (quoting *Barnette*, 319 U.S. at 637)); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 187 (3d Cir. 2005) (stating that "[i]t is settled law that 'government action that … requires the utterance of a particular message favored by the Government, contravenes the essential right' to refrain from speaking protected by the First Amendment" (quoting *Turner I*, 512 U.S. at 641)).

[211] S*ee* Country Music – *540am/1260am Country*, http://gocountry.am (last visited Dec. 14, 2006); WTCR-1420 Americana, *Home of Today's* '*New Grass,*'

more variety,[212] and that multicast HD radio channels only add to the level of diversity that currently exists.[213] Indeed, HD radio has enabled broadcasters to create an abundance of wholly new formats, many of which were previously available nowhere on America's radio dials, including a large number that are devoted solely to providing exposure for new and local music, as well as local news and information.[214] In short, the facts and record evidence demonstrate that opponents' objections are without merit and that there is no basis for the Commission to ignore the obvious benefits of common ownership of radio stations, and render it impossible for the FCC to justify a refusal to provide radio broadcasters with additional ownership flexibility.[215]

Finally, to the extent that some commenters contend that the "quality" of radio programming available to listeners has diminished, several recent surveys paint quite a

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http://www.wtcramericana.com/main.html (last visited Dec. 14, 2006). The reemergence of local country music radio in Los Angeles exemplifies the willingness and ability of broadcasters to respond to community needs and interests through format changes. *See* Comments of Clear Channel at 45, 63-66; NAB Attachment I, *Format Changes and Ownership Consolidation*.

[212] *See supra* Section III.B.

[213] *See* Comments of Clear Channel at 30-32; Comments of NAB at 80-82; NAB Attachment G, *Over-the-Air Radio Service Study* at 15-17 (listing dozens of formats on HD multicast stations, including Fusion Hispanic & Anglo, Kiss Espanol, My HD (all requests), and Long Island Country).

[214] *See* Find HD Radio Stations Near You, http://www.ibiquity.com/hd_radio/hdradio_find_a_station/SA/StnMarket (last visited Dec. 18, 2006); *see also* HD2 Digital Radio Formats in 68 Markets, http://www.hdradio.com/hd_digital_radio_format_list.php (last visited Dec. 18, 2006).

[215] *See supra* Section III.C.1.

different picture.[216] One recent survey by Bridge Ratings demonstrates widespread satisfaction with terrestrial radio; indeed, "over three quarters of those interviewed say that their local AM/FM stations are providing what they need in their daily and weekly radio listening."[217] Another recent study, also conducted by Bridge Ratings, shows that music consumers turn to terrestrial radio most as a source to discover new music.[218] And a recent survey by Hear2.0 reached strikingly similar results. That study demonstrates that "74% of all terrestrial radio listeners are satisfied with what they hear on the radio."[219] Moreover, audiences of formats specifically designed to meet the demands of minority groups (e.g., Latin and Urban formats) are the *most* satisfied with radio, with 85% of Latin and 80% of Urban listeners reporting satisfaction. These studies provide empirical data and factual evidence that compels rejection of some commenters' claims that terrestrial radio does not serve the needs and interests of the public.

B. The Commission Should Reform the Television Duopoly Rule to More Freely Allow Duopolies in Markets of All Sizes.

1. Ensuring that Local Television Broadcasters Survive Is a Vital Public Interest Concern.

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[216] *See, e.g.*, Comments of UCC at 80-82; Comments of Rachel Stilwell at 56-57; Comments of AFL-CIO at 46; Comments of AFTRA at 16.

[217] Bridge Ratings, *Bridge Ratings Industry Perceptual - Spring 2006: Traditional Radio Serves the Public Interest*, Apr. 28, 2006, http://www.bridgeratings.com/press.04.28.06.Perceptual.htm.

[218] *See* Bridge Ratings, *Bridge Ratings Industry Update – New Music Discovery*, July 21, 2006, http://www.bridgeratings.com/press_07.21.06.New%20Music.htm.

[219] Hear2.0, *Nationwide Study Illustrates Terrestrial Radio's Strengths*, June 7, 2006, http://mercury.blogs.com/news/2006/h20newsradiosatisfaction.pdf.

NAB and other commenters demonstrated that competition has eroded television broadcasters' audience, reduced advertising revenues, and is threatening the economic survival of some local stations.[220] A few commenters opposing deregulation challenge claims that some broadcasters are struggling to remain economically viable and suggest that the FCC need not be concerned with their survival.[221] Such claims are unfounded and inconsistent with the record evidence.

The competitive environment for local, free, over-the-air broadcast television has become progressively more difficult, as video competition has fragmented viewership and forced local stations to compete for viewers and advertising against multichannel operators that earn both advertising revenues and subscriber fees.[222] Thus, broadcasters today must fight even harder for advertising dollars, which, unlike their cable and satellite competitors, are their sole source of revenue. With broadcast audiences

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[220] *See e.g.*, Comments of NAB at 29-35; *Id.* at Attachment F, David Gunzerath, NAB, *Local Television Market Revenue Statistics* 5 (Aug. 18, 2006) (Competition and decreases in advertising revenue is "further challeng[ing] the financial health of local television broadcasting.") ("NAB Attachment F, *Local TV Market Rev. Stats.*"); Comments of NAB at Attachment J, Theresa Ottina, NAB, *The Declining Financial Position of Television Stations in Medium and Small Markets* 4 (Aug. 2006) (Many stations, particularly those in smaller markets, are in a "tenuous financial situation;" with increased news expenses and decreased network compensation, a number of smaller stations are experiencing "actual losses in revenue.") ("NAB Attachment J, *Declining Financial Position of TV Stations in Medium/Small Markets*"); *see also* Comments of Block Communications, Inc. ("Block") at 2-3, 5-6; Comments of Cascade Broadcasting Group ("Cascade") at 1-3.

[221] *See* Comments of Consumers Union at 17 (conceding that larger media outlets are "struggling" but alleging that smaller media operators "with a focus on quality news and locally produced content" are thriving); Comments of CWA at 38-46; Comments of UCC 67-68.

[222] Indeed, the FCC has recognized this fact before. *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,640 (¶ 62) ("the subscription model of cable television and DBS offer[s] an additional competitive advantage over advertising-only broadcast television stations").

decreasing, advertisers increasingly are focusing their ad campaigns on alternative media.[223] Analysts predict that because "marketers [will] continue to shift dollars from traditional media to emerging venues such as the Internet" and, with "audience fragmentation," the reduction in broadcasters' advertising revenue will continue.[224] Indeed, analysts believe that "the tough ad market" that "newspapers, television [and] radio" experienced in 2006 "is likely to worsen in 2007."[225]

While broadcasters are struggling, advertising revenues for competitive broadcast substitutes and new media outlets are rapidly increasing.[226] For example, between 1992

[223] Comments of NAB at 25-32; NAB Attachment F, *Local TV Market Rev. Stats.* at 5 (detailing the "ongoing erosion of advertising market share from local broadcast stations to local cable" which "further challenges the financial health of local television broadcasting"); *see also* Comments of Granite at 4 ("From 2003 to 2005, broadcast television stations experienced a four percentage decrease in audience share, whereas non-broadcast viewing share increased by this same amount. This downward trend likely will continue as more programming providers (*e.g.* wireline and wireless video programming) enter the market and viewers increasingly access alternatives to broadcast television."); Comments of Cox at 10-12 (Broadcasters share of households is decreasing with a commensurate decrease in advertising revenue. National and local companies are turning to the Internet for advertising, which is bringing this medium into direct competition with broadcasters.); Comments of Cascade at 1.

[224] Brian Steinberg, *Ad-Sales Woes Likely To Continue*, Wall St. J., Dec. 4, 2006, at B6.

[225] *Id.*; *see also* Stuart Elliot, *Troubling '07 Forecast For The Old-Line Media But Not For Online*, N.Y. Times, Dec. 5, 2006, at C3 (online advertising revenues expected to grow at "seven times the rate for traditional ad growth" in 2007 (quoting Steve King)); *see also id*. ("[A] flood of forecasts … from analysts and agencies, all generally point[] to a challenging year ahead for the traditional media along with substantial growth for all things online.").

[226] In the next four years, advertising revenues on cable ($27 billion) and the Internet ($22.5 billion) is predicted to far exceed the advertising spent on network television ($19.1 billion). *See* Comments of NAB at 32 (citing Anthony Bianco, *The Vanishing Mass Market*, Business Week, July 12, 2004, at 63 (citing the Wall Street firm of Sanford C. Bernstein & Co.)).

and 2006, cable revenue from local advertising increased approximately 525%.[227] The Interactive Advertising Bureau estimated that Internet advertising revenues reached $4.2 billion for the *third quarter* of 2006 alone, up 33% from the third quarter of 2005.[228] Ad-supported Internet video is also taking off, with reports predicting that online video advertising will increase from $225 million in 2005, to $1.5 billion in 2009.[229] In August 2006, YouTube started to let advertisers create "channels" filled with clips they produce themselves and then in turn sell spots to other advertisers.[230] Last spring, Google announced the introduction of "click-to-play" video ads, which many observers believe will lure advertisers, including "blue-chip" ones, away from local television and newspapers.[231] These video ads can be targeted to specific sites and even geographically, to a city level. Such ads can therefore compete directly with local advertising platforms, including local broadcast stations and newspapers.[232] Google is expanding its presence in

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[227] *See* NCTA Cable Advertising Revenue 1985-2007, http://www.ncta.com/ContentView.aspx?contentId=70 (last visited Jan. 4, 2007).

[228] *See* Press Release, Interactive Advertising Bureau, *Internet Advertising Revenues Surpasses $4 Billion for Q3* (Nov. 14, 2006), *available at* http://www.iab.net/news/pr_2006_11_14.asp.

[229] *See* Comments of NAB at 34 (citing Sean Callahan, *Media in Motion; Business Media Companies See Video Content as a Way to Attract Viewers—and Advertisers*, BtoB, March 1, 2006, *available at* http://www.thenewsmarket.com/about/assets/BtoBonline/3_Mar_2006.html.

[230] Dawn Chmielewski & Chris Gaither, *Video Site to Add to Ads*, L.A. Times, Aug. 22, 2006, at C1.

[231] *See* Comments of NAB at 34.

[232] *See* Carol Krol, *Google Unveils Online Video Ad Platform*, BtoB, June 12, 2006, *available at* http://www.btobonline.com/article.cms?articleId=28276. *See also* Google AdWords, Regional and Local Targeting: Sharpen Your Advertising Focus, https://adwords.google.com/select/targeting.html (last visited Jan. 3, 2007), for an

the advertising world in a number of other ways as well.[233] Because advertising revenues are tied to viewership, these competitive challenges will only increase as other video programming alternatives continue to grow in accessibility and popularity.[234]

NAB's comments demonstrated that, as a result of rising costs, reduced advertising revenues and falling audience shares, news profitability (*i.e.*, news operations that operated at a profit) has reached an all-time low.[235] The Radio-Television News Directors Association's most recent survey of news staffing and profitability showed that

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explanation of how Google's AdWords system can be used to target ads to appear in specific geographic locations.

[233] *See* Sara K. Goo, *A New Advertising Engine; Google Expands Its Web Reach To Madison Avenue*, Wash. Post, Oct. 28, 2006, at D01; Marguerite Reardon, *Google's Ambitions Going Mobile*, CNET News.com, Nov. 28, 2006, http://news.com.com/2008-1039_3-6138755.html.

[234] This burgeoning competition, *see also supra* Section II, wholly refutes CWA's claim that local television markets are "highly concentrated." *See* Comments of CWA at 33. Indeed, CWA admits that its calculations "are based on 2001 data." *Id*. Given the breathtaking pace of change that has occurred even since 2003, this fact alone renders such data and analysis wholly irrelevant. Even if the data were not outdated, it is faulty. CWA looks exclusively at local broadcast television station viewing, thus ignoring the viewing of cable, satellite and out-of-market stations that occur in a given market. Such an approach is arbitrary and capricious and in tension with the D.C. Circuit's decision in *Sinclair*, 284 F.3d at 164-65. As set forth in NAB's comments, a proper analysis that takes into account the direct competitors to local television stations makes clear that CWA's claim is incorrect. In fact, as of 2005, on average nationally only 44.0% of total television viewing was attributable to in-market broadcast television stations. This figure represents a 20% decrease in the total viewing shares earned by local in-market television stations just since 1997. *See* NAB Comments at 106 (citing *BIA Out-of-Market Voices Study* at 10-11). And in DMAs 101+, only 38.4% of total viewing was attributable to local broadcast stations. *Id*. at 11. In other words, 61.6% of the total viewing in these smaller markets went to the MVPD and out-of-market broadcast competitors of the local television stations. Thus, in no way can broadcast television stations be regarded as "controlling" local markets, as CWA alleges. *See also* Comments of Hearst-Argyle Television at 42-44 (showing local television markets to be unconcentrated).

[235] Comments of NAB at 95-98.

only 44.5% of all television news operations showed a profit, down from 62-63% as recently as the late 1990s.[236] These trends will only continue as news costs increase and audiences for local news programs decline, thereby threatening the viability of news operations in medium and small markets.[237]

Contrary to Consumers Union's claim that small and medium-sized broadcasters are thriving, the impact of marketplace developments has been "particularly harsh" on smaller broadcasters because "stations compete for disproportionately fewer viewers and advertising revenues than in larger markets."[238] With increasing competition, "shrinking"

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[236] *Id.* at 96 (citing Bob Papper, *News, Staffing and Profitability Survey*, Communicator, Oct. 2005, at 36, *available at* http://www.rtnda.org/communicator/pdfs/102005-34-38.pdf). The profitability of a station's news operation is extremely important for the overall viability of the station itself. RTNDA reports that, on average for all market sizes, 42.8% of television station revenues are produced by news, and that percentage is higher in smaller markets. For instance, in markets 101-150, 47.1% of station revenues were produced by news. *Id.*

[237] *See* Comments of NAB at 95-96 (demonstrating rising news costs and declining audiences for local news programs from the 1990s in markets 51 and smaller); *see also 2002 Biennial Regulatory Review*, Comments of NAB, MB Docket No. 02-277 (Jan. 2, 2003) at Attachment D (Smith Geiger, LLC, *Newsroom Budgets in Midsize (51-100) and Small Markets (101-210)* 13 (Dec. 2002)) (Given the increased cost of news production, coupled with competitive pressures, "local stations may look to exit the local news business in favor of lower costs propositions," such as syndicated programming."); *see also* Testimony of Royce Yudkoff, Managing Partner of Abry Partners, Inc., Transcript of FCC En Banc Hearing on Local Broadcast Ownership at 93 (Feb. 12, 1999) (in small markets, television station owners cannot afford to make the capital investments necessary "before turning the lights on" a local news operation, due to the high costs of "get[ting] the news on the air").

[238] Comments of Granite at 4. *Accord* Comments of NAB at 97; NAB Attachment F, *Local TV Market Rev. Stats.* at 2-3 (stations in smaller markets compete for far smaller total revenues than do stations in larger markets, and thus face more economic hardship from new competition for viewers and advertisers); Comments of Cascade at 1-3; Comments of Hoak Media at 5-6. To put such arguments in perspective, the New York DMA, for example, has nearly 7.4 million television households and total television advertising revenues of $1.544 billion in 2005 (an average revenue per household of $208). In contrast, in Louisville, the average revenues per television household in 2005

revenues, and "increasing" station operating costs,[239] a number of stations, especially in smaller markets, are in fact experiencing "negative pre-tax profits."[240] In particular, lower-rated network affiliated stations in the smallest markets (126+) have experienced actual losses in 2001, 2003, and 2005.[241]

The looming deadline for completion of the digital television ("DTV") transition has further strained broadcasters. The Commission has recognized that the DTV "transition is a significant undertaking," that requires "significant investment and planning . . . by the broadcasters to build new digital facilities and relocate operations."[242]

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were only $144, and in Evansville only $126. Not only are smaller television markets less valuable to advertisers than larger markets simply because they have fewer viewers, but the viewers they do have are valued less by advertisers on a per household basis than those in larger markets. *See* NAB Attachment F, *Local TV Market Rev. Stats.* at 2-3.

[239] Comments of Nexstar at 10.

[240] Comments of Granite at 5 ("many small and mid-sized market television stations—including stations ranked among the top four in a market—experience negative pre-tax profits"); *see also* NAB Attachment J, *Declining Financial Position of TV Stations in Medium/Small Markets* at 10 (observing that "many television stations today in smaller markets are experiencing reduced profitability …. These financial pressures are particularly acute for smaller market stations that are not the top-rated station in their respective markets"); Comments of Hoak Media (noting that many smaller market broadcasters experience negative pre-tax profits); Brooks Barnes, *Local Stations Struggle to Adapt as Web Grabs Viewers, Revenue*, Wall St. J., June 12, 2006 at A11 ("the majority of TV stations, especially those still owned by families and smaller companies, are in a rut").

[241] *See The Declining Financial Position of Television Stations in Medium and Small Markets*, at 9-10 (Dec. 2006) (attached hereto as Attachment A) ("*December 2006 TV Financial Report*"). This updated report confirms earlier studies as to the perilous financial condition of lower-rated stations in smaller markets. Indeed, this update shows that even lower-rated network affiliates in some mid-sized markets (DMAs 51-75) suffered not just declining profits but actual losses in 2005. *See id.* at 6.

[242] *In re Reallocation and Service Rules for the 698-746 MHz Band (Television Channels 52-59), Notice of Proposed Rulemaking,* 16 FCC Rcd 7278, 7285 (¶10) (2001).

The GAO similarly found that "[b]roadcasters must make large capital investments to begin broadcasting in digital," and that many stations have encountered problems in raising the necessary capital.[243] NAB's comments explain that stations have reported spending $3-$4 million on digital transmitters and towers, and even greater amounts on replacing production equipment and other infrastructure.[244] And, in its comments, Granite reports that it has spent an average of $2.2 million per station to build out its digital facilities.[245]

While these digital costs represent substantial outlays for all broadcasters, they are "overwhelming" for "many mid sized and small market stations and lower revenue stations in larger markets."[246] Indeed, for stations with annual revenues below $2 million

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[243] General Accounting Office, Report No. 02-466, *Telecommunications: Many Broadcasters Will Not Meet May 2002 Digital Television Deadline* 16 (Apr. 2002), available at http://www.gao.gov/new.items/d02466.pdf ("*GAO Digital Report*").

[244] Comments of NAB at 91 (citing Prentiss Findlay, *HDTV Coming to Stations*, Post & Courier, Feb. 23, 2003, at 1E (Charleston, S.C. station reported spending nearly $4 million on the conversion); Timothy C. Barmann, *Providence, R.I., TV Leader Discusses the Digital Age*, Providence J.-Bull., Oct. 25, 2003, at B01 (LIN Television estimated it must spend about $3 million per station for new transmitters and towers.); Bob Mercer, *Future of Rural TV Full of Static*, Aberdeen Am. News, Aug. 17, 2004, at 1A (South Dakota station reported spending $4.4 million for towers, and estimated that the cost of production equipment conversion would be considerably greater); Tania Panczyk-Collins, *Costs, Equipment Make Transition to HD News Slow*, Commc'ns Daily, April 8, 2005, at Today's News (reporting that Raleigh, NC station pioneering local HD news coverage spent $26 million to convert, replacing 30 field units, editing suites and entire infrastructure)).

[245] Comments of Granite at 5-6.

[246] BIA Financial Network, *State of the Television Industry 2001, Ownership Report: What Is Owned by Whom and Where* 9 (2001) ("*BIA TV Industry Report*"). Broadcasters have also replaced studio equipment, obtained digital programming, and "incur[red] the costs of running two stations [*i.e.*, an analog and a digital] during the transition period." *GAO Digital Report* at 9; *see also* William R. Richardson Jr., John A. Rogovin, & Jack N. Goodman, *A Little Relief*, XXIX Legal Times, Oct., 16, 2006, at 42,

(which tend to be in the smallest 100 DMAs), transition expenses average a staggering *242%* of annual revenues, but these expenses represent only 11% of annual revenues for large market stations that were required to be transmitting in digital prior to May 2002.[247] In the aggregate, broadcasters will have spent approximately $10-16 billion in furtherance of the transition before its conclusion.[248] Despite such significant investments, DTV has not produced any measurable revenues for broadcasters.[249] The

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available at http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1160643919671 ("smaller-market stations continue to incur substantial expenses in making the transition to digital television – by the government-mandated deadline of February 2009 – while facing uncertain prospects of new revenues from their digital spectrum") ("*A Little Relief*"); Comments of Hoak Media at 4-5; Comments of Smaller Market Television Stations at 7-8.

[247] *GAO Digital Report* at 18; s*ee also BIA TV Industry Report* at 8 (for medium and small market stations, DTV costs "in many cases equal[] a large percentage of the present fair market value of the existing stations without any strong indication that the digital transmission would generate immediate additional revenues"); David Lieberman, *Small TV Stations Reel Under Order to go Digital*, USA Today, July 17, 2002, at 1B (Industry analysts agree that small market stations have serious problems with financing digital transition, as small station owners are "lucky" to make "$300,000 a year in free cash flow," and "[i]t can cost $3 million to convert to digital.").

[248] *Digital Television Transition: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 109th Cong. 2 (2005) (testimony of Edward O. Fritts, President & CEO, NAB), *available at* http://commerce.senate.gov/pdf/fritts.pdf.

[249] UCC claims that the option, made available by digital technology, for broadcasters to include multiple programming streams within their broadcast signal reduces the need for regulatory relief. *See* Comments of UCC at 45-47. This claim is unfounded and reflects a fundamental misunderstanding of the digital transition. UCC erroneously assumes that the possibility that a broadcaster could offer multiple program streams is the equivalent of adding an entirely new station. Digital technology enables a broadcaster to choose between transmitting a single high quality, HD programming stream or several, lower resolution programming streams. When broadcasters elect to air HDTV, they typically transmit a single programming stream, the very same number of streams (one) as in the analog context. Clearly, then, no new station is magically created, as UCC imagines, when a station transmits in digital; it is still one station, subject to the same intensely competitive market conditions that, as NAB has explained, urgently necessitate regulatory reform. In any event, the opportunities made possible by digital technology

following chart shows that, at most, digital television revenues in 2005 constituted *0.2%* of a broadcast station's entire revenues.

Figure 1
Digital Broadcast Operations Revenue[250]
Includes affiliated stations: ABC, CBS, FOX, NBC

Market Size	2005 Average Dollar Amount	% of Net Revenue[251]
All Affiliate Stations	**$6,455**	**0.0%**
1-25	**$2,891**	**0.0%**
26-50	**$8,982**	**0.0%**

are not yet a present business reality for broadcasters and may never become one. Broadcasters have no assurance, for example, that any multiple program streams they offer will reach the audiences viewing their signals through a multi-channel operator. This is because such operators may strip out and block consumers from viewing portions of the broadcasters' signals. Given this reality, 79% of broadcasters have indicated that they will not invest in developing additional digital programming for multicast channels without an anti-stripping mandate. *Twelfth Annual Report*, 21 FCC Rcd at 2554 (¶ 101). For this same reason, UCC's apparent assumption that the opportunity to provide multiple program streams will produce the same economic efficiencies that broadcasters may generate through jointly operated stations is wrong. Simply put, at this time, multiple program streams create cost, not efficiency. Any additional programming that the broadcaster would air on those streams must be separately produced or procured, in many cases at considerable expense. Placed on top of the already significant costs that, as noted above, the statutorily-mandated digital transition has imposed on broadcasters, the financial strain likely to result from multiple program streams, if anything, supports regulatory relief for struggling broadcasters, not the maintenance of burdensome regulations.

[250] Data derived from the 2006 NAB/BCFM Television Financial Survey database. Digital Broadcast Operations Revenue is defined as any revenue derived from digital broadcast operations. Any multicast advertising revenues are included.

[251] Net Revenues is defined as a total of gross advertising revenues, plus network compensation, plus trade-outs and barter, plus digital broadcast operations revenue, plus other broadcast related revenues minus agency and rep commissions.

51-75	**$13,265**	**0.1%**
76-100	**$869**	**0.0%**
101-125	**$13,675**	**0.2%**
126-150	**$3,171**	**0.1%**
151-175	**$1,158**	**0.0%**

Given this dearth of revenues from digital operations, it is not surprising that the "financial burden imposed by the digital transition" is "compounded" and "further magnified by the recent decline in network compensation."[252] Between 1997 and 2005, network compensation declined on average 67.4%, 60.1%, 60.4%, 58.0%, and 63.7% for major network affiliated stations in DMAs 51-75, 76-100, 101-125, 126-150, and 151-175 respectively.[253]

The ability of television broadcasters to continue to provide the wealth of local news and other programming and valuable local services plainly is threatened. Indeed, the opening comments make clear that a number of broadcasters, especially smaller stations, already have been forced to cut programming because of dwindling revenues.[254]

[252] Comments of Granite at 5-6.

[253] *See December 2006 TV Financial Report* at 6-10.

[254] *See* Comments of Cascade at 2 (Economic necessity has compelled small market stations to reject new programming initiatives and become increasingly risk averse.); Comments of Block at 3 (Dwindling revenues have forced many broadcasters to abandon, curtail or outsource their local news operations.); *see also* Comments of NAB at 94-98; *id.* at 94 n.220 (citing Media General *Ex Parte*, MB Docket Nos. 06-121 and 02-277 (July 26, 2006) (listing dozens of examples of curtailments in local television newscasts since 1998); Associated Press, *Fox Affiliate to Stop Producing 10 o'clock News*, Jan. 12, 2006 (Fox affiliate in Pittsburgh ceased producing own 10:00 p.m. local news); *TV News: Down the Tube*, Colum. Journalism Rev., Sept./Oct. 2002, at 8 (identifying eight television stations in markets such as Kingsport, TN, Evansville, IN

At the very least, budget constraints, particularly in smaller markets, will lead to cut-backs and reduced quality of local news.[255] After initial comments were filed, Granite filed for Chapter 11 bankruptcy protection[256] – further confirmation that it is imperative for the Commission to act now to prevent additional local television broadcasters from suffering the same fate. Those opposing reform of the television duopoly rules do not – and indeed cannot – explain how cut backs in services by struggling local stations can possibly promote the public interest.

2. Reforming the Television Duopoly Rule Would Serve the Public Interest.

NAB and other commenters established that the existing duopoly rule, with its "eight-voice" test, prevents the formation of even a single duopoly in many DMAs and offers no means to ameliorate the deteriorating financial condition of television broadcasters in the majority of markets, especially smaller ones.[257] A few commenters nonetheless urge the Commission to retain the current television duopoly rule

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and Marquette, MI that "have scrapped their locally produced newscasts" due to a slumping economy, a drop in network compensation, and digital transition costs)).

[255] Radio and Television News Directors Foundation, *2003 Local Television News Study of News Directors and the American Public* 39 (2003), *available at* http://www.rtnda.org/ethics/2003survey.pdf (40.2% of news directors feel that budget constraints have a "serious" or "severe" impact on news quality, and another 39.5% believe that such constraints have a "moderate" impact.).

[256] *See* John Eggerton, *Granite Files Chapter 11*, Broad. & Cable, Dec. 12, 2006, http://www.broadcastingcable.com/index.asp?layout=articlePrint&articleID=CA6399167.

[257] *See, e.g.*, Comments of NAB at 98-110; Comments of Gannett at 34-48; Comments of Granite at 2-7; Comments of Gray Television at 12-25; Comments of Belo at 18-28. *See also* Comments of Hearst-Argyle at 33-46 (demonstrating in detail that the top-four restriction is not supported by empirical evidence or economic theory).

unchanged.[258] Because the evidence makes clear that retaining the duopoly rule, as opponents urge, will neither increase diversity nor enhance localism, these arguments are inconsistent with the public interest and must be rejected.

First, contrary to claims of opponents of deregulation, duopolies do not provide less local programming than independently-owned stations.[259] The "studies" upon which these commenters rely are rife with internal inconsistencies, make faulty assumptions (if the authors even explain their assumptions), and, as a result, are entirely unreliable and should be afforded no weight. The *Duopoly Ownership Paper*, which unfavorably compares the amount of news aired on stations in duopoly and non-duopoly markets in 1997, to the amount of news aired on stations in such markets in 2003, is riddled with unexplained assumptions and peculiar data collection. While the authors identify the markets they selected, they do not list the stations they sampled, nor do they adequately explain why the number of stations used in calculations increased from 106 in the base

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[258] *See*, *e.g.*, Comments of UCC at 51-54; Comments of AFTRA at 14-15; Comments of AFL-CIO at 43-44; Comments of CWA at 60-61; Comments of Cequel Communications, LLC d/b/a Suddenlink Communications at 7-8.

[259] *See e.g.*, Comments of UCC at 51-54 (citing Michael Z. Yan & Yong J. Park, Univ. of Mich., Dep't of Commc'n Studies, *Duopoly Ownership and Local Information Programming on Television: An Empirical Analysis* (2005), *available at* http://web.si.umich.edu/tprc/papers/2005/488/tprc2005_yan.pdf ("*Duopoly Ownership Paper*"); Michael Yan & Philip M. Napoli, Univ. of Mich., Dep't of Commc'n Studies, *Market Structure*, *Station Ownership and Local Public Affairs Programming on Local Broadcast Television* (2004), *available at* http://web.si.umich.edu/tprc/papers/2004/374/tprc2004_yan.pdf ("*Market Structure Paper*"); Peter J. Alexander & Brendan M. Cunningham, *Diversity in Broadcast Television: An Empirical Study of Local News*, 6 Int'l J. Media Mgmt. 176 (2004) ("*Diversity in Broadcast Television*")); Comments of Consumers Union, Study 16 (Mark Cooper & S. Derek Turner, *Consolidation and Conglomeration Diminish Diversity and do Not Promote the Public Interest: New Evidence*) (citing *Duopoly Ownership Paper*, *Market Structure Paper* and *Diversity in Broadcast Television*) ("Consumers Union Study 16, *Consolidation and Conglomeration II*").

year (1997), to 116 in the comparative year (2003).[260] In addition, it appears that the study grouped WB-UPN duopolies together with ABC, CBS, FOX, NBC duopolies – even though WB and UPN stations rarely have aired news programming, either as standalones or in duopolies. Doing so seriously distorts the results to make it appear that duopolies provide less news programming than comparable stand-alone stations.[261]

Even assuming that these data were not flawed, the *Duopoly Ownership Paper* actually shows that the *percentage increase of news for the duopoly stations* (22%) is *significantly greater* than the increase in news by other stations in the duopoly markets (4.1%), as well as the percentage increase in news in the non-duopoly markets (13.7%). What is more, this study found that "minor" duopoly stations (those not affiliated with a top-four broadcast network) had an *increase* of 0.9 hours (or 16.4%) in local news programming, whereas minor non-duopoly stations had a *decrease* in local news and programming over the time period examined.[262] Despite this clear evidence that

[260] *See Duopoly Ownership Paper* at 8, 10. Based on the markets identified, moreover, it appears that at least one of the alleged duopolies did not consummate until 2004, which clearly could not have impacted news programming in 2003. In addition, two of the comparative non-duopoly markets (Atlanta and Tampa) contain television stations owned by local newspapers. A number of studies have shown that such cross-owned stations air greater amounts of local news (*see infra* Section IV.C.), which could have biased the comparison between duopoly and non-duopoly stations.

[261] Indeed, the distorted results are shown in the average number of hours that the paper found that the duopoly stations aired news (22.6 hours) versus the non-duopoly stations in the same market (35.8 hours). Inclusion of the WP-UPN duopolies seriously under-represents the average number of hours that duopoly stations aired news in comparison to non-duopoly stations. Other parties have criticized this study for its lack of transparency, erroneous treatment of data, and other clear anomalies. *See* Coalition Request for Underlying Data, Smaller Markets Broadcasters Coalition, MB Docket Nos. 06-1221, 020277, 010235, 01-317, 00-244 (Dec. 7, 2006).

[262] *See Duopoly Ownership Paper* at Table 2A.

duopolies promote local news, the results-oriented authors *ignore their own data* and conclude that there is "no evidence that joint ownership induces minor stations to produce more local news programming."[263] The study thus makes unmistakably clear, contrary to the claims of pro-regulatory commenters, that duopolies have a positive impact and increase the production of local news and programming.

The other studies relied upon by opponents of deregulation suffer from similar flaws. The *Diversity in Broadcast Television* paper, cited by the UCC and Consumers Union, is based on faulty assumptions that lead to absurd results. This paper arbitrarily measures programming diversity based on the minutes of programming for topics that are not aired on any other channel. Thus, it assumes, for example, that if all three traditional affiliates' news programs devote their news programming to the same three or four important events that occurred on a particular day, the public is somehow harmed by a lack of diversity. But such a finding is nonsensical: should one national or local newscast not report on a significant event simply because other newscasts are also reporting it? Indeed, if an event is important to a community, it would be a disservice for a station not to cover the event. Moreover, the paper, which is based on 1998 data, includes only ABC, NBC, and CBS affiliates and excludes Fox affiliates, allegedly because Fox news stations had "practically nil" penetration. This is also incorrect. Local Fox affiliates in many markets, including Washington, D.C., New York, Chicago, and Los Angeles, have long had substantial news operations and audiences. Finally, the paper disregards the effect of the Internet. As detailed herein, Internet usage has changed

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[263] *See id*. at 12-13.

dramatically since 1998, rendering conclusions about the Internet based on data from 1998 invalid.

The *Market Structure Paper*, cited by UCC and Consumers Union, also suffers from a number of flaws. This paper attempts to show that there is an insufficient amount of local public affairs programming, and finds that ownership by one of the networks decreased a station's probability of offering any such local programming.[264] However, the statistical analysis in the *Market Structure Paper* is flawed due to the nature of the data. Simply put, in order to determine the effect of one explanatory variable (e.g., ownership by a major network) on the amount of local public affairs programming, that explanatory variable must be independent of other explanatory variables (e.g., VHF station or group ownership). In this case, there is no such independence and, in fact, many of the explanatory variables are highly correlated with one another, making the results highly questionable.

What is more, this paper finds that because non-commercial stations supposedly air more local public affairs programming, commercial television "inhibit[s]" the production of such programming.[265] But this conclusion does not necessarily follow. Even if the findings are correct, which, given the suspect data is questionable, there could be multiple reasons for decreased public affairs programming on commercial stations –

[264] As an initial matter, NAB notes that this paper merely examines local public affairs programming and completely ignores national public affairs programming offered by network-owned stations. As a result, this study never examined whether overall public affairs programming (local and national) has increased due to common ownership. In addition, NAB notes that the determination of whether a program qualified as a "public affairs program" has an inherent subjectivity, and the authors did not utilize any independent sources to confirm their conclusions in this regard.

[265] *Market Structure Paper* at 15.

most notably, consumer demand or, as explained in Section III.C.2. above, declining station revenues.

One of Consumers Union's own studies similarly attempts to cast doubt on the FCC's previous and fully supported conclusion that duopolies can increase the amount of local news offered by the commonly owned stations.[266] However, this "study" provides no new or additional empirical evidence, but merely makes broad assertions that lack substantiation about the allegedly undesirable effects of duopolies.[267] In fact, the Consumers Union study, in reexamining data previously provided by the broadcast networks, actually shows that the hours of news aired by stations in duopolies increased.[268] NAB also notes that this reexamination looks only at the data provided by NBC and FOX and omits the data provided by Viacom. Perhaps most importantly, the Consumers Union study does not dispute the principal finding of the networks' original submission – that stations in duopolies are more likely to carry local news than other stations.[269] And despite Consumers Union's claim that duopolies harm news quality, Study 15 fails to address the network's original finding that the quality of local news coverage by duopolies and non-duopolies, as measured by the number of news awards,

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[266] *See* Mark Cooper, *Consolidation and Conglomeration Diminish Diversity and Do Not Promote the Public Interest: A Review of the Hearing Record in the Media Ownership Proceeding* ("Consumers Union Study 15, *Consolidation and Conglomeration I*").

[267] *See, e.g., Consolidation and Conglomeration I* at 298 (duopolies come at a "severe cost to quality" of news).

[268] *See id.* at 299.

[269] *See id*. at 298.

was similar. Clearly, this Consumers Union "study" is more accurately described as an advocacy position paper and should be treated by the Commission as such.

In contrast with these seriously flawed analyses, as set forth in Section II.A, numerous studies have found that *common ownership has increased diversity of programming*. Indeed, arguments that broadcast duopolies harm the public interest are "counter intuitive":

> When one owner owns two stations, the owner has incentive to provide differing information and programs on its stations for maximum diversity in order to reach the widest possible audience. Indeed, there is no real benefit to the owner from broadcasting identical newscasts on two different stations because ultimately the owner wants to attract diverse viewership … to maximize its advertising revenues.[270]

Thus, as Drs. Luke Froeb, Michael Williams, and Padmanabhan Srinagesh concluded, commonly owned stations have "an incentive to move the merging products further away from one another to avoid cannibalizing each other's sales (or audience), so… products are more differentiated, resulting in greater diversity." This "suggest[s] that media mergers are more likely to increase diversity and increase consumer welfare."[271]

Second, suggestions by commenters that common ownership, not financial pressures due to technical changes, competition and reduced advertising revenue, is causing cost cutting and reductions in local news coverage are unfounded and refuted by

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[270] Comments of Nexstar at 14.

[271] *Hearst-Argyle Economists' Declaration* at 1; *see also What's Fit to Print* at 28 (study of newspaper industry found that "concentration appears to increase total content variety").

the evidence.[272] In fact, the opposite is true: studies make clear that more profitable stations carry more local news and public affairs programming.[273] Indeed, empirical evidence has consistently found that permitting common ownership will enhance localism because financially stable stations "are more inclined to incur the expense of providing local public affairs programming."[274] Such findings comport fully with Commission precedent, which has found that allowing local television duopolies "can contribute to programming and other benefits such as increased news and public affairs programming and improved entertainment programming, and, in some cases, can ensure the continued survival of a struggling station."[275] It is thus clear that reductions in news and other programming services are caused by competitive pressures and decreased advertising revenue, *see supra* section IV.B.1, and that regulatory relief is needed to ensure that financially struggling stations remain viable and able to provide high quality news and other programming important to local communities.[276]

The record likewise confirms that allowing the formation of television duopolies more freely will enhance local stations' ability to serve their audiences with valuable and

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[272] *See, e.g.,* Comments of AFL-CIO at iii, 22.

[273] *See supra* Section III.B.2 (citing *Napoli Paper*; *Carroll Article*; *Park Paper*).

[274] *Napoli Paper*, Conclusion Section; *see generally supra* Section III.B. The *Napoli Paper* also found that stations in markets with "greater revenue potential" (i.e., larger markets) "provide more local news programming." *Napoli Paper*, Conclusion Section.

[275] *Review of the Commission's Regulatory Governing Television Broadcasting, Report and Order*, 14 FCC Rcd 12,903, 12,930 (¶ 57) (1999) ("*Local TV Ownership Order*").

[276] *See Journalism, Transparency and the Public Trust* at v, 4 (discussing the consequences of technological changes, audience fragmentation and consumer behavioral shifts on media profitability and traditional business models in journalism).

diverse programming. NAB's comments, for example, attached an October 2006 BIA Financial Network study that examined duopolies in a number of mid-sized markets, and found that the formation of duopolies in these markets enabled stations to add or expand local news programming.[277] The study also found that duopolies improved the acquired station's performance. In particular, the study found that acquired stations in local duopolies experienced an 11.0% increase in audience share and a 15.4% increase in revenue share following their acquisition.[278] This evidence makes unmistakably clear that the joining with another in-market station enabled these stations to offer programming more attractive to viewers, to improve their financial position, and to provide more effective competition to other video outlets in their local markets.[279]

Other commenters echoed this conclusion. Nexstar, for example, explains that "a station [that is] not teetering on the edge of survival is more likely to host or sponsor political debates and community forums and participate (or participate at a higher level) in local community activities."[280] Similarly, Granite states that "common ownership allows television stations to spread a single cost across two revenue-generating stations.

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[277] Comments of NAB at Attachment H, Mark R. Fratrik, BIA Financial Network, *Economic Viability of Local Television Stations in Duopolies* at 9 (Oct. 23, 2006) ("*Local TV Duopoly Study*").

[278] *Local TV Duopoly Study* at i, 6.

[279] This 2006 study merely reconfirms the results of an earlier study finding that stations in duopolies and parties to local marketing agreements improve their competitive and financial position and offer more desirable programming services to local viewers. *See* NAB Comments at 99 (citing Comments of Coalition Broadcasters, MB Docket No. 02-277, Jan. 2, 2003, at Attachment A (BIA Financial Network, *Television Local Marketing Agreements and Local Duopolies: Do They Generate New Competition and Diversity?*)).

[280] Comments of Nexstar at 13.

These cost savings and additional revenues can then be used to develop more and better local programming to successfully compete against non-broadcast media for audience and advertising."[281] The economies of scale and "efficiencies generated through duopolies can help offset this Hobson's choice and may be the difference between maintaining local programming on local TV broadcast stations and operating with no local programming."[282] Such cost savings will be particularly helpful in small markets where struggling stations competing for much more limited advertising dollars need the flexibility to form more economically viable ownership structures.[283]

The Commission must reform the arbitrary and capricious television duopoly standard to provide television stations and their local operations, especially in smaller markets, a fair chance to maintain economic viability.[284] Given the importance of local broadcasters to communities, it is clearly in the public interest for the Commission to

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[281] Comments of Granite at 6-7; *see also* Comments of Belo Corp at 25 (common ownership provides efficiencies that enable owners to provide a variety of cross media offerings, such as local cable news channels); Comments of Nexstar at 15 (efficiencies from shared sources enables broadcaster to "preserve or expand existing newscasts while also making technological investments").

[282] Comments of Nexstar at 13-14; *see also A Little Relief* at 42 ("Smaller-market TV stations are facing increasing difficulties in offering high-quality local news and information programming. They face much greater competition for advertisers and viewers from cable, satellite, and now the Internet.").

[283] Comments of Cascade at 3; NAB Attachment F, *Local TV Market Rev. Stats.* at 2-3 (stations in smaller markets face increased challenges in attracting advertising revenue); NAB Attachment J, *Declining Financial Position of TV Stations in Medium/Small Markets* at 10 (noting that financial pressures are "particularly acute for smaller markets that are not the top-ranked station in their respective markets"); *December 2006 TV Financial Report* at 6, 9-10 (reconfirming that lower-rated stations in a number of medium and small markets are in a perilous financial position).

[284] *See Sinclair*, 284 F.3d at 169.

respond to increased marketplace competition by modifying regulations that threaten the continued survival of these local stations. As Block Communications explains:

> The media landscape continues to become more competitive, and the Commission must not assume that because large numbers of stations are not going dark, the local broadcast industry is healthy. … By failing to see the difficulties faced by broadcasters in small and mid-sized markets today, the Commission tomorrow could be explaining to Congress why these markets no longer have over-the-air television stations or why local television news has suffered or been eliminated in those markets. Instead, the Commission must act now to repeal its duopoly restrictions and allow broadcasters in all markets to enjoy the benefits of joint operations.[285]

The Supreme Court has made clear that the Commission must consider circumstances where competition may harm the public, including the effect of competition on a station's "ability … adequately to serve [the] public," the likelihood "that both stations … will go under, with the result that a portion of the listening public will be left without adequate service," and the possibility that "by a division of the field, both stations will be compelled to render inadequate service."[286] Modified regulations are appropriate so that local stations are able to continue serving the public in the face of competition. Doing so will enable broadcasters to form more efficient ownership structures, better attract viewers and advertisers, and enhance local stations' ability to serve their viewers and communities in markets of all sizes.

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[285] Comments of Block at 4-5.

[286] *Sanders Bros. Radio Station*, 309 U.S. at 476.

C. The Commission Has No Basis for Retaining the Current Cross-Ownership Rules.

In addressing newspaper/broadcast and radio/television cross-ownership, NAB and other commenters unequivocally confirmed that combinations provide higher levels of public service to their local communities without causing any of the oft-mentioned, but never-proven, harms to viewpoint diversity.[287] Put another way, these ownership restrictions actually inhibit localism without enhancing diversity at all.

As NAB showed, and as the vast majority of comments echoed, the FCC need not revisit its determination, which the Third Circuit upheld, that newspaper/broadcast combinations promote localism by providing high-quality local news and providing greater quantities of such news.[288] Indeed, this conclusion was supported by over 30 years of real-world evidence and empirical studies. In their most recent comments, broadcasters demonstrated that the quantity and quality advantages continue to exist.[289] The long list of research repeatedly confirming these findings includes:

[287] *See* Comments of Cox at 19-20; Comments of Gannett at 30; Comments of NAA at 79-84; Comments of NAB at 110-124.

[288] *See supra* Section III.C.2; Comments of Belo at 5-9; Comments of Bonneville at 15-16; Comments of Cox at 6-8; Comments of Gannett at 6-11; Comments of Morris at 4-9; Comments of NAA at 3-13; Comments of NAB at 5-6, 36-38; Comments of Tribune Company at 5-6.

[289] *See supra* III.C.2; *see also* Comments of NAA at 66-79; Comments of Tribune Company at 34-79.

- A 1973 FCC study concluding that newspaper-owned television stations offered 6% more local news, 9% more local non-entertainment programming, and 12% more local programming than other stations.[290]
- A 1980 *Journalism Quarterly* paper finding that cross-ownership of television stations and daily newspaper results in higher expenditures for television news programming.[291]
- Allen M. Parkman's 1982 research, published in *The Review of Economics and Statistics*, finding a significant, positive relationship between local television news ratings and a station's ownership by a local newspaper, a media group, or an owner with a local AM radio station.[292]
- A 1988 report in the *Journal of Media Economics* stating that "television stations co-owned with a daily newspaper in the same local market broadcast 41 minutes more of local programming" in a composite week "than television stations that were not cross-owned."[293]

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[290] *Amendment of Section 73.34, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations*, 50 FCC 2d 1046 (1975), Appendix C.

[291] John C. Busterna, *Ownership, CATV and Expenditures for Local Television News*, 57 Journalism Quarterly 287, 289 (1980).

[292] Allen M. Parkman, *The Effect of Television Station Ownership on Local News Ratings*, 64 Rev. Econ & Stat. 289 (1982).

[293] John C. Busterna, *Television Station Ownership Effects on Programming and Idea Diversity: Baseline Data*, 1 J. Media Econ. 63, 65-66 (Fall 1988).

- A 1998 study submitted by Belo Corp., showing that cross-owned WFAA-TV aired an impressive 61 hours of non-entertainment programming, far more than other network affiliates in the Dallas market.[294]
- Dr. Samuel Lichter's analysis, submitted with Media General's 2001 comments, comparing each DMA with a Media General newspaper/television combination with the immediately higher-ranked DMA. Dr. Lichter found that five out of six of the DMAs with combinations aired more non-entertainment programming than their paired market.[295]
- A 2001 study by Victor Miller of Bear Stearns determining that grandfathered newspaper-owned television stations, during earlier news day parts, led the market and delivered 43% more audience share than their closest market competitors, and 193% more than the third-ranked stations.[296]
- The 2002 MOWG Study No. 7, conducted by Thomas C. Spavins *et al.*, finding that television stations in intramarket newspaper/broadcast combinations garnered higher ratings and tallied more industry awards than their counterparts.[297] The Commission and the Third Circuit relied on the Spavins Study to justify, and uphold, repeal of the newspaper/broadcast cross-ownership ban.

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[294] Comments of Belo, MM Docket No. 98-35 (July 21, 1998) at Appendix C.

[295] Comments of Media General, MM Docket No. 01-235 (Dec. 3, 2001) at Appendix 5.

[296] Comments of Victor B. Miller & Kevin B. Grunech of Bear, Stearns & Co., MM Docket No. 01-235 (Dec. 3, 2001) (cited in *2002 Biennial Review Order*, 18 FCC Rcd at 13,761 (¶ 357)).

[297] Thomas C. Spavins *et al.*, *The Measurement of Local Television News and Public Affairs*, MOWG Study No. 7 (Sept. 2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-226838A12.pdf.

- A 2003 Project for Excellence in Journalism news quality analysis finding a link between newspaper cross-ownership and higher quality television news.[298] The Third Circuit sounded the Commission's observation that, according to the PEJ Study, newspaper-owned stations "were more likely to do stories focusing on important community issues and to provide a wide mix of opinions, and they were less likely to do celebrity and human interest features."[299]
- A 2006 update of Dr. Lichter's study, attached to Media General's comments, concluding that DMAs with Media General newspaper/television combinations continue to provide more non-entertainment television programming than paired DMAs without cross-owned stations.[300]

Notwithstanding this overwhelming evidence, opponents of deregulation rely on mere rhetoric and neglect to provide any studies to bolster their assertions that cross-ownership will be detrimental to localism.[301] These parties also fail to cast any serious doubt on the substantial evidence showing that cross-ownership actually enhances the quality and quantity of local television news. Indeed, the only research opponents of deregulation submit concerning the relationship between localism and cross-ownership

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[298] PEJ Study at 1, 5.

[299] *Prometheus*, 373 F.3d at 398; *2002 Biennial Review Order*, 18 FCC Rcd at 13,755 (¶ 345).

[300] Comments of Media General at Appendix 5 (Michael G. Baumann, *"Review of the Increase in Non-Entertainment Programming Provided in Markets with Newspaper-Owned Television Stations": An Update* (Oct. 2006)).

[301] *See, e.g.*, Comments of AFL-CIO at iii (speculating that "[t]he national media chains are governed by the dictates of mass audiences, that is, a drive to capture large market shares by catering to the lowest common denominator in programming, undercutting the ability to deliver culturally diverse, locally-oriented, and public interest programming").

criticize the findings of only one of the many studies listed above. Specifically, a few opponents of deregulation pin their claims on a Michael Yan study, which criticizes the findings of the MOWG Study 7 that newspaper-owned television stations air a higher quantity of local news.[302] Using data collected by Professor Yan, Mark Cooper and S. Derek Turner of the Consumers Union present another analysis of newspaper/television cross-ownership that reaches conclusions analogous to those in the Yan Study.[303] Both studies are inconclusive and methodologically flawed.

As a preliminary matter, although downplayed both by its author and pro-regulatory commenters, the Yan Study includes important evidence that *supports* lifting the cross-ownership ban. In fact, Professor Yan concludes that cross-owned stations are significantly more likely to be in the local news business than other stations.[304] Moreover, the data Yan uses shows that cross-owned stations air 84% more local news and 113% more local public affairs programming than stations that are not part of combinations.[305]

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[302] Michael Yan, *Newspaper/Television Cross-ownership and Local News and Public Affairs Programming on Television Stations: An Empirical Analysis*, Oct. 17, 2006 (submitted as Comments of the Donald McGannon Communication Research Center) ("*Yan Study*").

[303] Consumers Union Study 16, *Consolidation and Conglomeration II.*

[304] *See Yan Study* at 12 ("The regression analysis results show that . . . cross-owned station [sic] were more likely to be in the local news business….").

[305] *Yan Study* at 7. In the same vein, Cooper and Turner find that cross-owned stations air more local public affairs programming and produce higher revenues. *See* Consumers Union Study 16, *Consolidation and Conglomeration II* at 318 (showing a significant relationship between cross-ownership and the amount of local public affairs aired).

According to Professor Yan, however, cross-ownership is not responsible for these impressive quantity differences.[306] Rather, Yan concludes that newspaper-owned television stations air more local news because they tend to be VHF stations, tend to be big four affiliates, and achieve higher revenues.[307] But Yan's methodology improperly minimizes the effect of cross-ownership by "masking" its impact into these other factors. The fact is that nearly all cross-owned television stations are VHF stations (23 of 27 stations) or big four affiliates (22 of 27) or both.[308] Because Yan includes VHF status and big four affiliation as independent variables in his study, the high degree of correlation between cross-ownership and these variables makes it impossible to evaluate the actual impact of cross-ownership. The Cooper/Turner Study suffers from the same basic flaw. In particular, Cooper and Turner factor a station's age into their analysis.[309] Because the majority of cross-owned stations are grandfathered, and therefore at least 30 years old, cross-ownership's effect on local news production will be captured in part by

[306] *Yan Study* at 7. In Yan's data set, cross-owned stations provided approximately 46 hours of local news and 96 minutes of local public affairs programming over a two-week sample, whereas non-cross-owned stations provided 25 hours of local news and 45 minutes of local public affairs programming. *Id.*

[307] *Id.* at 9, 18. In the report's text, Yan only cites VHF status and big four network affiliation as significant factors affecting local news quantity. The study's data, however, shows that station revenues are also a significant factor, with a higher z-score than any of Yan's other independent variables.

[308] *See Yan Study* at 15.

[309] *See* Consumers Union Study 16, *Consolidation and Conglomeration II* at 313.

the age variable. Thus, the Cooper/Turner study also incorporates variables that mask the effects of cross-ownership.[310]

In addition, both the Yan and the Cooper/Turner studies attack only the *quantity* of local news findings in MOWG Study 7. Neither study takes on the MOWG conclusion that newspaper-owned stations win far more journalism awards than their standalone counterparts and thus tend to offer consumers considerably *higher-quality* local news. But both factors were equally critical to the FCC's finding in 2003 that cross-ownership is likely to benefit localism.[311]

Finally, it is notable that the Cooper/Turner study finds that cross-ownership boosts station revenues, which itself has positive effects on the provision of local news.[312] In fact, many commenters urged the Commission to relax the cross-ownership rules (as

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[310] The Cooper/Turner study's analysis of the allegedly insignificant relationship between duopoly status and the amount of news aired suffers from the same problem. *See* Consumer Union Study 16, *Consolidation and Conglomeration II* at 329.

[311] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,757-59 (¶¶ 347-50). In Consumers Union Study No. 15, Mark Cooper also criticizes the Commission for its reliance in 2003 on the findings in the PEJ Study that support relaxation of the newspaper cross-ownership ban. In particular, Cooper claims without substantiation that these findings were "statistically insignificant." Consumers Union Study 15 *Consolidation and Conglomeration I* at 290. Yet, Cooper and Consumers Union do not hesitate to rely on the PEJ Study themselves when it suits them. For example, elsewhere in the Consumers Union comments, Cooper highlights the PEJ Study finding that the ratings of cross-owned stations allegedly have declined over time and that smaller station groups tend to producer higher quality newscasts. *See id*. at 290; Comments of Consumers Union, Study 4 at 65 (Marjorie Heins & Mark Cooper, *Localism and Diversity*). Cooper does not explain why these findings are any more "statistically significant" than those that lend support to relaxing the rule. NAB further notes that other studies reexamining the FCC's 2002 study and data have reconfirmed the FCC's previous finding that "newspaper ownership" is "positively related to the provision of local news programming." *Napoli Paper*, Conclusion Section.

[312] *See* Consumers Union Study 16, *Consolidation and Conglomeration II* at 322.

well as the duopoly rule) largely because of their urgent need for increased revenue streams, which, in turn, support the provision of increasingly costly news and other local programming. As shown dispositively in the record, traditional media outlets desperately need regulatory relief to continue their high levels of local public service.[313] Shackled by ownership restrictions that other media are free of, television, radio, and print news providers all will continue to cede advertising share and circulation to Internet content providers, cable and satellite television, satellite radio, and providers of electronic devices such as iPods.[314] Despite these outlets' innovative efforts to retain customers and become "outlet neutral,"[315] it is inevitable, absent ownership relaxation, that their exemplary promotion of localism will begin to wane as a result of financial constraints.[316]

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[313] *See* Comments of Fox at 13; Comments of Freedom of Expression Foundation at 10, 22; Comments of Gannett at 21; Comments of Media General at 45.

[314] *See supra* Section IV.B; Comments of NAB at 29-35. Newspapers are seeing their classified advertising revenue erode as consumers move such advertisements online to free services such as Craigslist and others. *See id.* at 32 (noting that, for the year ending July 31, 2006, traffic to online classified ads increased 47%); Mark Walsh, *Craigslist Traffic Surges*, MediaPost Publications, Sept. 6, 2006, *available at* http://publications.mediapost.com?useaction=articles.showarticlehomepage&art)aid=47721 (reporting that 37.4 million people now visit online classified sites); *see also* Brian Steinberg, *Ad-Sales Woes Likely To Continue*, Wall St. J., Dec. 4, 2006, at B6; Jennifer Saba, *Analyst: Print Advertising Slump Likely to Stick Around*, Ed. & Publisher, Jan. 9, 2007 (Prudential Equity Research reported that advertising slump affecting newspaper industry does not "show signs of a correction").

[315] Letter from the Publisher, *What Is Changing—and What Isn't—In the Wall Street Journal*, Wall St. J., Dec. 4, 2006, at A17; see also Frank Ahrens, *A Newspaper Chain Sees Its Future, and It's Online and Hyper-Local*, Wash. Post, Dec. 4, 2006, at A01.

[316] Louis Hau, *Why Newsrooms Pray To St. Petersburg*¸ Forbes.com, Dec. 4, 2006, *available at* http://www.forbes.com/digitalentertainment/2006/12/01/newspapers-poynter-st-petersberg-tech-media_cx_lh_1204stpete.html (reporting that The St. Petersburg Times, owned by the non-profit Poynter Institute for Media Studies, will begin cutting staff in 2007).

Indeed, just the past few months have seen innumerable reports about the continued financial struggles of the newspaper industry. For example, recent reports of declining circulation have prompted newsroom cutbacks and reportedly caused the *Philadelphia Inquirer*'s publisher to tell his employees to prepare for job cuts resulting from the "largest two month revenue drop in our history."[317] Just last month, in another "troubling signal" for the newspaper industry, McClatchy Co. agreed to sell the Minneapolis Star Tribune for $530 million, after paying $1.2 billion for the paper in 1998.[318] Yet another report estimates that shares of publicly held newspaper publishing stocks lost nearly $13.5 billion in value (or 20.5% of their market capitalization) during the last two years alone.[319] It is hardly surprising that long-time newspaper publishers such as E.W. Scripps are "taking a hard look at the future" of their "sluggish newspaper

[317] *Tierney: Philly Papers' Ad Decline May Be Biggest Drop Ever, Job Cuts Comin*g, Ed. & Publisher, Oct. 20, 2006; Katharine Q. Seelye, *Newspaper Circulation Falls Sharply*, N.Y. Times, Oct. 31, 2006, at C1; *see also Philly Paper Facing 150 Job Cuts?*, Ed. & Publisher, Nov. 6, 2006; Michael Oneal, *A Tidal Shift for Newspapers*, Chi. Trib., Nov. 2, 2006, at C1; James Rainey, *Publisher, 20 Others Laid Off at Daily News*, L.A. Times, Oct. 31, 2006, at C2; Jennifer Saba, *Big Metros Show Severe Declines in Latest Circ Report*, Ed. & Publisher, Oct. 30, 2006; Jennifer Saba, *Report: May Be Decades Before Online Sustains Newspapers*, Ed. & Publisher, Oct. 25, 2006; *'Mercury News to Axe Up to 101, Including 15% of Newsroom*, Ed. & Publisher, Oct. 20, 2006; Joe Strupp, *"Blade" Expects to Lose $5 Million in 2006*, Ed. & Publisher, Dec. 29. 2006.

[318] Ed. & Publisher, *Goldman Sachs Says "Star Tribune" Sale a Troubling Sign for Industry*, Dec. 27, 2006 (Goldman declared that the "substantial loss on the sale is a vivid reminder of the industry's declining fortunes.").

[319] *See Vaporized: $13.5B in News Stock Value*, Reflections of a Newsosaur (Blog of Alan Mutter, Managing Partner of Tapit Partners), http://newsosaur.blogspot.com/2007/01/vaporized-135b-in-news-stock-value.html (Jan. 1, 2007).

operations," while "increasingly focusing" on their growing media operations, such as "cable television and Internet-based businesses."[320]

To oppose much-needed ownership reform, a handful of commenters again attempt to drum up fears of consolidation of viewpoint and damage to diversity, which they claim are symptoms of common ownership.[321] Media representatives, however, showed that, as both the Commission and Third Circuit already have found,[322] common ownership does not threaten diversity.[323] Media General, for example, studied 2004 presidential endorsements and found no pattern linking viewpoint to ownership.[324] Similarly, as also described above, two University of Chicago economists recently concluded that media outlets adjust the slant of their coverage to suit their customers, not their owners.[325] The researchers determined that "after controlling for the geographic location of newspapers, [there is] *no evidence* that the variation in slant has an owner-

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[320] E&P Staff and Associated Press, *Scripps CEO: No "Immediate" Plans to Sell Papers*, Ed. & Publisher, Jan. 15, 2007.

[321] *See* Comments of Consumers Union at 16; Comments of UCC at 68-69.

[322] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,763-69 (¶¶ 361-71); *Prometheus*, 373 F.3d at 399-400.

[323] *See* Comments of Cox at 19-20, Attachment A (citing examples of news articles published in *The Atlanta Journal-Constitution* that are critical of other Cox-owned properties, and examples of Cox radio host Neal Boortz criticizing *The Atlanta Journal-Constitution* and its editorial page editor); Comments of Gannett at 30 (describing how *The Arizona Republic* touted programs of the ABC- and CBS-affiliated competitors of co-owed KPNX-TV, an NBC affiliate); Comments of NAA at 79-84 (describing how WDWS(AM), a Champaign-Urbana-area radio station, invited a political candidate to one of the station's radio programs to allow the candidate to respond to negative articles published in the station's co-owed newspaper).

[324] *See* Comments of Media General at Appendix 6 (2004 Presidential Endorsements).

[325] *See supra* Section III.B; *Media Slant Study* at 33.

specific component."[326] Therefore, the record plainly establishes that the current cross-ownership restrictions do not produce any measurable increase in the level of diversity; they only serve to suppress proven localism benefits by denying owners the synergies and efficiencies that are necessary to maintain local news operations or increase local news coverage, especially in smaller markets.[327]

Furthermore, in evaluating whether to modify the current cross-ownership rules, the Commission must be cognizant of its duties under sections 202(b) and 202(d) of the 1996 Act.[328] Section 202(b) requires the Commission to allow "a party" to "own, operate, or control up to" a specific number of radio stations. The statute does not, however, limit the class of covered parties to non-television owners or non-newspaper owners, and therefore bars the Commission from using cross-ownership restrictions to prevent multimedia companies from owning *up to* the maximum number of radio stations allowed.[329] Additionally, section 202(d) mandates an expansion of the Commission's waiver policy for radio/television cross-ownership, specifically. Consequently, section 202(d) prohibits the Commission from returning to a blanket one-to-a-market restriction,

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[326] *Media Slant Study* at 44 (emphasis added).

[327] *See* Comments of NAB at 115-117; *see also* Comments of Block at 1-6; Comments of Cascade Broadcasting at 1-3; Comments of Galaxy Communications at 3, 8; Comments of Gannett at 39-45; Comments of Granite at 2, 4-5; Comments of Gray at 19, 24-25; Comments of Hoak Media at 3-7; Comments of Media General at 94-97.

[328] 1996 Act § 202(b), 202(c)(2).

[329] *Accord* Comments of Clear Channel at 89.

and, as the Commission found in 1999, also supports further radio/television cross-ownership relaxation.[330]

V. CONSISTENT WITH LONG-STANDING PRECEDENT, THE COMMISSION SHOULD REJECT ARGUMENTS OUTSIDE THE SCOPE OF THIS PROCEEDING.

Finally, a number of commenters seek to turn this proceeding into a free-for-all and urge the Commission to impose regulations that are wholly inapposite to local broadcast ownership. The Commission has long rejected attempts to interject unrelated topics into a discrete proceeding such as this one.[331] The Commission should affirm its longstanding precedent and refuse to consider the merits of the following arguments:

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[330] *See Local TV Ownership Order*, 14 FCC Rcd at 12,946. Furthermore, contrary to UCC's contention, *see* Comments of UCC at 76, in the event the Commission returns to a "voice" test for the radio/television cross-ownership rule, local cable operators and their programming must be included as a voice. This is because, among other things, the D.C. Circuit in *Sinclair* found that it was arbitrary and capricious for the Commission to fail to include cable and other non-broadcast sources in the relevant market in the course of revising its local television ownership rule. *See Sinclair*, 284 F.3d at 165; *see also Fox*, 280 F.3d at 1051 (finding the FCC's decision to retain the cable/broadcast cross-ownership ban arbitrary and capricious, and vacating the rule, because it completely "failed to consider competition from DBS"). The Third Circuit, moreover, agreed that "record evidence suggests that cable and the Internet supplement the viewpoint diversity provided by broadcast and newspaper outlets in local markets," rendering it, in the Court's view, perfectly "acceptable for the Commission to find that cable and the Internet contribute to viewpoint diversity," and that maintenance of the absolute ban on newspaper/broadcast cross-ownership was not necessary to protect diversity. *Prometheus*, 373 F.3d at 399-400.

[331] *See, e.g.*, *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules and Processes; Policies and Rules Regarding Minority and Female Ownership of Mass Media Facilities*, Report and Order, 13 FCC Rcd 23,056, 23,093 n.152 (1998) ("Comments calling for differing substantive changes in the ownership disclosure obligations of commercial or noncommercial broadcast licensees and permittees are outside the scope of this rulemaking, and we accordingly decline to address them herein …."); *2002 Biennial Review Order*, 18 FCC Rcd at 13,865 (¶ 642) (rejecting proposals that were neither "responsive to the Notice" nor "a logical outgrowth of the Notice"); *Pacific Bell and Nevada Bell Comparably Efficient Interconnection Plan for the Provision of Basic Telephone Service; Implementation of the Pay Telephone*

- *Children's Television Programming*. The Children's Media Project Coalition (at 2) urges the Commission to "adopt policies that safeguard children's interests" and "ensure [that there is] sufficient original programming for children" by "limit[ing] local broadcasters to one license in a given market." While broadcasters take seriously the importance of educational and informational children's programming, the instant proceeding is not the proper forum for addressing such concerns. The Commission has separate rules governing children's television.[332] Indeed, Commission recently revised those rules and heightened the regulatory requirements for broadcasters.[333] Thus, as other

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Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, 12 FCC Rcd 4793, 4852 (¶ 73) (1997) ("We find that the issue of whether PacTel is providing screening information in compliance with the requirements established in the payphone rulemaking is outside the scope of the CEI review process and is more appropriately addressed in that proceeding or in other proceedings."); *Amendment of Parts 1 and 61 of the Commission's Rules*, Report and Order, 98 FCC 2d 855, 881 (¶ 96) (1984) ("MCI requested streamlined regulation for non-dominant international carriers. MCI indicated that consumers would be the ultimate beneficiaries if non-dominant international carriers were allowed to file presumptively lawful tariffs on fourteen days' notice like non-dominant domestic carriers. This request is clearly beyond the scope of this Part 61 Rulemaking and should be dealt with in the Competitive Carrier Rulemaking."); *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Vinton, Louisiana, Crystal Beach, Lumberton and Winnie, Texas)*, Memorandum Opinion and Order, 19 FCC Rcd 22,660, 22,662 (¶ 5) (2004) ("It would not be conducive to the efficient transaction of Commission business to expand the scope of an FM allotment rulemaking proceeding to include other issues … it is established policy that we do not consider multiple ownership issues in conjunction with an allotment rulemaking proceeding." (citations omitted)).

[332] 47 C.F.R. §§ 73.670-73.671, 73.673; *see also* 47 C.F.R. § 76.225.

[333] *See In the Matter of Children's Television Obligations of Digital Television Broadcasters*, Second Order on Reconsideration and Second Report and Order, 21 FCC Rcd 11,065 (2006). The new rules took effect on January 2, 2007. *See* 71 Fed. Reg. 64,160 (Nov. 1, 2006) (noting that the rules take effect 60 days after publication in the Federal Register or January 2, 2007). Notably, the new children's programming rules are

commenters explain,[334] changes to the media ownership rules are irrelevant to and will have no bearing on children's television rules.[335]

- *Independent Programming Mandates*. The Screen Actors Guild urges the FCC to mandate that 25% of prime-time television programming on each of the four major networks be produced by an independent, unaffiliated production entity.[336] Not only is this issue irrelevant to the instant proceeding focusing on *local* broadcast ownership rules, this very argument was raised and rejected in the last

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based on a proposal submitted to the FCC by members of the Children's Media Project Coalition.

[334] *See* Comments of Nexstar at 16 n.25.

[335] Even if the Commission were to consider the merits of the Children's Media Policy Coalition's arguments, its concerns are unfounded. As Nexstar stated, the "majority of core children's programming is provided to stations via their network affiliates. Thus, it would be nearly impossible for a broadcaster to provide the same three hours of core children's programming on two co-owned stations, because of the stations' different network affiliations." Comments of Nexstar at 15-16.

Furthermore, the 2003 "Big Media, Little Kids" study attached to the Children's Media Policy Comments fails to support their claim. While the study asserts that there are fewer children's programs on broadcast television in 2003 compared to 1998, the study fails to make any connection between the alleged decline in children's programs and the mere existence of two duopolies in Los Angeles. Nor does the study demonstrate that, if such decline occurred, that the existence of duopolies caused such decline. The study also wholly ignores competition from other media. Thus, the study fails to consider whether there has been a corresponding increase in children's programming on cable networks, such as Nickelodeon and Disney, which likely have increased the overall amount of children's programming on television.

[336] Comments of the Screen Actors Guild, The Directors Guild of America, The Producers Guild of America, and AFTRA at 14.

ownership proceeding as outside the scope of the *Notice* and there is no reason for a different approach here.[337]

- *Digital Television Obligations.* The United States Conference of Catholic Bishops encourages the Commission "to promulgate regulations to define digital television broadcasters' public interest obligations."[338] Again, the Commission has multiple proceedings pending regarding digital television, including one specifically addressing public interest obligations of digital television broadcasters.[339] This proceeding is not the proper forum for adopting digital television rules.

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[337] *See 2002 Biennial Review Order*, 18 FCC Rcd at 13,865 (¶ 642) ("[W]e do not believe that the Fin/Syn Proposals are responsive to the Notice, or that the adoption of such rules could be thought to be a logical outgrowth of the Notice."). The Commission also rejected the merits of such proposals, finding that the Commission's concern "is to promote the interests of consumers and viewers, not to protect the financial interests of independent producers." *See id.* at 13,868 (¶ 651).

[338] Comments of the U.S. Conference of Catholic Bishops at 2

[339] *Public Interest Obligations of TV Broadcast Licensees,* Notice of Inquiry, 14 FCC Rcd 21,633 (1999); see also *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Report and Order, 19 FCC Rcd 18,279, 18,248 (¶ 10) (2004) (explaining that the Commission "will address any comments on public interest issues" filed in response to the periodic review notice when "we finalize the public interest proceedings in the near future"). The Commission also has a number of other proceedings addressing digital television and the obligations of broadcasters. *See, e.g.*, *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Seventh Further Notice of Proposed Rulemaking, 21 FCC Rcd 12,100 (2006) (comments are currently due on January 25, 2007, and reply comments are due on February 26, 2007); *DTV Distributed Transmission System Technologies,* Clarification Order and Notice of Proposed Rulemaking, 20 FCC Rcd 17,797 (2005); *Requirements for Digital Television Receiving Capability,* Second Report and Order, 20 FCC Rcd 18,607 (2005); *Carriage of Digital Television Broadcast Signals: Amendments to Part 76 of the Commission's Rules*, Second Report and Order and First Order on Reconsideration, 20 FCC Rcd 4516 (2005); *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996 Commercial Availability of Navigation Devices Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second

- *Labor and Employment Concerns*. The Communications Workers of America comment on, and submit a series of surveys regarding, employment, wage and various worker-related issues in all sectors of the communications industry.[340] Such issues are outside the scope of this proceeding and, indeed, likely outside the Commission's authority to address in the first instance.

Precedent demands that the Commission refuse to consider the above arguments in the instant proceeding. In fact, if it *did* adopt rules concerning these unrelated issues, the Commission would likely violate the APA's notice and comment requirements. As noted, *supra* section I.C, the APA requires that an agency provide adequate notice of any rules. In this case, the *Notice* concerns broadcast ownership and the *Prometheus* decision. Children's television, Fin-Syn-type questions, digital television, or labor issues are not directly related. Thus, the Commission has not "fairly apprise[d]" interested parties that the Commission might adopt new children's television rules, reinstate the repealed Fin-Syn rules, or alter broadcasters' digital television public interest obligations in this broadcast ownership proceeding.[341] As a result, any such action would run afoul

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Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 518 (2003) (waiver petitions pending).

[340] *See* Peter DiCola, *Employment and Wage Effects of Radio Consolidation* (Aug. 9, 2006) (attached to Comments of CWA); Vicki Lovell, Heidi Hartmann, & Jessica Koski, Inst. For Women's Policy Research, *Making the Right Call: Jobs and Diversity in the Communications and Media Sector* (2006) (attached to Comments of CWA); Lauer Research, Inc., *Media Professionals and Their Industry* (undated) (attached to Comments of CWA).

[341] *Prometheus*, 373 F.3d at 411 (quoting *Am. Iron & Steel Inst.*, 568 F.2d at 293).

of the fundamental APA requirement that final agency rules be a "logical outgrowth" of the notice given.[342]

VI. CONCLUSION

In this robustly competitive media marketplace, the Commission is compelled by Section 202(h) of the Act and basic principles of administrative law to eliminate or relax regulations that are no longer necessary and in the public interest. The record in this proceeding now makes undeniably clear that the existing ownership regulations are not necessary to promote, and in fact affirmatively *undermine*, the Commission's stated goals of competition, diversity, and localism. The vast empirical and marketplace evidence submitted by commenters establishes that reforming the outdated local ownership restrictions will actually increase competition and diversity, and enhance localism. In view of local stations' struggles to remain viable and vibrant in today's digital, multichannel marketplace, the public interest demands that the Commission reform the local ownership rules to enable broadcasters to establish economically sustainable ownership structures in response to competitive pressures. Anything less than prompt

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[342] *Ariz. Pub. Serv. Co.*, 211 F.3d at 1299 (citing *Aeronautical Radio, Inc.*, 928 F.2d at 445-46); *see Int'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1259-60 (D.C. Cir. 2005) ("The logical outgrowth doctrine does not extend to a final rule that is a brand new rule, since something is not a logical outgrowth of nothing, nor does it apply where interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the proposed rule." (internal quotations, brackets and citations omitted)); *see also supra* Section I.C.

regulatory relief to that end will jeopardize the important role that broadcasters have played, and are striving to continue to play, in local communities throughout the country.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Jerianne Timmerman

Marsha J. MacBride
Jane E. Mago
Jerianne Timmerman

David Gunzerath, Ph.D.
Theresa Ottina
NAB Research and Planning

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The Declining Financial Position of

Television Stations in Medium and Small Markets

Prepared by:

Theresa J. Ottina

Sr. Director, Research & Analysis

National Association of Broadcasters

Research & Planning Department

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The Declining Financial Position of Television Stations in Medium and Small Markets

Introduction

The television duopoly rule currently allows common ownership of two television stations in a Designated Market Area ("DMA") where eight independently owned, full power television stations will remain in the DMA post-merger, and at least one of the stations is not among the top four ranked stations in the market. This "eight voice" standard effectively prevents the formation of even a single duopoly in medium and smaller markets. The Federal Communications Commission in 1999 determined to limit strictly the ability of television licensees to form duopolies to ensure a diversity of voices. But given the current competitive conditions in local media markets, a relaxation of this rule to permit co-ownership of television stations in smaller markets would provide needed financial relief to television broadcasters, and allow television stations to compete more effectively with cable operators and other multichannel video programming distributors.

Methodology

To illustrate the current financial position of stations in medium and small DMAs, an examination of the profitability of television stations in markets 51-175 was conducted. The data contained in this report was compiled from the NAB/BCFM Television Financial Survey, a longstanding industry survey that has been conducted annually for several decades. This annual television financial survey, conducted by the NAB in conjunction with the accounting firm Hungerford, Aldrin, Nichols & Carter P.C., requests revenue and expense information from all commercial television stations. For the purpose of this submission examining smaller market stations, a specialized data run was conducted by Hungerford, Aldrin, Nichols & Carter for the data years 1997, 2001, 2003 and 2005. The overall response rates for the annual television survey for each of the years examined are as follows: 1997 data: 70.0%; 2001 data: 64.0%; 2003 data: 63.5%; 2005 data: 63.1%.

Please note, to obtain the data for this submission and for NAB's two previous reports on small market television finances,[1] Hungerford, Aldrin, Nichols & Carter P.C. examined the responses from the annual television industry survey to determine the number of markets that contained a response from both the high-rated and low-rated network affiliated stations.[2] Although the overall response rate of 63.1% for the 2005 annual survey is consistent with previous years, the total number of markets reporting data for both high-rated and low-rated stations decreased in comparison to the previous years examined in this report. Therefore caution should be used when interpreting these results, particularly in the two smallest market size groupings.

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[1] See Attachment C, Comments of NAB in MB Docket No. 02-277 (filed Jan. 2, 2003); Attachment J, Comments of NAB in MB Docket No. 06-121 (filed Oct. 23, 2006).

[2] Includes ABC, CBS, FOX and NBC affiliated stations. We chose to look at affiliated stations because, particularly in smaller markets, stations not affiliated with the four leading networks are much less likely to provide regular local news programs.

For the cash flow and pre-tax profit line items, data were used for markets only where both the highest rated and the lowest rated affiliated stations participated in the survey in order to directly compare the financial position of these stations. The table below displays the number of markets included in each market-size grouping.

Table 1

Number of Markets

Market Size	1997	2001	2003	2005
51-75	21	18	15	**12**
76-100	16	15	16	**12**
101-125	15	13	17	**11**
126-150	15	14	14	**5***
151-175	16	10	13	**3***

For the network compensation and news expense line items, *all* network affiliated stations that participated in the 2005 annual survey are included in the analysis.

**Due to a small number of markets reporting 2005 data for both the high-rated and low-rated network affiliated stations in the 126-150 and 151-175 market size groupings, caution should be used in interpreting these results.*

Analysis

A review of television station profitability in smaller markets reveals that profit margins are already at risk today, especially for the lower rated affiliated stations. It is clear that overall these stations show declining profitability in the years examined. Furthermore, those stations located in the smallest of markets are also now at a stage where the average low rated station experienced actual losses. Declining network compensation coupled with increasing news expenses adds to the tenuous financial situation of these small market stations.

To demonstrate this, the following section contains an analysis of the average cash flow,[3] pre-tax profits,[4] network compensation and news expense[5] in market sizes 51-75, 76-100, 101-125, 126-150, and 151-175. Please note, because of the small number of stations in many of the 176+ markets, these markets are excluded from this analysis.

[3] Cash flow is defined as net revenues minus total expenses.
[4] A pre-tax profit is defined as cash flow minus depreciation & amortization & interest.
[5] Network compensation and news expense include average numbers for *all* affiliate stations (ABC, CBS, FOX, and NBC) in the market-size grouping. They are not broken out by average high and average low rated stations.

Markets 51-75: 1997-2005

While the highest rated stations experienced an 11.0% increase in cash flow between the years 1997-2005, the lowest rated stations saw their cash flow decrease by over one-half. In examining the pre-tax profits, the profitability of the average highest rated stations saw a modest increase of 11.7%; in contrast, the lowest rated affiliate stations experienced a 126.0% decrease in profitability.

Network compensation decreased by 67.4% between 1997-2005. Additionally, news expenses increased by 14.7% for the average affiliate station (see Table 2).

Table 2

Markets 51-75

	Cash Flow		***Pre-Tax Profit***		***Network Compensation***	***News Expense***
Year	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: All Affiliate Stations**	**Average: All Affiliate Stations**
1997	$7,446,263	$3,606,818	$5,527,154	$1,275,170	$741,660	$2,143,301
2001	$6,312,692	$1,940,512	$3,340,566	$(269,865)	$498,233	$2,214,057
2003	$7,655,615	$1,525,087	$5,632,695	$429,900	$365,413	$2,485,451
2005	$8,263,200	$1,503,312	$6,173,826	$(331,409)	$241,914	$2,457,376
% Change 1997-2005	*11.0%*	*-58.3%*	*11.7%*	*-126.0%*	*-67.4%*	*14.7%*

Markets 76-100: 1997-2005

The cash flow for the highest rated stations remained flat between the years 1997-2005, and the lowest rated stations saw their cash flow decrease by 3.6%. In examining the pre-tax profits, the profitability of the average highest rated affiliate station increased by 94.3%; while the lowest rated affiliate station experienced an increase in profitability of 291.2%. It should be noted, however, that this apparently large increase in profitability for the lowest rated station is actually a return to relatively modest profitability after several years of losses. Indeed, the profits earned by the highest rated station are nearly ten times the amount of the lowest rated.

Between 1997-2005 there was a 60.1% decrease in network compensation. Additionally, news expenses increased by 22.5% for the average affiliate station (see Table 3).

Table 3

Markets 76-100

	Cash Flow		***Pre-Tax Profits***		***Network Compensation***	***News Expense***
Year	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: All Affiliate Stations**	**Average: All Affiliate Stations**
1997	$5,196,269	$2,002,674	$1,604,544	($177,509)	$602,945	$1,318,438
2001	$4,501,747	$1,837,445	$349,123	($770,915)	$523,930	$1,838,865
2003	$5,395,123	$1,687,584	$2,340,758	$254,353	$352,424	$1,675,414
2005	$5,230,690	$1,930,295	$3,117,578	$339,393	$240,801	$1,614,759
% Change 1997-2005	*0.7%*	*-3.6%*	*94.3%*	*291.2%*	*-60.1%*	*22.5%*

Markets 101-125: 1997-2005

While cash flow for the highest rated stations remained flat between the years 1997-2005, the lowest rated stations saw their cash flow decrease by 4.6%. In examining the pre-tax profits, the profitability of the average highest rated affiliate station increased by 55.3%; while the lowest rated affiliate station experienced an 18.2% increase.

Network compensation decreased by 60.4% between 1997-2005. Additionally, news expenses increased by 36.8% for the average affiliate station between 1997-2005 (see Table 4).

Table 4

Markets 101-125

	Cash Flow		***Pre-Tax Profits***		***Network Compensation***	***News Expense***
Year	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: All Affiliate Stations**	**Average: All Affiliate Stations**
1997	$4,282,359	$1,378,834	$1,397,684	$570,936	$458,650	$909,901
2001	$3,981,049	$523,806	$292,545	($254,234)	$359,843	$1,120,541
2003	$3,661,890	$1,048,977	$981,939	$411,943	$289,869	$1,138,665
2005	$4,248,166	$1,315,394	$2,170,161	$674,935	$181,464	$1,244,646
% Change 1997-2005	*-0.8%*	*-4.6%*	*55.3%*	*18.2%*	*-60.4%*	*36.8%*

Markets 126-150: 1997-2005

The highest rated stations experienced an increase of 44.2% in cash flow between the years 1997-2005 and the lowest rated stations saw a decrease of 121.2%. The highest rated stations experienced nearly twenty times the cash flow of the lowest rated stations in these markets. Additionally, in examining the pre-tax profits, the average highest rated affiliate station experienced a 66.4% increase in profitability; while the lowest rated affiliate station saw its losses escalate by 1,136.0%.

Similar to markets 101-125, markets 126-150 experienced a 58.0% decrease in network compensation from 1997-2005. Additionally, news expenses increased by 20.3% for the average affiliate station between 1997-2005 (see Table 5).

Table 5

Markets 126-150

	Cash Flow		***Pre-Tax Profit***		***Network Compensation***	***News Expense***
Year	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: All Affiliate Stations**	**Average: All Affiliate Stations**
1997	$2,350,371	$800,912	$1,427,403	$206,147	$470,707	$719,187
2001	$2,448,103	$461,252	$999,599	($1,432,339)	$374,274	$824,752
2003	$2,315,389	$444,846	$912,192	($1,193,682)	$275,866	$812,310
2005	$3,390,036	$(170,192)	$2,374,542	$(2,547,093)	$197,905	$865,344
% Change 1997-2005	*44.2%*	*-121.2%*	*66.4%*	*-1,136%*	*-58.0%*	*20.3%*

Markets 151-175: 1997-2005

While the highest rated stations experienced a 20.9% increase in cash flow between the years 1997-2005, the lowest rated stations saw their cash flow decrease by 70.1%. Additionally, the average highest rated station experienced nearly nine times the cash flow of the average lowest rated station in these markets.

In examining the pre-tax profits, the profitability of the average highest rated affiliate station increased by 41.7% over the 1997-2005 period, but actually declined from 2001 and 2003 levels. Conversely, the average lowest rated affiliate station not only experienced a 117.0% decrease in profitability in the years examined, but also incurred actual losses in 2005.

Between 1997-2005 there was a 63.7% decrease in the network compensation revenue source. Additionally, news expenses increased by 31.4% for the average affiliate station between 1997-2005 (see Table 6).

Table 6
Markets 151-175

	Cash Flow		***Pre-Tax Profits***		***Network Compensation***	***News Expense***
Year	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: High-Rated Station**	**Average: Low-Rated Station**	**Average: All Affiliate Stations**	**Average: All Affiliate Stations**
1997	$2,134,991	$976,248	$519,551	$554,059	$404,826	$628,734
2001	$2,741,192	$403,303	$1,269,239	($92,917)	$253,636	$739,290
2003	$2,488,419	$3,463	$1,327,203	($265,237)	$185,482	$800,618
2005	$2,582,096	$292,059	$736,051	$(94,462)	$146,875	$826,165
% Change 1997-2005	*20.9%*	*-70.1%*	*41.7%*	*-117.0%*	*-63.7%*	*31.4%*

Conclusions

From the data presented in this report, it is clear that many television stations today in smaller markets are experiencing reduced profitability over the years examined. These financial pressures are particularly acute for smaller market stations that are not the top-rated station in their respective markets. Indeed, the average low-rated station in the smallest market size groupings (126+) experienced actual losses in 2001, 2003 and 2005. Even low-rated affiliates in medium-sized markets (51-75) experienced losses in 2005. As this study demonstrates, a relaxation of the television duopoly rule to permit common ownership of two stations in smaller markets would provide needed financial relief for these struggling stations, thereby increasing the strength of local television.